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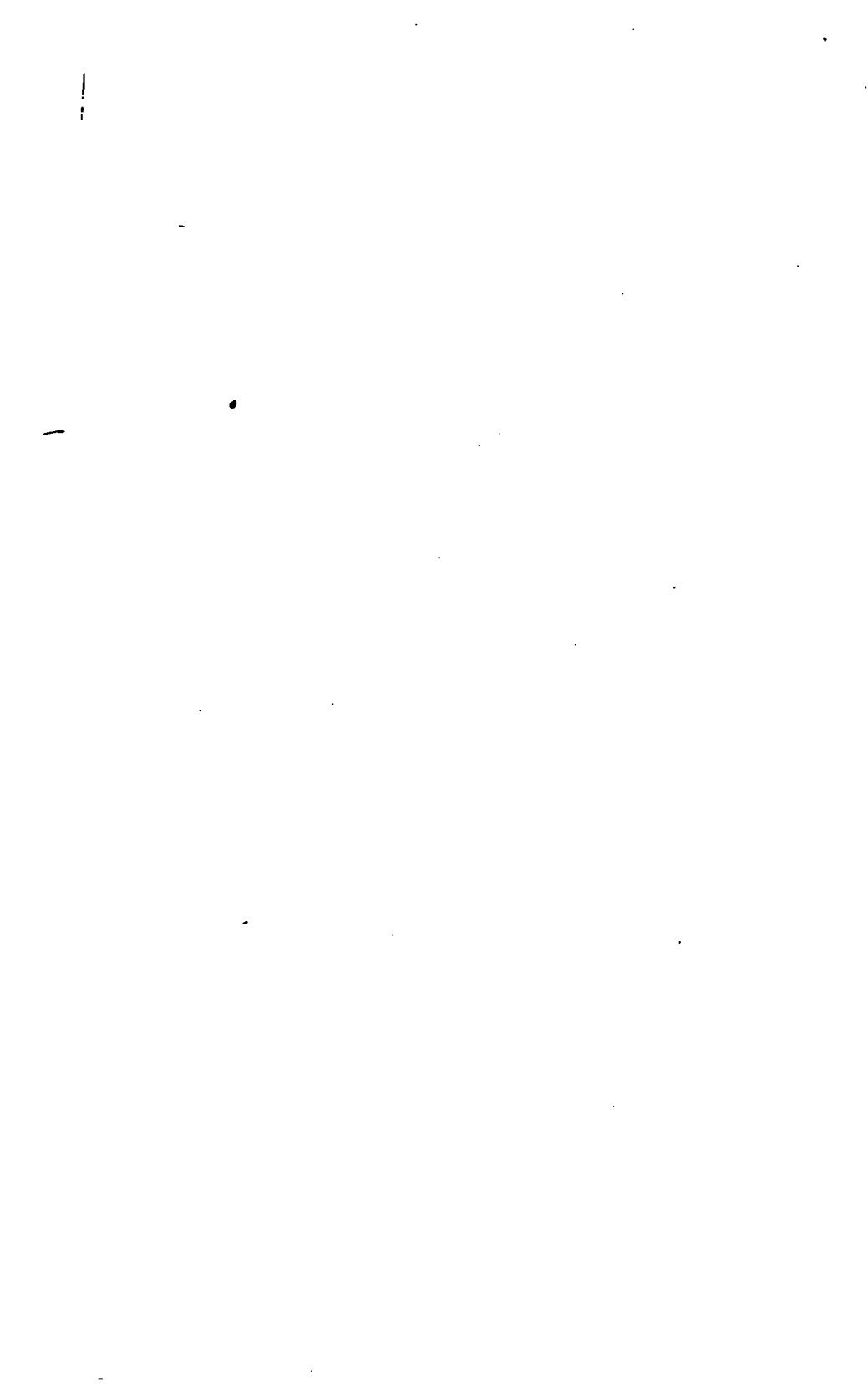


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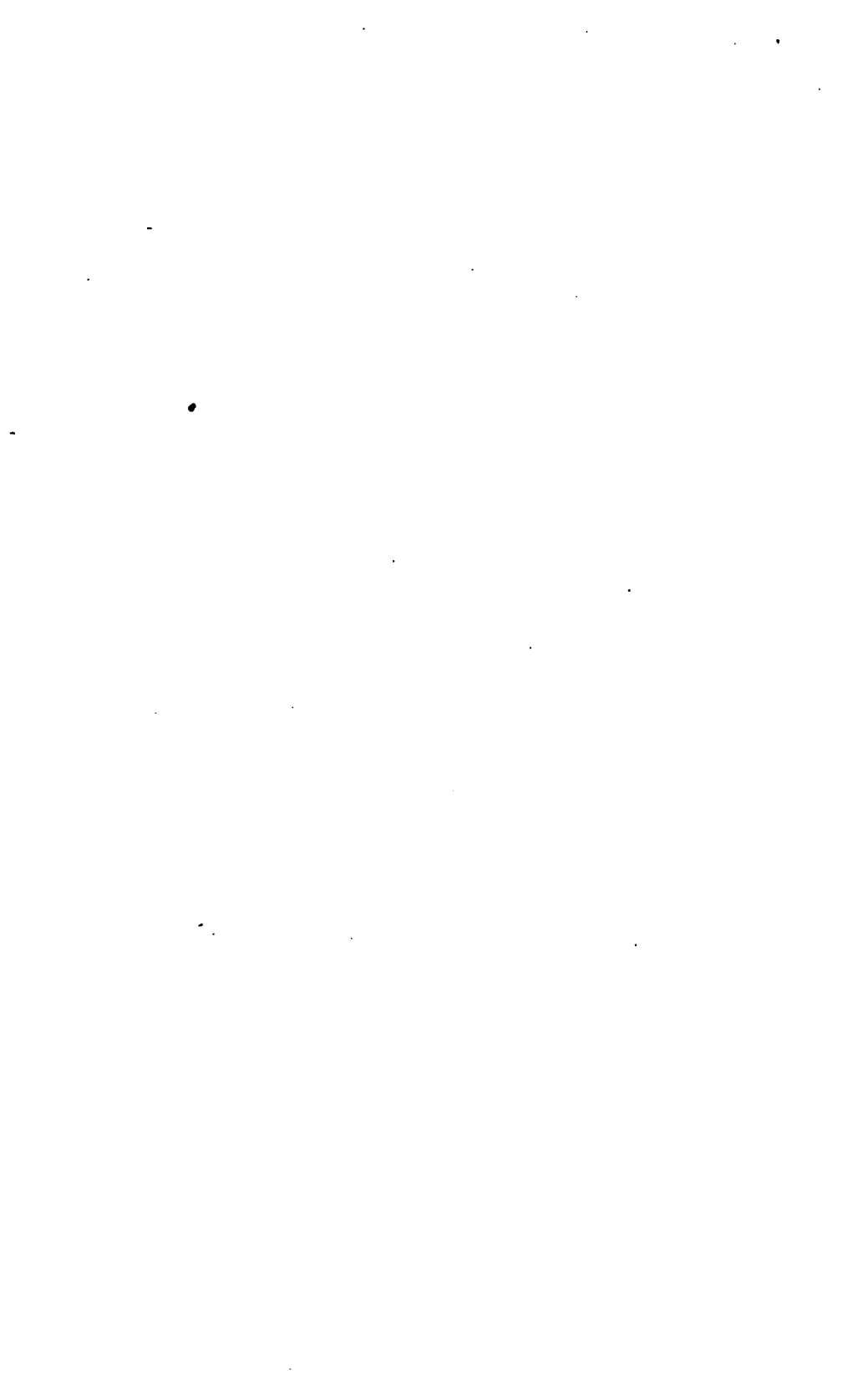


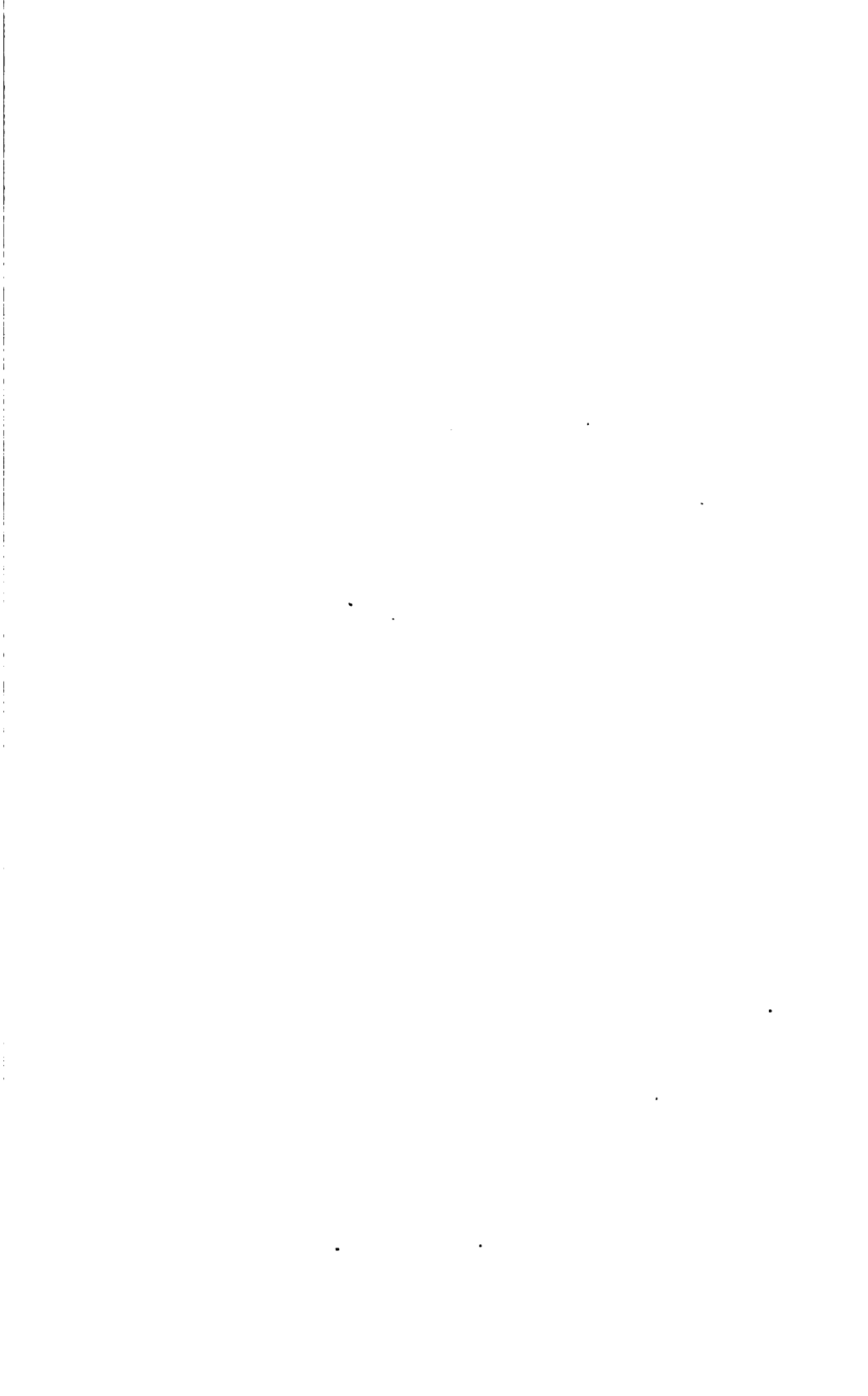


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REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,  
DURING THE YEAR 1879-80.

REPORTED BY  
CHAS. F. BICKNELL, CLERK OF SUPREME COURT,  
AND  
HON. THOMAS. P. HAWLEY, ASSOCIATE JUSTICE.

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Volume 14.

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WITH NOTES ON NEVADA REPORTS.

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1911.

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## JUSTICES OF THE SUPREME COURT.

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HON. WILLIAM H. BEATTY ..... CHIEF JUSTICE.  
HON. ORVILLE R. LEONARD . } ASSOCIATE JUSTICES.  
HON. THOMAS P. HAWLEY ... }

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## OFFICERS OF THE COURT.

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HON. M. A. MURPHY ..... ATTORNEY-GENERAL.  
CHAS. F. BICKNELL ..... CLERK.  
LLOYD HILL ..... BAILIFF.

**DISTRICT JUDGES OF THE STATE OF  
NEVADA 1879.**

---

**FIRST DISTRICT .....HON. RICHARD RISING.**  
**SECOND DISTRICT .....HON. S. D. KING.**  
**THIRD DISTRICT .....HON. W. M. SEAWELL.**  
**FOURTH DISTRICT .....HON. W. S. BONNIFIELD.**  
**FIFTH DISTRICT .....HON. D. C. MCKENNEY.**  
**SIXTH DISTRICT .....HON. HENRY RIVES.**  
**SEVENTH DISTRICT .....HON. J. H. FLACK.**

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# RULES

OF THE

## BOARD OF PARDONS.

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### RULE I.

1. The regular meetings of the board shall be held on the second Monday of January, April, July and October of each year.

2. Special meetings may be called by the Governor at any time when the exigencies of any case demand it, notice thereof being given to each member of the board.

3. No application for the remission of a fine or forfeiture, or for a commutation of sentence or pardon, shall be considered by the board unless presented in the form and manner required by the law of the State, "approved February 20, 1875."

4. In every case where the applicant has been confined in the State prison, he or she must procure a written certificate of his or her conduct during such confinement, from the warden of said prison, and file the same with the secretary of this board, on or before the day of hearing.

5. All oral testimony offered upon the hearing of any case must be presented under oath, unless otherwise directed by a majority of the board.

6. Action by the board upon every case shall be in private, unless otherwise ordered by the consent of all the members present.

7. After a case has once been acted upon and the relief asked for has been refused, it shall not, within twelve months thereafter, be again taken up or considered upon

any of the grounds specified in the original application, except by the consent of all the members of the board; nor in any case except upon new and regular notice as required by law in case of original application.

8. In voting upon any application the roll of members shall be called by the secretary of the board, in the following order:

First. The Attorney-general.

Second. The Junior Associate Justice of the Supreme Court.

Third. The Senior Associate Justice.

Fourth. The Chief Justice.

Fifth. The Governor.

Each member, when his name is called, shall declare his vote "for" or "against" the remission of the fine or forfeiture, commutation of sentence, pardon or restoration of citizenship.

R U L E S  
OF  
THE SUPREME COURT  
OF  
THE STATE OF NEVADA.

---

RULE I.

1. Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

2. The Supreme Court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counselors at law. Such committee will consist of the district judge and at least two attorneys resident of the district.

The examination by the committee so appointed shall be conducted and certified according to the following rules:

The applicants shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination.

The examination shall embrace the following subjects:

1. The history of this State and of the United States;
2. The constitutional relations of the State and Federal governments;
3. The jurisdiction of the various courts of this State and of the United States;
4. The various sources of our municipal law;
5. The general principles of the common law relating to property and personal rights and obligations;



6. The general grounds of equity jurisdiction and principles of equity jurisprudence;

7. Rules and principles of pleadings and evidence;

8. Practice under the civil and criminal codes of Nevada;

9. Remedies in hypothetical cases;

10. The course and duration of the applicant's studies.

3. The examiners will not be expected to go very much at large into the details of these subjects, but only sufficiently so, fairly to test the extent of the applicant's knowledge and the accuracy of his understanding of those subjects and books which he has studied.

4. When the examination is completed and reduced to writing, the examiners will return it to this court, accompanied by their certificate showing whether or not the applicant is of good moral character and has attained his majority, and is a *bona fide* resident of this State, such certificate shall also contain the facts that the applicant was examined in the presence of the committee; that he had no knowledge or intimation of the nature of any of the questions to be propounded to him before the same were asked by the committee, and that the answers to each and all the questions were taken down as given by the applicant without reference to any books or other outside aid.

5. The fee for license must in all cases be deposited with the clerk of the court before the application is made, to be returned to the applicant in case of rejection.

#### RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) thirty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

#### RULE III.

1. If the transcript of the record be not filed within the time prescribed by Rule II, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored the dismissal shall be final, and a bar to any other appeal from the same order or judgment.

2. On such motion, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of the filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

#### RULE IV.

1. All transcripts of record in civil cases shall be printed on unruled white writing paper, ten inches long by seven inches wide, with a margin, on the outer edge, of not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and one half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica solid is the smallest letter and most compact mode of composition allowed.

2. Transcripts in criminal cases may be printed in like manner as prescribed for civil cases; or, if not printed, shall be written on one side only of transcript paper, sixteen inches long by ten and one half inches in width, with a margin of not less than one and one half inches wide, fastened or bound together on the left sides of the pages by ribbon or tape, so that the same may be secured, and every part conveniently read. The transcript, if written, shall be in a fair, legible hand, and each paper or order shall be separately inserted.

3. The pleadings, proceedings and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order or proceeding,

and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover.

4. No record which fails to conform to these rules shall be received or filed by the clerk of the court.

RULE V.

The written transcript in civil causes, together with sufficient funds to pay for the printing of the same, may be transmitted to the clerk of this court. The clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be *prima facie* evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file.

RULE VI.

The expense of printing transcripts on appeal in civil causes and pleadings, affidavits, briefs or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed, shall be allowed as costs, and taxed in bills of cost in the usual mode.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required, or may produce the same duly certified, without such order. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy is produced at the time, must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions or objections to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical exception or objection to

the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, and must be noted in the written or the printed points of the respondent, and filed at least one day before the argument, or they will not be regarded.

#### RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made and the cause shall proceed as in other cases.

#### RULE X.

1. The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; *provided*, that all civil cases in which the appeal is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

2. When the transcript in a criminal cause is filed, after the calendar is made up, the cause may be placed thereon at any time, on motion of the defendant.

3. Causes shall be placed on the calendar in the order in which the transcripts are filed with the clerk.

#### RULE XI.

1. At least six days before the argument, the appellant shall furnish to the respondent a printed copy of his points and authorities, and within two days thereafter the respondent shall furnish to the appellant a written or printed copy of his points and authorities.

2. On or before the calling of the cause for argument each party shall file with the clerk his printed points and authorities, together with a brief statement of such of the facts as are necessary to explain the points made.

3. The oral argument may, in the discretion of the court, be limited to the printed points and authorities filed, and a failure by either party to file points and authorities under the provisions of this rule, shall be deemed a waiver by such party of the right to orally argue the cause.

4. No more than two counsel on a side will be heard upon the oral argument, except by special permission of the court, but each defendant who has appeared separately in the court below, may be heard through his own counsel.

5. At the argument, the court may order printed briefs to be filed by counsel for the respective parties within such time as may then be fixed.

6. In criminal cases it is left optional with counsel either to file written or printed points and authorities or briefs.

RULE XII.

In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper, and in the same style and form (except the numbering of the folios in the margin), as is prescribed for the printing of transcripts.

RULE XIII.

Besides the original, there shall be filed ten copies of the transcript, briefs and points and authorities, which copies shall be distributed by the clerk.

RULE XIV.

All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, and presented within ten days after the final judgment is rendered, or order made by the court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the court below shall be issued until the expiration of the ten days herein provided, and decisions upon the petition, except on special order.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

## RULE XVII.

No paper shall be taken from the court room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

## RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the court, upon petition, showing a proper cause for issuing the same.

## RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a *supersedeas*. The bond or undertaking shall be substantially the same as required in cases on appeal.

## RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

## RULE XXI.

The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

## RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order or decree which is sought to be reviewed, except under special circumstances.

## RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional days' notice will be required for each fifty miles, or fraction of fifty miles, from Carson.

## RULE XXIV.

In all cases where notice of a motion is necessary, unless, for good cause shown, the time is shortened by an order of one of the justices, the notice shall be five days.

REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,  
JANUARY TERM, 1879.

---

[1892.]

JULIA A. BLAISDELL ET AL., RESPONDENTS, v. HEISTER STEPHENS ET AL., APPELLANTS.

**JOINT LIABILITY—WHEN DOES NOT EXIST.**—Where two or more parties act each for himself, in producing a result injurious to plaintiff, they can not be held jointly liable for the acts of each other.

**INJUNCTION—EASEMENT—DRAINAGE.**—The owner of upper land, who has for more than five years enjoyed the privilege of running the waste water used from artificial sources for the purpose of irrigating his land, does not acquire an easement to run the same over the lower lands in such unreasonable or unnatural quantities as to damage the property of such lower land-owners, and an injunction will issue to prevent such injury although the parties enjoined are not jointly liable for the damages.

**APPEAL** from the District Court of the Second Judicial District, Washoe County.

The facts sufficiently appear in the opinion.

*R. M. Clarke*, for Appellants:

I. The defendants are in no sense joint wrong-doers. Their acts were several and distinct. There was no co-operation or concert of action between them. (2 Hilliard on Nev. Vol. XIV.—2.

## Argument for Respondents.

Torts, p. 247, sec. 10; 19 Johnson, 381; 26 Pa. 482; 57 Id. 142.)

II. The right of drainage is an incident to the ownership of land and the defendants had the undoubted right to its exercise and enjoyment, so long as they allowed the water to take its natural course. (Angell on Water Courses, secs. 108 a, 108 c, 108 d; Washb. 306; 1 Beasley, 280.)

III. The right of easement and servitude for drainage may be acquired by prescription or adverse user; and as more than five years adverse user is shown, defendants' right is established. (*Earl v. De Hart*, 1 Beasley, 285; Angeli, secs. 108 h, 108 j, 206 a, 372; 13 N. H. 467; 5 Metcalf, 253.)

IV. The defendants could not be sued for the injury which was occasioned by the waste water from the lands of other parties.

*Thomas E. Haydon*, for Respondents:

I. The only question in this case is one of law, whether the maxim, "*Sic utere tuo ut alienum non lædas*," applies to this case.

II. A party has no right to use any more water than is sufficient to irrigate his own land. (*Barnes v. Sabron*, 10 Nev. 212.) The claim of prescriptive title can only be acquired by some beneficial use or purpose. (*Weaver v. Eureka Lake*, 15 Cal. 271; *McKinney v. Smith*, 21 Id. 374.) Defendants had no right or beneficial interest in the water after it passed their land, and plaintiffs acquired no prescriptive right to continue the use of such surplus water. (*Hanson v. McCue*, 42 Cal. 303.)

III. A ditch owner is responsible for any injury that is caused by want of due care in the construction or management of his ditch. (*Tenney v. Miners' Ditch Co.*, 7 Cal. 339; *Wolf v. St. Louis Water Co.*, 10 Id. 541; *Hoffman v. Tuolumne Water Co.*, 10 Id. 413; Angell on Water Courses, sec. 336; *Bailey v. Mayor of New York*, 3 Hill, 531. Leading Cases on Mines, Minerals, etc., 747, 748; S. & Red. on Negligence, secs. 576-81, and note 3; *Baird v. Williamson*, 15 C. B. (N. S.) 376; *Eastman v. Amoskeag Co.*, 44 N.



H. 143; Hilliard on Remedies, 462-3, sec. 3 a, 4; 1 Hilliard on Torts (3 ed.), 606-608, secs. 16-18.)

IV. This is a suit in equity. (*Lake v. Tolles*, 8 Nev. 286; *Van Vliet v. Olin*, 4 Nev. 95; *Minturn v. Hayes*, 2 Cal. 590; *Smith v. Rowe*, 4 Id. 6; *Tuolumne Water Co. v. Chapman*, 8 Id. 392; *Goode v. Smith*, 13 Id. 84; *Koppikus v. Stat. Cap. Com.*, 16 Id. 248.)

V. The principle of "*Sic utere tuo ut alienum non lædas*" is applicable to ditch owners, but does not apply to ditches for irrigating purposes. (*Richardson v. Kier*, 34 Cal. 63; *Richardson v. Kier*, 37 Id. 263; *Gregory v. Nelson*, 41 Id. 278.)

*Boardman & Varian*, also for Respondents.

By the Court, HAWLEY, J.:

The plaintiffs, as owners of a drain ditch constructed in 1876, brought this action to recover damages against defendants for wrongfully flowing waste water from their lands to the injury of plaintiffs' ditch, and for an injunction to restrain such wrongful flowing of waste water. At the close of plaintiffs' testimony the defendants moved for a nonsuit upon the ground, among others, that it did not appear that the injury complained of "was the result of the joint or concurrent act of the defendants." This motion was overruled. The cause was tried before a jury to whom special issues were submitted. The jury answered the special issues, and also found a general verdict in favor of the plaintiffs, assessing the damages at fifty dollars. Both parties moved for judgment upon the special issues found by the jury. The court gave judgment in favor of the plaintiffs, and the defendants appeal.

From the issues found by the jury it appears that the "waste water from the defendants' lands and irrigating ditches" did flow into plaintiffs' drain ditch and that the waste water from the lands and irrigating ditches of Henry Weston and Mary Wall also flowed into plaintiffs' drain ditch. The waste water from the lands and ditches of the defendants has flowed upon the land drained and intersected by the drain ditch of plaintiffs ever since 1864.

With the exception of the eighth day of May, 1877, no more waste or drainage water flowed from the lands and ditches of the defendants than in previous years. The defendants "own, occupy and irrigate separate and distinct tracts or parcels of land each in his own right." They have no drain ditch which they use together in common. The defendant Sessions in 1876 constructed a drain ditch leading from his land to the Truckee river of sufficient capacity to carry, and it did carry, all the waste water brought or used by him on his land with exception of the eighth day of May, 1877.

The jury failed to find whether the defendants, or either of them, used any more water upon their land than was proper and necessary, to irrigate the same, but did find that each defendant used proper and reasonable methods of irrigation. The plaintiff, Henry Stephens, had dams across the slough or channel, in which waste or surplus water from the lands of defendants' flowed, and turned the water out upon his lands to irrigate the same. The grantors of the plaintiff, Henry Stephens, appropriated, claimed and used the waste water flowing from the lands of defendants for irrigating purposes. The plaintiff, Pine, upon the land of the plaintiff, Blaisdell, used the waste or surplus water flowing from the lands of Henry Stephens, for irrigating purposes. The waste water flowing from the lands of defendants flowed upon the lands of the plaintiff, Henry Stephens, in a natural channel or slough, and he turned the water out of said channel upon his land. The waste water flowing from the lands of defendants, after passing over the lands of the plaintiff, Henry Stephens, flowed into an artificial ditch constructed upon the lands of the plaintiff, Blaisdell, and thence into the drain ditch of the plaintiffs. The plaintiffs' ditch was damaged to the extent of seventy-five dollars.

The jury did not know how much it was damaged by the water flowing from the lands of Mary Wall and Henry Weston, but found that it was damaged fifty dollars by the water flowing from the lands of defendants and twenty-

five dollars by the "waste water flowing from plaintiffs' lands."

It does not appear from the evidence that the defendants acted in concert, or that the act of either in any manner produced the act of the other.

We are of opinion that the motion for a nonsuit ought to have been sustained. •

The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they can not be held jointly liable for the acts of each other. (*Ferguson v. Terry*, 1 B. Mon. 96; *Parthenheimer v. Van Order*, 20 Barb. 479; *Guille v. Swan*, 19 Johns. 381; *Bard & Wenrich v. Yohn*, 26 Pa. St. 482; *Little Schuylkill Navigation Railroad and Coal Company v. Richards*, 57 Id. 142.)

The case last cited is certainly analogous to the case at bar. There the suit was brought for damages to a dam filled by deposits of coal dirt from different mines on the stream above the dam, and the plaintiffs ought to hold the defendant liable for the whole damages caused by the deposits. Speaking of the results that would follow if the defendant was held liable for the acts of others, the supreme court say: "It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream—this is the tort, while the deposit below is only a consequence. The liability, therefore, began above

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Opinion of Hawley, J., for rehearing.

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with the defendant's act upon his own land, and this act was wholly separate and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterwards became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream, his dirt filled only its own space, and it was made neither more nor less by the accretions." In this case, the right of action arises, if at all, upon the act of allowing the waste water to run into the slough from the land of the defendants. This is the tort. The damage to the drain ditch below is only a consequence. The act of defendant, Sessions, in allowing the waste water to run from his land was separate and independent from the act of defendant, Stephens, in allowing the waste water to run from his land, and neither of them could be held liable in damages for the wrongful acts of the other.

The judgment of the district court is reversed and the cause remanded for a new trial.

RESPONSE TO PETITION FOR REHEARING.

By the Court, HAWLEY, J.:

A re-examination of all the testimony contained in the transcript strengthens the convictions expressed in the former opinion, that "it does not appear from the evidence that the defendants acted in concert, or that the act of either, in any manner, produced the act of the other." This being true, it follows, for the reasons stated in our former opinion, that the action at law can not be sustained as against both defendants. A rehearing was granted, principally upon the ground that—conceding the correctness of the views expressed in the opinion—it might not necessarily follow that the nonsuit should be granted as against both defendants. The plaintiffs might have the right to dismiss as to one of the parties and proceed against the other. This question, however, has not been relied upon by the respondents.

We are asked to decide the equitable rights of the re-

spective parties, and determine whether or not, upon the facts disclosed in the record, the plaintiffs are entitled to an injunction.

The respondents admit, as the authorities declare, that the owner of an upper tract of land has an easement in the lower tracts to the extent of the natural flow of water from the upper to and upon the lower tract of land.

It is unnecessary to discuss the important, delicate and interesting questions that, under the improved methods of irrigation and improvement of agricultural lands, are liable to be raised as to the general right of the owner of an upper tract of land to flow the waste or surplus water used for irrigation from artificial means upon the lower lands of his neighbors. So far as the present case is concerned, it only presents the single question, whether the owner of the upper land, who has for more than five years enjoyed the undisturbed privilege of running the waste waters used from artificial sources for the purpose of irrigating his land, thereby acquires an easement by prescription to run the same over the lower lands in such unreasonable and unnatural quantities as to damage a drain ditch recently constructed by parties owning land below him, for the purpose of carrying off such surplus or waste water, as well as the waste water used in irrigating their own land.

The jury found, as stated in the former opinion, that, with the exception of the eighth of May, no more water flowed from defendants' lands than in previous years, and although they failed affirmatively "to find whether the defendants, or either of them, used any more water upon their land than was proper and unnecessary to irrigate the same," yet their other findings would seem to imply such to be the fact. But, be that as it may, the court, in its judgment and decree, did expressly find that, on the eighth of May, the defendants did allow an "inordinate quantity" to flow down over plaintiffs' lands. There is ample testimony to sustain this finding.

Under the decree the defendants are permitted to irrigate their lands by all reasonable use of the waters and by all convenient methods or systems of irrigation, and are only

## Points decided.

bound to so regulate the enjoyment of this right "as not to materially injure the drain ditch of plaintiffs below their respective lands."

We are of opinion that upon the facts disclosed by the record the plaintiffs are certainly entitled to the injunction as decreed by the court. Upon a review of the questions involved in this case we are also of the opinion that respondents should be allowed, within fifteen days after the filing of the remittitur herein, if they so desire, to remit the judgment for damages, and if so remitted then the decree ordering an injunction should remain. Otherwise a new trial must be granted.

The judgment of the district court, in so far as it awards damages against the defendants, is reversed, and the cause remanded for such further proceedings as are indicated in this opinion would be proper.

The costs of this appeal to be taxed against respondents.

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[No. 896.]

**JAMES HUNTER & CO. ET AL., RESPONDENTS, v.  
TRUCKEE LODGE, No. 14, I. O. O. F. ET AL.,  
APPELLANTS.**

**MOTION FOR NEW TRIAL—WAIVER OF NOTICE—TIME TO MOVE FOR NEW TRIAL.**—Service of a statement on appeal is a waiver of written notice of the filing of findings of the court, and in such a case a notice of intention to move for a new trial must be filed within ten days after the service of statement. (*Corbett v. Swift*, 8 Nev. 194, affirmed.)

**MECHANICS' LIEN LAW—LIBERALLY CONSTRUED.**—The lien law is to be liberally construed. A substantial compliance with its provisions is all that is required. (*Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219, affirmed.)

**IDEM—TIME FOR FILING NOTICE.**—The lien claimant is only required by the statute to file his notice before the expiration of thirty days after the completion of the building.

**IDEM—FORECLOSURE—RIGHTS OF INTERVENORS.**—Intervenor is connected with the proceeding to foreclose plaintiffs' lien, by force of the statute, when the action is commenced and notice thereof is published. The liens may be proved without any formal intervention.

**IDEM—ALTERATION OF RECORD—DESCRIPTION OF PREMISES.**—M. and D. filed a notice of lien and described the premises as being in lot 9 in a certain block. After the notice was recorded, but before the time had elapsed for filing, they were permitted to change the number of the lot in the

## Argument for Appellants.

notice and upon the record: *Held*, it appearing that no fraud was intended, and the notice otherwise containing a good description of the premises, that such alteration did not affect the validity of the notice.

**PAYMENTS TO CONTRACTOR—MUST BE PLEADED BY DEFENDANT.**—Before the defendant can avail himself of the fact, if it be a defense, that he had paid all that he agreed to pay, before notice of the claims of third parties, he must allege and prove the fact.

**IDEM—NOT A DEFENSE—RIGHTS OF SUB-CONTRACTORS.**—In construing the lien law (Stat. 1875, 122) the court, upon rehearing, *held*, that the legislature intended to give sub-contractors and material-men direct liens upon the premises for the value of their labor and materials, regardless of payments on the principal contract made prior to the time within which the law requires notice of their claims to be recorded.

**CONSTRUCTION OF STATUTE ADOPTED FROM ANOTHER STATE—PRESUMPTION.**—The rule that where a statute has received a judicial construction in another state, discussed: *Held*, that the decision of another state can not be presumed to be known to the legislature of this state, antecedent to its official publication.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

*Robert M. Clarke*, for Appellants:

I. The alteration of Manning & Duck's notice was an unlawful act, Stat. 1871, 75, and could not confer any rights upon the claimants. It was a new notice and was never sworn to.

II. The liens were filed before the completion of the building. This was premature and unauthorized. (Stat. 1875, 122.)

III. Boyd & Courtois' notice of lien did not show that materials were used or furnished for the building. It should have been excluded. (*Houghton v. Blake*, 5 Cal. 240; *Bottomly v. Grace Church*, 2 Id. 90.)

IV. The lien claimants, other than plaintiff, did not comply with the law in bringing suits within six months. Their liens can not therefore bind the property. Commencing proceedings means commencing suits and issuing summons. (6 Nev. 290; 10 Cal. 240; 18 Ill. 318.) The filing of a petition for intervention is a superfluous act. (6 Nev. 291; 8 Id. 236; 14 Cal. 127.)

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Argument for Appellants.

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V. Our lien law was borrowed from California, Stat. Cal. 1867-8, 589, and unless the complaint shows that the owner of the building was indebted to the contractor when actual or constructive notice was given of his claim, it fails to state facts sufficient to constitute a cause of action. (49 Cal. 185; 51 Id. 423.)

VI. The presumption is that this law was adopted as interpreted by the supreme court of California. The question of actual knowledge or learning of the legislature is never considered when we seek to arrive at their intent in the construction of a law. Therefore, it is immaterial whether our legislature knew of the interpretation by the courts of California of the act in question previous to its adoption. If the rule shall prevail it must rest upon a legal presumption, whatever may be the reason for such presumption. The books lay down the rule in question, without any qualification as to the time of the construction or its publication. (Cooley Const. Law, 52; 2 Nev. 206; 5 Id. 24; 7 Id. 23; 8 Id. 320.) The highest tribunals of a country are presumed to have correctly understood their own laws, and having construed them, comity and prudence alike require the adopting state to take that construction as sound and correct. Hence results the duty of the law makers who adopt the law, if they desire to avoid the consequences of the rule, to provide in terms for an independent construction of the law. The true reason for the rule is found in the wants and necessities of the people of the state where a law is introduced. The law is passed because it is necessary. It takes effect immediately upon its passage. The wisest Solon is but an imperfect draughtsman of legislative enactments. To frame a perfect law upon any important subject, and one that will leave no room for construction, requires more skill, more wisdom and learning than is commonly attributed to our legislators. Most statutes are full of imperfections; yet the community must act upon them; men must regulate their most important concerns in conformity with them. In so doing, the law says they are entitled to have something whereby to guide their conduct. They have a right to rely upon rules of construction estab-



lished by the law of the land. If this be the true reason of the rule, it follows that it can not be affected by the publication of the decision in authentic form previous to the enactment of the law.

*Thomas E. Haydon*, for Respondents:

I. Appellants waived their right to move for a new trial by not acting upon their actual notice of the decision of the court. (6 Nev. 195.)

II. The mechanics' lien law must be liberally construed. (8 Nev. 236; 11 Id. 277.)

III. The description in *Manning & Duck's* lien was sufficient, without the alteration. (*Dickson v. Corbett*, 11 Nev. 277.)

IV. There is nothing in the lien law which requires any notice to the owners or that limits their liability to the contract price. The owner must give notice to the subcontractors that he will not be liable for any materials furnished or labor done by them, otherwise he is bound. (*Fuquay v. Stickney*, 41 Cal. 583; 49 Id. 357; *Henry v. Tilson*, 17 Vt. 479.) The case of *Renton v. Conley*, 49 Cal. 185, is ill considered, illogical and absurd. It is true when one state adopts a statute of another state, it adopts also the *known construction* of such statute in the state from which it is borrowed. The language of the books generally, is that where a statute has a *known construction*, resulting from a *uniform series* of judicial expositions, then it is adopted by the state borrowing with the construction *well settled* in the state from which borrowed. (*Campbell v. Quinlin*, 3 Scam. 288.) But courts do not always follow this rule when unsatisfied with the reasoning of such decisions. (*Milliken v. Sloat*, 1 Nev. 580; *Van Doren v. Tjader*, 1 Id. 394; *Galland v. Lewis*, 26 Cal. 46.)

*Boardman & Varian*, and *W. L. Knox*, also, for Respondents:

By the Court, BEATTY, C. J.:

This is an action under the mechanics' lien law of 1875 (Stat. 1875, p. 122). The plaintiffs and intervenors were

sub-contractors or material-men under Wood & Richards, the principal contractors for the erection of appellants' building. The judgment of the district court was in favor of the lien claimants, and the appeal is from the judgment and also from the order of the district court refusing a new trial.

The motion for a new trial, we think, was properly overruled upon the ground stated in the opinion of the district judge. The decree was entered October 13, 1876; on the eighteenth of October, appellant filed and served a statement on appeal, and its notice of intention to move for a new trial was not filed or served until more than ten days thereafter. On the principle decided in *Corbett v. Swift*, 6 Nev. 194, the service of the statement on appeal was a waiver of written notice of the filing of the findings of the court, and the notice of intention to move for a new trial not having been given within ten days thereafter was not in time. We shall therefore consider only those errors which are assigned in support of the appeal from the judgment.

1. The lien law provides, sec. 5, that every person claiming under it, except the original contractor, shall file a statement of his claim "within thirty days after the completion of the building." In this case all the notices of liens were filed before the completion of the building, and appellant claims that this was not a sufficient compliance with the law. We think it was. The law is to be liberally construed, and a substantial compliance with its provisions is all that is required. (*Skyrme v. Occidental Co.*, 8 Nev. 239.) The meaning of the statute, and all that it requires, is that the lien-claimant shall file his notice before the expiration of thirty days after the completion of the building, not that he must decide at his peril exactly when it is finished (a thing that it would often be impossible to do), and file his claim within the ensuing thirty days. There could have been no possible object in such a requirement, while the necessity of fixing a term within which liens of this character must be asserted is obvious. It may be true, as counsel contends, that a sub-contractor's claim is subordinate to that of the principal contractor, and that neither

can have any lien unless or until the building is completed. But if this were conceded it would not not necessarily follow that a sub-contractor's notice of intention to claim a lien would be void if filed before his right was perfected by the completion of the principal contract. If both things are essential to his right of action it still makes no difference which is done first.

2. It is claimed that the intervenors in this case failed to commence proceedings in time. The statute provides, sec. 8, that no lien shall be binding for a longer period than six months after the same is filed "unless proceedings be commenced in a proper court within that time to enforce the same."

This action was commenced less than six months after the claims of intervenors were filed, and the plaintiffs caused the statutory notice to other claimants to be duly published. Each of the intervenors filed his petition of intervention in the case within six months after his claim was filed for record. But appellant contends that as these petitions were filed without the previous leave of the court they were wholly unauthorized, and consequently that the intervenors never connected themselves with the proceedings until the day of the trial, which was more than six months after their claims were recorded.

We think that, if it had been necessary for the intervenors to file petitions in order to connect themselves with the proceeding, they were authorized to do so without any order of court, for the statute gave them the absolute right to intervene. But we think the intervenors were connected with the proceeding by force of the statute from the moment the action was commenced and notice published by the plaintiffs. The action was a proceeding to enforce not only the lien of the plaintiffs but all the recorded liens. The holders of those liens not only had the right, but they were obliged to prove up their claims in this action, or be held to have waived them. This court has decided (*Elliott v. Ivers*, 6 Nev. 290), that in these cases a formal intervention is unnecessary, and that holders of recorded liens may prove them without having pleaded them, and such is the plain meaning of the

statute. It was intimated, without being decided, by the supreme court of California (*Mars v. McKay*, 14 Cal. 129), that a lien holder would be barred of his right of action if he failed to file an intervention before the lapse of six months after filing his lien for record; but we fail to see any good reason for so holding. If the commencement of the first action and the publication of the statutory notice gives the court jurisdiction to determine all the recorded claims, and if the determination of that action bars all claims not presented, it would seem that the holders of all such claims are necessarily connected with the proceeding from the moment of its institution. This construction of the statute can lead to no possible inconvenience, and is in accord not only with its letter but its spirit, which is to afford a simple, inexpensive and summary process for the enforcement of mechanics' liens.

3. Manning & Duck's notice of lien, as originally filed and recorded, described the premises to be charged as lot 9 in a certain block in Reno. Before the time for filing notice of their claim had elapsed they discovered that the true description of the premises was a fraction of lot 10 in the same block. The recorder permitted them to change the description in the notice already filed, and made a corresponding change in the book where it was recorded. It is claimed that it was error to admit proof of this claim. What would be the effect of such an alteration if there was no other sufficient description of the premises, or if it was fraudulently intended, it is unnecessary to decide. It is sufficient for this case to say that it appears from the statement that no fraud was intended by Manning & Duck, and that their notice contained a good description of the premises without reference to the number of the lot. It described the building of the defendant situated on a certain block, and it was proved that defendant had but one building on that block, which was well known. The court found that this description was sufficient to identify the premises to be charged with the lien, and that is all the statute requires. (Sec. 5.)

4. Objection was made to the proof of Boyd & Courtois'

claim on the ground that their petition of intervention did not aver that the materials supplied by them were actually used in the construction of the building of defendant. The objection was overruled, and this is assigned as error. We have already decided that no petitions of intervention were necessary. Boyd & Courtois had filed a sufficient notice of their claim, which showed among other things that the materials charged for had been used in the construction of defendants' building. Under that recorded notice they were entitled to prove their claim without any additional pleading.

Finally. It is contended that the district court erred in charging defendants' building with liens in favor of sub-contractors exceeding in amount the sum due to the original contractors when defendants first had notice of the claims of the sub-contractors.

It does not affirmatively appear from the record before us that less was due to the principal contractors than the amount of the liens; the pleadings, the findings of the court and the statement on appeal are silent upon this point. The complaint alleges that the original contract price of the building was nineteen thousand five hundred dollars—more than the aggregate amount of the liens—but fails to allege that any part thereof remained due at the time the liens were filed. There was no demurrer, and the answer is a mere general denial of the complaint without any affirmative allegations whatever. It will thus be seen that the proposition to be maintained by appellant under this assignment is that the judgment is erroneous, because it is not averred in the complaint that anything was due to the principal contractors when notice was given of the claims of the respondents. This involves a construction of the law and a question of pleading. In order to pronounce the judgment erroneous it must not only be held that under the law there can be no lien for an amount greater than is due from the owner of the building to the original contractor, but also that a complaint which fails to allege that anything was due when notice of the sub-contractor's claim was given is so fatally defective that it will not support a judgment in favor of the lien.

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Opinion of the Court—Beatty, C. J.

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The case of *Renton v. Conley*, 49 Cal. 187, which arose under a statute from which ours was substantially copied, seems to affirm both branches of the proposition, and the decision in that case was followed in *Wells v. Cahn*, 51 Cal. 423. We think these decisions go too far. Conceding their correctness as to the rights of lien claimants under the statute, it still does not follow that the rule of pleading is as they assume it to be. They give no reason for holding to so strict a rule, and they are professedly based upon earlier California decisions, which went only to the extent of holding that it was a good defense on the part of the owner of the building to show that he had paid the original contractor, in good faith and in pursuance of his contract, before receiving notice of the sub-contractor's claim. (See 13 Cal. 620; 16 Id. 126.) The doctrine of these cases is sufficiently vindicated by allowing to the owner of the building the advantage of his defense, when he himself pleads and proves it.

To hold that the plaintiff and intervenor must aver that he has not paid the original contractor, or that there is still due on the original contract an amount equal to the aggregate of their liens, would be inconsistent with the whole tenor of the law. For, as we have seen, an intervenor is not required to file any complaint or petition of intervention, the evident intention of the law being that his recorded claim shall serve the purpose of a complaint. If, then, a statement of his demand which comes up to the requirements of the statute makes out a *prima facie* case for a lienholder who intervenes in the action, there would seem to be no reason or consistency in requiring the lienholder who commences the action to allege something more. He could not, in any event, be required to make an allegation on the point in question more than sufficiently broad to cover his own claim, and then, if other liens were proved to a greater amount than he had alleged to be due on the original contract (as we have held they might be), the judgment would be open to the same objection which is urged in this case.

Our opinion is that it was the intention of the legisla-

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ture to give to material-men and sub-contractors, claiming liens under the law, the benefit of a presumption that contracts made with the original contractor were authorized by the owner of the premises, and, if under the statute, or under the constitution, it is a good defense for the owner to show that he has paid, in good faith and in pursuance of his contract, all that he agreed to pay, before notice of the claims of third parties, he is bound to allege and prove the fact.

The case of *Renton v. Conley*, *supra*, was decided a few months before our present lien law was passed, and the rule is invoked that when a statute of another state has received a construction before its adoption here, it is taken to have been adopted as construed. We think, however, the rule, even if it had been more strictly adhered to in this state, would scarcely be applicable in this instance; for the case in question, although decided, was not reported before the passage of our law, and it can not be presumed that the legislature was aware of the decision.

The judgment and order of the district court are affirmed.

## RESPONSE TO PETITION FOR REHEARING.

By the Court, BEATTY, C. J.:

This case was originally submitted for decision without a very full or satisfactory argument of the main question involved in the last assignment of error discussed in our former opinion. On account of the important interests depending upon a correct solution of that question we felt unwilling to decide it without a fuller argument, and, believing that the appellant was not entitled under its answer to raise the point, we placed our decision upon that ground. But, a rehearing having been granted, the question alluded to has been thoroughly discussed, not only by counsel for the parties, but also by counsel interested in other cases, and we no longer have any motive to refrain from deciding it. We are not satisfied that the ground upon which we based the conclusion reached in our former opinion—the insufficiency of appellant's answer—is untenable; but since

it is the earnest desire of all parties that the more important question as to the rights of sub-contractors and material-men should be settled by an authoritative construction of the lien law, and since our understanding of the statute leads us to the same conclusion to which we came before, there will be no occasion to revert to the question of pleading or practice.

The respondents are sub-contractors and material-men, and the law under which they claim (Stats. 1875, 122), is in all essential respects a copy of the California lien law of 1868. (Cal. Stats. 1867-8, 589.) The supreme court of that state, at the October term, 1874, decided that, under their statute, sub-contractors and material-men have no lien except to the extent that the owner of the building is indebted to the principal contractor at the time he receives notice of their claims. (*Renton v. Conley*, 49 Cal. 187.) After that decision was made, but before the publication of the volume of reports in which it appears, our legislature adopted the California statute, and upon the authority of *Renton v. Conley*, and another case in which it was followed (*Wells v. Cahn*, 51 Cal. 423), counsel for appellant claims that our statute must receive the same construction. He claims this upon the ground: 1. That the California statute was correctly construed in those cases; and 2. That even if *Renton v. Conley* was erroneously decided, there is nevertheless a conclusive presumption that our legislature, in adopting the statute, intended it to mean what, in that case, it had been construed to mean.

If the second of these propositions is true, we shall have no occasion to consider the first; for our duty ends with ascertaining and giving effect to the intention of the legislature, and if there is indeed a conclusive presumption that the construction given to the law in *Renton v. Conley* was adopted along with the statute, it becomes a mere question of curiosity whether that case was correctly decided. We shall, therefore, inquire in the first place whether we are bound by that decision.

The rule of construction relied on by appellant is a familiar one, so familiar in fact that scarcely a volume of decisions



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of the younger states of the Union can be found in which it is not either expressly stated in terms more or less exact or tacitly assumed as the basis of decision. From this very frequency of allusion and statement, it has resulted that the rule and the principle upon which it rests have more than once been expressed in somewhat unguarded terms. But generally, if not always, such looseness of expression has been due to the fact that the circumstances of the particular case did not call for greater exactitude. The rule was neither misunderstood nor misapplied; and it was stated with sufficient precision for the case in hand, though in terms too unqualified for universal application.

As an example in illustration of this statement, we may cite what was said by this court in *McLane v. Abrams*, 2 Nev. 206: "It is a rule of construction, too familiar to require the citation of authorities, that where one state adopts the statute of another it is adopted with the construction placed upon it by the highest court of judicature of the state from which it is taken. The reason upon which this rule rests, gives it an importance and weight which should not be disregarded except upon the most urgent reasons. When the legislature of one state adopts the laws of another, it is presumed to know the construction placed upon those laws in the state from which they are adopted, and therefore that it adopts the construction with the law," etc.

Giving to this language its full and literal effect, and supposing it to be subject to no sort of qualification, it clearly sustains the position of appellant. It would follow that we should be absolutely bound by the decision of *Renton v. Conley*, even if it had been rendered but a day before and set aside the day after our statute was approved by the Governor. But nothing is better settled than that the language of every opinion is to be understood in a qualified sense—qualified, that is to say, by the fact of the case. It is a decision only upon those facts, and so far as it transcends them is merely *dictum*.

Now, in *McLane v. Abrams*, the court was considering a state which had been copied from the laws of California *verbatim* nine years after it had been construed by the su-

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preme court of that state and seven years after the decision had been published in their official reports. In view of these facts the decision in that case lends no support to the position of appellant. It was, indeed, decided by implication that after the construction of a statute has been published for seven years the legislature of another state, adopting the statute, will be presumed to have known such construction. But even this was a question not mooted in the case, and it is clear that all the court intended to decide was that when there is reason to presume that a legislature in adopting the statute of another state knows the construction that has been put upon such statute by the highest courts of the state from which it is borrowed, that construction is presumed to have been adopted along with the statute. Stated in these terms there can be no objection to the rule, and undoubtedly it obtains in this state (see 1 Nev. 537; 2 Id. 206; 5 Id. 24; 7 Id. 27; 8 Id. 320), but subject to at least one important exception, viz: "When the language of a statute is so plain it will admit of but one construction, we can not give it another and absurd one because it has been so construed in another state." (1 Nev. 394.) This exception affords an indication of the limits within which the rule is of any validity. It is resorted to only as a means of discovering the intention of the legislature, and so far only as it conduces to that end is it allowed any force. If the language of a statute leaves no room for construction, its operation is excluded, and so, likewise, it can never be applied where the only reason upon which it rests totally fails.

In this view it becomes important to ascertain the origin and reason of the rule.

As to its origin it is undoubtedly a mere adaptation of the rule of construing statutes that were re-enacted after having been repealed, or after having expired by their own limitations or become obsolete. In such cases there was a natural and just presumption that the legislature was informed of any decision, however recent, of its own highest courts, giving a construction to the law proposed to be re-enacted, and there was a further and very cogent presump-

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tion that if it had wished to exclude such construction it would have made the necessary alteration in the terms of the law. According it has long been settled that when a state re-enacts one of its own laws, substantially in its original terms, the courts of that state will continue to construe the law after its re-enactment as they had construed it before. And they will do this not only because there are the best reasons for supposing that they are thereby conforming to the actual intent of the legislature, but because, so far as their former decision has become to any extent a rule of property, they are bound to adhere to it upon the principle of *stare decisis*.

When, however, a question arises as to the construction of a statute adopted from another state, it is clear that the decisions of that state construing the law derive no additional force from the doctrine of *stare decisis*. They are binding, if binding at all, only because they afford conclusive evidence of the actual intention of the legislature; and it is manifest that they can afford no such evidence unless there are good reasons for presuming them to have been actually known to the legislature when the law was adopted. This consideration is essential to a just appreciation of the rule, and a reference to the language of the earlier cases in which it was applied will show that at first it was constantly borne in mind. Those were cases in which statutes were to be construed that had been adopted in this country after having been in force in England for hundreds of years and their construction settled by long series of decisions.

Under such circumstances, it was eminently just to presume that their construction was known, and therefore adopted along with the statutes themselves.

In *Downey v. Hotchkiss*, it was held that the legislature of Connecticut, in adopting the English statute of frauds, also adopted its long-settled construction by the English courts. (2 Day, 225.) In *Kirkpatrick v. Gibson*, Chief Justice Marshall said: "I am the more inclined to that opinion because it is reasonable to suppose that where a British statute is re-enacted in this country we adopt the settled construc-

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tion it has received, as well as the statute itself." (2 Brock. 391.) In *Pennock v. Dialogue*, Judge Story said: "It is doubtless true, as has been suggested at the bar, that where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority." (2 Peters, 18.) In *Adams v. Field*, the supreme court of Vermont said: "When our statute of wills was enacted the statute of Charles II. had received a long, fixed and well-known construction, and when we adopt an English statute we take it with the construction which it had received, and this upon the ground that such was the implied intention of the legislature." (21 Vt. 266.) These cases and several others to the same effect are cited in *Commonwealth v. Hartnett*, 3 Gray, 451, where the principal of the rule is thus stated: "For if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effect that intention."

At a later period the principle established by these decisions was invoked in the construction of statutes borrowed by one state from another, and in the more recent cases a tendency may be observed to give a wider scope to the rule and to ignore the wholesome and necessary limitations under which it was first applied. This, however, is a tendency to be deprecated, and, so far as possible, avoided. It has probably resulted from the fact that the courts have found themselves unable to draw any definite line of distinction between such long-settled constructions as a legislature may reasonably be presumed to know and those more recent constructions to which no such presumption fairly attaches. It being once held that a legislature must be presumed to have known the long-settled construction of a statute adopted from another state, the rule thence deduced was naturally invoked in cases where the construction was more and more recent, and there being no means of fixing a limit of time within which it could be held that such pre-

sumption would not arise, the operation of the rule has been gradually, and perhaps unavoidably, extended to cases in which it is more likely to have been misleading than otherwise.

But so far as we have observed no court has gone to the extent of holding that the decision of another state can be presumed to be known antecedent to its official publication; and we think that here at least a safe and practical and reasonable limit may be set to the operation of a rule already too much extended. We do not say that we should feel bound to conform to the decision of the highest court of another state merely because it was published in an official report before our adoption of a statute construed by it, but we do feel safe in holding that before such publication there ought to be no presumption that the decision was known to our legislature, and consequently that no inference of their intention can be drawn from any such presumption.

It is certainly true, as contended by counsel for appellant, that no case has been found in which this distinction has been recognized, but this is accounted for by the fact that no case has been found in which the facts warranted a decision based upon any such distinction. We are, however, sustained to this extent by the cases cited below. In frequent instances the courts have taken pains to show by comparison of dates and otherwise that it was reasonable to presume that the previous construction of borrowed statutes was actually known to the legislature by which they were adopted; and in one case, *Campbell v. Quinlin*, 3 Scam. 289, some stress was laid upon the fact that the decisions had not only been made but the "reports published to the world" prior to the adoption of the statute in question.

We think we are entirely justified, in view of all the cases, in qualifying the rule at least to the extent above stated. Nor do we anticipate that we shall thereby bring upon ourselves any of the inconveniences suggested by counsel. We are asked how we are to know when a decision is first published, and if we are not aware that they are frequently, if not always, published in the newspapers and in law magazines in advance of the official reports. Our answer is that

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the whole subject is one of judicial cognizance. Any application of the rule contended for presupposes judicial knowledge of the date when a decision was rendered, and it is as easy to know judicially when a decision was published in official form as to know when it was rendered, or that it was ever made. As to such ephemeral reports of cases as may be found in newspapers and magazines, it is safer to ignore them altogether than to presume that their contents are known to the legislature.

We refer to the following cases as bearing more or less directly upon the point above discussed: "See cases cited at page 52 of Cooley's Constitutional Limitations; also, *McKenzie v. State*, 11 Ark. 596; *Draper v. Emerson*, 22 Wis. 150; *Poertner v. Russell*, 33 Id. 193; *Harrison v. Sager*, 27 Mich. 478; *Greiner v. Klein*, 28 Id. 22; *State ex rel. M. and M. Railroad Company v. Macon county*, 41 Mo. 464; *Snoddy v. Cage*, 5 Texas, 108.)

Upon these authorities, and for the reasons above stated, we say as we said before, that there is no reason to presume that our legislature, when it adopted the California lien law, knew of the construction it had received in *Renton v. Conley*, and consequently it can not be presumed that the law was intended to mean what it was there held to mean, unless such intention is fairly deducible from the terms of the statute itself. We are thus brought back to appellant's first proposition, viz.: that the California statute of 1868, from which our statute of 1875 was copied, was correctly construed in *Renton v. Conley*.

We regret to say that after a most careful examination of the statute in question, as well as of the whole course of legislation and judicial construction in California on the subject of mechanics' liens antecedent to that decision, we are forced to the conviction that sub-contractors and material-men were thereby deprived of the rights which it was the intention of the legislature to give them.

In discussing the relation of owners of buildings to sub-contractors and others, Mr. Phillips, in his work on Mechanics' Liens says: "The protection of the sub-contractor and material-man, with a just regard to the rights of the owner

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of the property, has been a subject of much solicitude with most of the legislatures. Two systems seem principally to have been adopted. The one in Pennsylvania, which was the first, where the mechanic who did the work and the material-man who supplied the articles used, were deemed entitled to protection, rather than a mere builder or undertaker of contracts, made provision that the sub-contractor and material-man should have a lien for whatever sum might be due them directly on the building and land upon which it stood, and subordinating the lien of the contractor thereto. The other was the plan adopted in New York, which did not secure to any one except the original contractor an absolute lien on the property for the whole sum due, but by a species of equitable subrogation allowed the sub-contractor and material-man to give written notice to the owner of his unpaid claim, requiring the owner thereupon to retain such funds as were in his hands belonging to the contractor, to answer the suit of the sub-contractor and securing the same either by lien on the interest of the owner in the property, or a right of action against him—the payment of this sum to operate as a valid set-off against any demand of the contractor." (Sec. 57, p. 82.)

A comparison of the statutes and decisions of California on the subject of mechanics' liens give us the impression that the legislature and supreme court of that state have most of the time since 1858 been acting at cross purposes. By various amendments to the statute the legislature has evinced an intention to establish the Pennsylvania system, but the law has been construed at every stage of its development into a mere embodiment of the New York system. The strong leaning of the court in favor of the latter system has been the result of what is probably an enlightened view of the true policy of legislation on this subject; for it seems that the plan of conferring on sub-contractors and material-men a right of lien for all sums which may be due them, irrespective of payments already made by the owner to the contractor, is passing out of favor, and that the tendency in the later legislation in the various states of the union is to confine their right to what may be owing by

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the owners at the time of notice to him of their claims. (Phillips on Mechanics' Liens, sec. 57.)

But although it may be true that the supreme court of California has at all times had a more just conception than the legislature of what the law ought to be, we can not help thinking that their lively appreciation of the injustice to which owners of buildings might be subjected under the Pennsylvania system has biased their judgment in the construction of the acts of the legislature.

By the first section of the act of 1856 (Cal. Stats. 1856, p. 203), it was enacted that: "All artisans, builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials for the construction of any building, wharf, or superstructure, shall have a lien on such building, wharf or superstructure for the work and labor done or material furnished by each respectively."

This section by itself would seem to give to sub-contractors, etc., a direct and absolute lien on the building for the amounts due them; but the provisions of section 3 were perhaps sufficient to justify the supreme court in holding that it was not the design of the legislature to make the owner responsible except upon notice, or to a greater extent than the sum due to the contractor at the date of the notice. (See *Knowles v. Joost*, 13 Cal. 621.) Section 3 of the act of 1856 was as follows: "On being served with a notice by a sub-contractor as provided in the last preceding section, the owner of such building, wharf or superstructure shall withhold from the contractor out of the first money due, or to become due to him under the contract, a sufficient sum to cover the lien claimed by such sub-contractor, journeyman or other persons performing labor or furnishing materials, until the validity thereof shall be ascertained by a proper legal proceeding if the same be contested; and if so established the amount thereof shall be a valid offset," etc.

But in 1858 this section was amended so as to read as follows: "Every sub-contractor, journeyman, \* \* \* shall, under the provisions of this act, have a valid lien upon the building, wharf or superstructure on which such labor was performed, or for which such materials were furnished, re-



gardless of the claims of the contractor against the owner of such building, etc.; but if any money be due or is to become due under the contract from said owner to said contractor, on being served with notice by a sub-contractor, as provided in the last preceding section, said owner may withhold, out of the first money due, or to become due, under the contract, a sufficient sum to cover the lien," etc. (Stats. 1858, p. 225.)

To our minds this amendment to the statute clearly indicates the intention of the legislature to make the owner responsible to sub-contractors and material-men for the amount of their claims, notwithstanding previous payment to the contractor of the entire contract price, provided, of course, they complied with the requirements of section 2, as to claiming, recording and serving notice of their liens. The first part of the section is positive to that effect, and the latter part does not qualify it—it merely gives to the owner of a means of protection *pro tanto*, in case any portion of the contract price is still due, or to become due.

But, notwithstanding the pointed and stringent terms of this amendment, it was held in *McAlpin v. Duncan*, 16 Cal. 126, that it gave no additional rights to sub-contractors and material-men. The effect of the decision being that the law was left by the amendment exactly as it was before; or, in other words, that the legislature had taken the pains to amend the law without any intention of changing it. The only argument by which it was attempted to support this conclusion was an enumeration of the grave inconveniences which it was supposed would ensue if the language of the statute should be allowed its natural and obvious effect. This sort of argument is never very conclusive, and its force in this instance is greatly impaired by the fact that several of the states, for the sake of giving more complete protection to mechanics, laborers, etc., have long been contended to endure all the mischiefs involved in what Mr. Phillips calls the Pennsylvania system.

But it is not with the law of 1858, or the case of *McAlpin v. Duncan*, that we are particularly concerned. In 1862 the legislature of California repealed all existing laws on

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the subject of mechanics' liens, and passed a new act embodying the New York system and containing specific and ample provisions for giving it full effect. Under that law a number of cases arose in which it was held that all liens were subordinate to the original contract; that the owner could never be compelled to pay more than he had expressly contracted to pay; that if he paid the original contractor according to the terms of his original contract before notice of the claims of sub-contractors, etc., he was absolved to the extent of the payment so made. It is upon these decisions that appellant chiefly relies in its petition for a rehearing. They are, however, entirely inapplicable. No doubt they give a correct construction to the law of 1862 (Stats. 1862, p. 384), but that law bears scarcely a trace of resemblance to the act of 1868 (Stats. 1868, p. 589), by which it was repealed, and under which the case of *Renton v. Conley* arose. It seems to us scarcely possible to compare the two acts without being convinced that the intention of the latter was to make a radical change in the existing law and to give to sub-contractors, etc., direct liens for the amounts due them, regardless of the terms of the original contract or of the state of the account between the owner and contractor. It may be that such a law is arbitrary, unjust and impolitic, but the intention of the legislature to so frame it is to our minds clear. This is proved by the fact that although it was modeled upon the law of 1858, it was by no means a mere copy of that law. Various additions and alterations were made, all clearly tending to one purpose, and all evincing the desire of the legislature to obviate the construction placed upon the old law in *McAlpin v. Duncan*, and other cases.

For instance, it was enacted in the first section that every mechanic, artisan, lumber merchant, etc., should have a lien for his labor or materials "whether furnished at the instance of the owner of the building or other improvement or his agent," and for the purposes of the act "every contractor, sub-contractor, architect, builder or other person having charge" of the work or improvement was declared to be the agent of the owner.

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Again, by section 4 it was enacted that land upon which any improvement was made without the consent or authority of the owner, should be subject to liens for the cost of the improvement, unless the owner, within three days after being informed of the commencement of the improvement, should post a written notice on the premises that he would not be responsible. Still more significant are the provisions of section 11, which gives to the owner the right to recover back from the contractor any amount which he may be compelled by lienholders to pay "in excess of the contract price."

In all these strongly marked features the law of 1868 differed from that of 1858, and it is a significant circumstance that they were all left out of the code, which was prepared by the code commissioners and adopted by the legislature in 1872. Those commissioners undertook to provide (Code of Civil Procedure, sec. 1183), that the aggregate amount of liens should never exceed what "the owner would be otherwise liable to pay," and it is evident they thought it necessary to strike out the provisions above referred to in order to make the code consistent with itself. It is to be presumed this portion of the code was unwittingly adopted by the legislature, for at its next session, in 1874, the amendments of the code commissioners were stricken out and the law of 1868 re-enacted. See 2 Hittell's Codes and Statutes, secs. 11,183, 11,192, 11,193.)

After all this industrious changing of the law, *Renton v. Conley* was decided upon the assumption that it remained exactly what it had been before. In this view we are unable to coincide. On the contrary, we think the language of the statute, without reference to the significant circumstances under which it was amended and re-amended in California, leaves no room for doubt that the legislature intended to give sub-contractors and material-men direct liens upon the premises for the value of their labor and materials, regardless of payments on the principal contract made prior to the time within which the law requires notice of their claims to be recorded. In support of this conclusion, we refer to *Colter v. Frese et al.*, 45 Ind. 97, in which most of the cases

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involving the point under discussion are carefully reviewed. Thus, and upon broader grounds, we again conclude that the judgment and order appealed from should be affirmed. It is so ordered.

HAWLEY, J., concurring:

I concur in the judgment of affirmance upon the ground that appellant, having failed in its answer to allege that there was not anything due to the principal contractors at the time of receiving proper notice of the claim of the subcontractors, is not a position to raise the material question discussed in the opinion of the chief justice, as to the proper construction of the statute.

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[No. 952.]

THE STATE OF NEVADA *EX REL.* W. W. HOBART,  
RELATOR, *v.* RICHARD RYLAND, TREASURER OF  
EUREKA COUNTY, RESPONDENT.

MILITIA ROLL—EXPENSES OF, HOW PAID.—In construing the provisions of the statute: *Held*, that the bills of county assessors for making the militia roll must be passed upon by the state board of military auditors and paid out of the militia fund of the state.

APPLICATION for Mandamus.

The facts are stated in the opinion.

*Robert M. Clarke*, for Relator.

*Bishop & Sabin* and *C. N. Harris*, for Respondent.

By the Court, LEONARD, J.:

The relator, as state controller, filed his petition in this court, praying for the issuance of an alternative writ of mandamus requiring respondent to show cause why he had failed to pay into the state treasury the sum of one hundred and forty four dollars alleged to be due to the state, and that upon the hearing respondent be peremptorily commanded to pay said sum into the State treasury.

Respondent appeared, and in justification of his action in the premises, stated the following facts in his answer: That in the year 1877, one H. Knight was assessor of Eureka county, and as such officer, as required by law, he prepared and made out a list or roll of all persons in the county subject to military duty in said year; that thereafter said Knight duly presented to the board of county commissioners of the county his bill for services in making said military list or roll, for allowance; that on the first day of April, 1878, the board duly allowed said bill in the sum of four hundred dollars; that the same was thereafter duly approved and allowed by the county auditor of the county for the sum of four hundred dollars; that the portion of said bill to be paid by the county of Eureka was two hundred and fifty-six dollars, and the portion by the state was one hundred and forty-four dollars, as fixed by law; that on the first day of April, 1878, the said county auditor drew his warrant upon respondent for the sum of two hundred and fifty-six dollars, directing the payment of said sum to said Knight, for and on account of the portion of said bill due and payable from Eureka county, which sum respondent, as such treasurer, then and there paid from the funds of said county, then in his hands; that said county auditor then and there issued and delivered to respondent, as such treasurer, a voucher against the state of Nevada for the sum of one hundred and forty-four dollars, the same being the amount due from the state to said Knight, on account of his said services; that in the first semi-annual settlement for the year 1878 with the state, respondent returned said voucher for one hundred and forty-four dollars to the relator as state controller, as a legal and just charge and demand against the state; that relator wrongfully refused to allow said voucher in said semi-annual settlement as a lawful charge against the state.

Relator demurred to respondent's answer, on the ground that it did not state facts sufficient to constitute a defense; that it appeared from the answer that it was the duty of the respondent to pay over the said sum of money mentioned in the petition.

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Section 3200, Compiled Laws, provides in substance that when an allowance is made to any assessor or auditor, as in the revenue law provided, the clerk of the board of county commissioners shall certify the account allowed, to the auditor, who shall draw his warrant on the county treasurer for that part of the same which the county is required to pay, which shall be in proportion to the taxes levied for state and county purposes respectively; and the auditor shall make a certified copy of the account and indorse thereon the amount due from the state, \* \* \* and shall furnish such copy, with its indorsements, to the county treasurer, who shall pay out the moneys belonging to the state and county respectively the amounts indorsed on such accounts to the assessor and auditor, and take his receipt therefor thereon. See also section 3210.

As we understand, the board of commissioners, auditor and treasurer, acted under the sections of the revenue law last referred to, in relation to the claim of Knight for preparing the military roll, and the principal question before us, is whether or not those sections which provide for the payment of claims of assessors for services rendered in assessing property also apply to claims of such officers in preparing the military roll. In our opinion they do not.

Under "An Act to provide for Organizing and Disciplining the Militia of the State," approved March 4, 1865 (Comp. Laws, 3641, 3642), it is made the duty of the county assessor of each revenue district or county, when he prepares a roll containing the taxable inhabitants of his county, to enroll all the inhabitants thereof subject to military duty, which list or roll shall be sworn to. \* \* \* "And the compensation allowed for making out said military list shall be the same, or be determined and fixed in the same manner, as for making out the assessment list." No compensation is allowed for making an "assessment list" by the assessor, but section 3136 makes it his duty to prepare a *tax list or assessment roll*, in which book shall be listed all the property of the county subject to taxation. The preparation of such tax list or assessment roll is a necessary part of a valid assessment of property, and the time properly

occupied in making the same is to be included in the number of days for which he is allowed a per diem of ten dollars, under section 3209. We have no doubt that when the legislature used the words "assessment list" in section 3642 of the militia law, the same was intended as in the use of the words "tax list or assessment roll" in section 3136 of the revenue law. Such being the case, it would seem that the assessor is really entitled to receive from some source the sum of ten dollars per day for the time necessarily required and occupied in making out a military list or roll. The revenue law, however, neither requires the making of a military list or roll by the assessor, nor provides for payment of the expenses of the same. The militia law does both. But the provision of section 3642 of the militia law, that "the compensation allowed for making out said military list shall be the same, or be determined and fixed in the same manner as for making out the assessment list," simply fixes the amount of the compensation allowed. It does not determine the manner of payment, whether by the state and county together or by either alone. The words, "or be determined and fixed in the same manner" were intended to be explanatory of the remainder of the sentence quoted, so that the assessor's aggregate compensation for making out the military roll should not in any case exceed ten dollars per day. For instance, had not those words been inserted, assessors might, perhaps, have claimed the same aggregate compensation for making out the military roll as they were allowed for making out the assessment roll, although the number of days employed upon the latter were more than those occupied upon the former. At least, had it not been for the explanatory words there would have been some room for conflict of opinion. Their meaning can not be as claimed by respondent, that is, that the assessor's bill for making out the military roll should be passed upon by the board of county commissioners and be paid by the state and county, in proportion to the taxes levied for state and county purposes respectively. In the first place, it was not the intention of the legislature, as appears from the whole statute, that any portion of the expenses incident to enrolling, organ-

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izing or sustaining a state militia should be borne by any county *per se*, but that the state at large should bear the same. The object of the law in enrolling the inhabitants of Eureka county subject to military duty was not for the protection of that county alone, but for the whole state. "In case of war, insurrection or rebellion, or of resistance the execution of the laws of this state, \* \* \* the commander-in-chief is authorized to call into active service any portion of the organized or enrolled militia of the state." (Comp. Laws, 3663.) The organized and enrolled militia of Eureka county may be called to do duty in Storey county, and *vice versa*. Under such circumstances, it was proper and equitable for the legislature to require the state to bear the burden entailed by the enactment of the militia law, and we have no doubt that such was the intention of the legislature. But in addition to the reason and evident spirit of the law, sections 3677, 3678, 3679 and 3680 provide that the commander-in-chief, the adjutant-general and state controller shall constitute a state board of military auditors; that such board shall have a seal, an impression of which shall be attached to all orders drawn upon the general or military fund; that no money shall be paid out of such fund by the state treasurer upon the order of such board except by order thereof, with the seal attached, and that such order shall specify upon its face the objects for which such money is paid and to whom; that it shall be the duty of said board to audit and pay all reasonable expenses incurred by volunteer companies in the service of this state and officers attached to the same, and all other claims required under the provisions of this act." \* \* \*

A claim for the enrollment of the inhabitants of a county subject to military duty is as much a claim "required under the provisions" of the militia act as any other claim could be.

The required enrollment is the very foundation of the organization of the state militia, and the bills for the same must be passed upon by the military auditors instead of the county commissioners of any county. If no appropriation has been made for the payment of such claims, the legisla-



ture can come to the rescue of assessors, but county commissioners and treasurers can not, nor can courts.

In our opinion the voucher presented by respondent to relator did not excuse the former from payment of the sum of one hundred and forty-four dollars into the state treasury, and the demurrer must be sustained. Such being our view of this case, the writ of mandamus must issue commanding respondent forthwith to pay said sum of one hundred and forty-four dollars into the state treasury, as required by law.

It is so ordered.

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[No. 942.]

GIOVANNI ESCERE, RESPONDENT, v. JOHN TORRE,  
APPELLANT.

**APPEAL TAKEN FOR DELAY—DAMAGES.**—Where an appeal is taken merely for delay, damages will be awarded equal to ten per cent. of the judgment. (*Wheeler v. Floral M. & M. Co.*, 10 Nev. 200, affirmed.)

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts appear in the opinion.

*C. J. Lansing* and *D. E. Baily*, for appellant.

*Laspeyre & Beatty*, for Respondent.

By the Court, BEATTY, C. J.:

This case was submitted by stipulation upon briefs to be filed. The time within which the appellant was to file his brief has long since elapsed, and he has failed to present anything in support of his appeal. The respondent now moves that the judgment be affirmed, and suggesting that the appeal was taken merely for delay, asks that he be awarded damages at the rate of two per cent. a month on the amount of his judgment, for the time execution has been stayed by the appeal in accordance with the rule announced in *Wheeler v. Floral M. & M. Co.*, 10 Nev. 200.

We think the motion should be granted. No error is

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assigned in support of the appeal from the judgment. The appeal from the order denying a new trial is without any pretense of merit. The only ground of the motion was insufficiency of the evidence to warrant the verdict, but the statement clearly shows that if the evidence of the plaintiff was true the verdict was correct. On a direct conflict of evidence the finding of the jury and the decision of the court was for the plaintiff, and there is nothing upon which it can be pretended the judgment or order appealed from could be reversed. It is manifest that the appeal was taken for delay merely, and it has had the effect of staying execution for a period of six months.

The judgment is affirmed with twelve per cent. damages in addition to costs and accruing interest.

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[No. 900.]

TOWN OF GOLD HILL, APPELLANT, v. ALEXANDER  
BRISACHER, RESPONDENT.

**VIOLATION OF TOWN ORDINANCE—CRIMINAL CAUSE—JURISDICTION.**—The trial of a party charged with violation of a town ordinance is a criminal case. The charge does not amount to a felony, and this court has no jurisdiction in such a case.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

*J. H. Harris, Town Attorney, and R. H. Taylor, for Appellant.*

*William Woodburn, for Respondent.*

By the Court, BEATTY, C. J.:

The defendant was convicted in a justice's court of violating an ordinance of Gold Hill and adjudged to pay a fine and to be imprisoned in default of payment. He appealed to the district court of Storey county, where a judgment was rendered in his favor. From that judgment this ap-

## Statement of Facts.

peal is taken. The defendant moves to dismiss the appeal on the ground that the supreme court has no jurisdiction in cases of this character. The motion must prevail. This is not a "case at law" involving the legality of a municipal fine. We decided in *State v. Rising*, 10 Nev. 103, that the expressions "all cases at law" and "all criminal cases," as used in the constitution, were intended to designate distinct categories, mutually exclusive. This is clearly a criminal case, and can not, therefore, be one of the "cases at law" in which this court has appellate jurisdiction; and since the offense charged does not amount to a felony, we have no jurisdiction of it as a criminal case. (Constitution, art. VI., sec. 4.)

The appeal is dismissed.

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[No. 925.]

THE ORR WATER DITCH COMPANY, APPELLANT, v.  
JOHN LARCOMBE, ET AL., RESPONDENTS.

**BILL OF INTERPLEADER—WHAT CONSTITUTES.**—In a bill of interpleader it must be shown that two or more persons have a claim against the plaintiff; that they claim the same property; that the plaintiff has no beneficial interest in the property and can not safely determine to which of the defendants it belongs.

**BILL IN THE NATURE OF AN INTERPLEADER.**—Is distinguished from a bill of interpleader proper in this that the complainant may seek some relief against the respective claimants to the property.

**JUDGMENT ON PLEADINGS—WHEN ERRONEOUS.**—In construing the pleadings: *Held*, that the court erred in rendering a decree in favor of defendant, Larcombe, for one hundred inches of water, without allowing the plaintiffs to introduce evidence, if it could, that Larcombe was not entitled to any more than thirty-five inches.

**IDEM.**—Where one of the defendants answered and disclaimed having any interest in the property: *Held*, that the court erred in rendering a judgment, upon the pleadings, in his favor for costs. Plaintiff had the right to show, if it could, that his disclaimer was untrue.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The material averments of the complaint are as follows: That in 1871 Alonzo Dodge agreed with the defendant, John

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Larcombe, one James Sullivan, Patrick Kelly, George Snively, T. P. Myers and Daniel Powell, to construct a water ditch from the Truckee river, about three and a half miles above the town of Reno down to the lands of said parties; that in order to construct said ditch, said Alonzo Dodge agreed to purchase from Henry Orr, a certain small ditch then owned by him, which he used for the purpose of conducting water to his land, and which was on the route contemplated by said Alonzo Dodge for his aforesaid ditch, agreeing to give said Orr in consideration thereof sufficient water to irrigate his land; that Alonzo Dodge agreed to have his ditch completed on or about the first day of April, A. D. 1872; that on the eighth day of November, A. D. 1871, and before the said completion thereof by him, Alonzo Dodge executed to John Larcombe a deed of grant, bargain and sale of one hundred inches of water in said ditch, to be thereafter conducted therein, and afterwards executed similar deeds to the other parties to said agreement; that Alonzo Dodge failed to complete the ditch according to his contract, and on the fifth day of March, 1872, he was released therefrom, and said Larcombe, Powell, Snively, Myers and Alonzo Dodge entered into an agreement with Henry Orr, as in said complaint set forth, for him to construct said ditch on the terms therein specified; that Henry Orr did duly construct said ditch according to his said agreement, all members except John Larcombe paying for the expenses thereof; that on the seventeenth day of March, A. D. 1873, Henry Orr conveyed his right, title and interest in his first mentioned small ditch to said Powell, Snively, Myers and Dodge, who thereafter, on the twentieth day of March, A. D. 1873, located the same in accordance with the laws of the State of Nevada, said Daniel Powell owning ten shares, and Snively, Myers and Alonzo Dodge seven shares each; that on the twenty-ninth day of March, 1875, Alonzo Dodge conveyed by deed, in consideration of seven hundred dollars, his seven shares in said ditch to Henry Orr, and then ceased to have any further or other interest therein; that at this date the seven shares being the interest of Alonzo Dodge, did not exceed thirty-five inches of water; that on the

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twentieth day of December, A. D. 1875, said Powell, Orr, and James Gooch, Eugene Gooch, D. C. Bryant and Robert Frazer, grantees of G. W. Snively and T. P. Myers, formed an incorporation under the name of the Orr Water Ditch Company, plaintiffs, and said John Larcombe is not a member thereof; that since the first day of May, A. D. 1874, John Larcombe has used and appropriated one hundred inches of the water of said ditch, claiming the same by virtue of his deed of grant, bargain and sale of November 8, 1871, from Alonzo Dodge; that since said twenty-ninth day of March, A. D. 1875, Henry Orr claims to be the owner of all the water that said Alonzo Dodge had conveyed to him by his deed of that date, and uses the same for irrigating purposes on his land; that plaintiffs do not know to whom to give this water of Alonzo Dodge, and from whom to withhold the same, and therefore bring this action against both these parties, in order to have a final adjudication, binding upon all parties to this controversy.

To this complaint the said defendant John Larcombe demurred and afterward answered, claiming the right to use one hundred inches of water from said ditch by virtue of his aforesaid deed, dated November 8, 1871, from Alonzo Dodge. A default was entered against defendant Orr on the seventh of November, 1877.

On the twenty-third day of January 1878, Henry Orr moved the court to set aside his default and allow him to answer, which request and motion was denied by the court. He subsequently filed an answer disclaiming any interest in the property.

At the trial, defendant John Larcombe introduced testimony to show that he was the owner of and entitled to the use of one hundred inches of water in said ditch, and rested his case.

Plaintiff offered to prove that the defendants, John Larcombe and Henry Orr, were not entitled to more than thirty-five inches of water, as stated in the complaint, by reason of any title derived from said Alonzo Dodge. This testimony was objected to. The court sustained this objection, on the ground that the only parties who could be heard

## Argument for Appellant.

were the two defendants, John Larcombe and Henry Orr, and that the plaintiff could not be heard in opposition to John Larcombe's claim of one hundred inches of water, but that they were estopped from proving that he was not entitled to that amount of water; to all of which ruling the plaintiffs then and there duly excepted. A decree was rendered and duly entered in favor of John Larcombe for one hundred inches of water, and in favor of the defendant Orr for his costs.

*William Cain* for Appellant:

I. Bills in the nature of an interpleader are eminently the subject for a court of equity. (Story Eq. Pl., sec. 297b; 2 Story Eq. Jur., secs. 822, 824; *Bedell v. Hoffman*, 2 Paige Ch. 199; *Mohawk & H. R. R. v. Clute*, 4 Id. 388, 392; *Dorn v. Fox*, 61 N. Y. 264.)

II. There does not appear to be any settled practice in cases of this character. (*City Bank v. Bangs*, 2 Paige Ch. 571; 2 Story Eq. Jur., sec. 822; *Condict v. King*, 13 N. J. Eq. 375; U. S. Digest, 606.)

III. In this action the plaintiffs allege that thirty-five inches of water are the property of one or the other of the defendants. It may be that by his default the defendant Henry Orr admits he has no claim thereto, and hence that defendant, John Larcombe, is the owner thereof and entitled to a decree for that amount of water from plaintiffs' ditch, and is a tenant in common with them to that extent. (*Badeau v. Rogers & Lecord*, 2 Paige Ch. 210; *Richard v. Salter*, 6 Johns. Ch. 445; *Cogswell v. Armstrong*, 77 Ill. 139; *Aymer v. Gault*, 2 Paige, 283.) But when the defendant Larcombe claims more water than is admitted by plaintiffs to be due to either of the parties defendants, to wit, one hundred inches, then the plaintiff ought clearly to be heard as to this excess of sixty-five inches. (*City Bank v. Bangs*, 2 Paige, 570.)

IV. The court also erred in refusing the plaintiff a decree against defendant Henry Orr for the thirty-five inches of water decreed to the said defendant John Larcombe. (*Badeau v. Rogers*, 2 Paige Ch. 210.)

*Robert M. Clarke*, also for Appellant.

*Boardman & Varian*, for Respondent Larcombe.

There is a difficulty in the way of plaintiff which its appeal can not overcome. The complaint shows that there was and could be no dispute as to the legal title of the one hundred inches claimed by Larcombe, between Orr and Larcombe. By deed of date, November 8, 1871, Dodge conveys one hundred inches to Larcombe. Whatever interest Dodge had at this date passed to and vested in Larcombe under his deed, by virtue of the statute. The subsequent location of the ditch, under the acts of 1866 and 1869, gave the locators, Powell, Snively, Myers and Dodge, no additional rights to the water. (*Barnes v. Sabron*, 10 Nev. 232.) Consequently Dodge's deed to Orr of March 29, 1875, conveyed no interest, because Dodge *had* no interest to convey.

*Thomas E. Haydon*, for Respondent Orr.

By the Court, HAWLEY, J.:

A bill of interpleader proper lies only where two or more persons claim the same debt or duty from the complainant. In the language of the court in *Dorn v. Fox*: "In a strict bill of interpleader the following ingredients are necessary: 1. Two or more persons must have preferred a claim against the plaintiff. 2. They must claim the same thing, whether it be a debt or duty. 3. The plaintiff must have no beneficial interest in the thing claimed. 4. It must appear that he can not determine without hazard to himself, to which of the defendants the thing, of right, belongs." (61 N. Y. 268; *Hathaway v. Foy*, 40 Mo. 540; *Cady v. Potter*, 55 Barb. 463; *Long v. Barker*, 85 Ill. 432.)

Applying these rules to plaintiff's complaint, it is apparent that it can not be treated as a bill of interpleader. It is somewhat difficult to determine the real character of the complaint. It is, to say the least, very carelessly drawn. It seems to have been the intention of plaintiff's counsel to prepare a bill of interpleader; but as soon as objections are made to it as such, he admits its insufficiency and then

claims that he is entitled to have it sustained as a bill in the nature of an interpleader.

One of the distinguishing features in bills in the nature of an interpleader seems to be that the complainant may seek some relief against the respective claimants to the property. In order to maintain a bill in the nature of an interpleader, where the plaintiff is entitled to equitable relief against the owner of the property, it must also appear that the legal title thereto is in dispute between two or more persons, and that plaintiff can not ascertain to which of said parties it actually belongs. (*The Mohawk and Hudson River Railroad Co. v. Clute*, 4 Paige Ch. 385; 2 Story's Eq. Jur., sec. 824.)

The complaint in this action can not be treated as a bill in the nature of an interpleader. From the facts alleged it may be that the plaintiff could sustain a separate and independent cause of action against both of the defendants; but there is nothing in the case, as stated, which would authorize the plaintiff to compel the defendants to litigate their respective rights to the property in question in this proceeding.

It may be that the court did not err in overruling the special demurrer interposed upon the ground that the complaint was ambiguous, uncertain and unintelligible, because the real objections to the pleadings were not therein particularly specified; but, be that as it may, it is evident that the court, in treating the complaint as a bill of interpleader, did err in rendering a decree in favor of the defendant Larcombe upon the pleadings and testimony, without allowing the plaintiff to introduce evidence, as requested, to show, if it could, that the defendant Larcombe was not entitled in any event to a decree for more than thirty-five inches of water. If the complaint, in terms, admitted that the defendant Larcombe was entitled to one hundred inches of water, as claimed by his counsel, then it did not state facts sufficient to constitute a cause of action, and the suit ought for that reason to have been dismissed. But the complaint, when read entire, does not expressly admit that Larcombe is entitled to one hundred inches of water by virtue of his



interest in the ditch derived by the deed from Alonzo Dodge, executed on the eighth day of November, 1871, but, on the other hand, it alleges that by reason of the failure of Alonzo Dodge to complete the ditch, and by reason of its completion by Henry Orr, under the agreement of March 5, 1872, the said Larcombe was entitled, if at all, to only thirty-five inches of water.

The complaint is ambiguous, indefinite and uncertain in this, that it does not state what portion of the ditch was completed under the original contract with Alonzo Dodge and what portion thereof was constructed by Henry Orr under the second agreement. It is inconsistent in this, that although it alleges that the plaintiff is ignorant of the respective rights of the defendants, and hence is unable to determine which of said parties is entitled to the interest of Alonzo Dodge in said ditches, it sets forth with minuteness of detail all the facts upon which each of the defendants rely to substantiate their respective claims.

Treating the complaint as a bill of interpleader the court also erred in rendering a judgment in favor of the defendant Orr for his costs. Admitting that it was not erroneous to allow the defendant Orr to answer after his default had been entered, and that his answer or disclaimer shows that he had no interest in the questions involved at the time of filing his answer, yet the plaintiff would have had the right to show, if it could, that his disclaimer was untrue, and that at the time of the commencement of the action, the defendant Orr did claim the certificates of stock referred to, and by virtue thereof did claim an interest in the property as alleged in the complaint.

We are not called upon by this appeal to intimate any opinion as to the respective rights of the defendant Larcombe under the deed from Alonzo Dodge, bearing date November 8, 1871, and of the other parties claiming an interest in the ditch under and by virtue of the deed executed on the twenty-ninth day of March, A. D. 1875, by Alonzo Dodge to Henry Orr. For the errors indicated the judgment must be reversed and the cause remanded. It may be that under our liberal form of pleading, the plaintiff might be able to

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amend its present complaint so as to allege facts sufficient to constitute a cause of action against the defendant Larcombe.

The judgment of the district court is reversed, and the cause remanded with instructions to the district court to dismiss the suit unless the complainant moves to amend its complaint so as to show a cause of action against the defendant Larcombe.

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[No. 934.]

P. PARONI, RESPONDENT, v. W. F. ELLISON ET AL.,  
APPELLANTS.

**CONSTRUCTION OF DEED—SUFFICIENCY OF DESCRIPTION.**—Where a deed described the property as "that certain piece or parcel of timber land lying and being about forty-five miles, northerly direction, from the town of Eureka, \* \* \* and the said timber land being known as McLeod Wood Ranch, and containing about five hundred acres more or less:" Held, that the deed sufficiently describes the property by name.

**EJECTMENT—POSSESSION OF PURCHASER PRIOR TO DEED.**—In an action of ejectment it is admissible for plaintiff to introduce evidence that he took possession of the property after his agreement to purchase and before he received a deed, and to state what his acts of possession were.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The testimony relative to the question of actual possession by the plaintiff and his grantor is briefly and substantially as follows: McLeod located the land in dispute on the sixteenth day of February, 1876, and marked the lines with brush fence and blazed trees. At the time of his location there had been no appropriation of the land. He erected a cabin and put men at work upon the ranch chopping wood. On the seventh day of September, 1877, he sold the ranch to plaintiff and J. J. Maggaroli, and put them in possession of the property. Maggaroli remained in possession, and plaintiff and McLeod went to Eureka, where the deed was executed by McLeod and delivered to plaintiff, on the fifteenth of September.

On the seventeenth of the same month plaintiff learned

## Argument for Appellants.

that defendants had taken possession of the ranch. Prior to that date he had sent some men to the ranch to cut wood.

*A. M. Hillhouse, for Appellants:*

I. The deed from McLeod to Paroni is void for uncertainty and does not embrace the premises in dispute. When a natural object, such as a creek, is called for in a conveyance, it is conclusive over mere courses, distances or names. (*Holmes v. Trout*, 7 Peters, 217; *McIver's Lessee v. Walker*, 9 Cranch, 173; *Newson v. Pryor*, 7 Wheat. 7; *Blake v. Dougherty*, 5 Id. 362; *Walsh v. Hill*, 38 Cal. 481; *Colton v. Seavey*, 22 Id. 496; *De Arguello v. Green*, 26 Id. 615.) No extrinsic evidence is ever permitted which in any way contradicts the terms of the conveyance. (*Altschul v. S. F. C. P. H. A.*, 43 Cal. 173; *Pierson v. McCahill*, 21 Id. 122; *Richardson v. Scott River Co.*, 22 Id. 150; *Lennard v. Vischer*, 2 Id. 37; *Clark v. Lancaster*, 36 Md. 196; 1 Wharton's Law of Evidence, sec. 1050; *Stanley v. Green*, 12 Cal. 148.)

II. The description in this deed is so uncertain as to render it void. (*Fenwick v. Floyd*, 1 Har. & Gills R. 172; *McLaughlin v. Bishop*, 35 N. J. L. 512.)

III. If the deed is good, then there is not sufficient proof of occupation by the grantor of plaintiff to sustain the findings and judgment. (*Hutton v. Schumaker*, 21 Cal. 453; *Polack v. McGrath*, 32 Id. 20; *Brumagin v. Bradshaw*, 39 Id. 44; 12 Nev. 66; 11 Id. 171; 9 Id. 20; 4 Id. 59.)

IV. The court erred in admitting evidence that the plaintiff, after the ouster by defendants, was proceeding to get men to work upon the premises. (*Sowder, etc v. McMillian's Heirs*, 4 Dana, 456; 4 Nev. 59.) The court erred in holding and deciding that plaintiff at the time of the entry of defendants, was proceeding with diligence to complete his occupation of the premises, because there is no proof that plaintiff had done anything prior to the alleged ouster to which any subsequent act could by relation attach. Besides all the alleged sale of these premises prior to the fifteenth of September, 1877, was parol and incompetent. (1 Comp. Laws, sec. 283, p. 87; 3 Nev. 507.)

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Opinion of the Court—Hawley, J.

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*George W. Baker and John T. Baker, for Respondent:*

I. It is essential to the validity of a conveyance that the property conveyed should be so described as to be capable of identification; but it is not essential that the deed should itself contain such a description without the aid of extrinsic evidence. (3 Cal. 59; 12 Id. 148; 44 Id. 253.) The defendants did not connect themselves with the title of plaintiff's grantors but were mere intruders. (*Walsh v. Hill*, 38 Cal. 482.)

II. The acts of the plaintiff showed sufficient possession of the land in dispute.

III. The possession and occupation by Paroni was sufficient to hold the land independent of the deed. (2 Nev. 280; 4 Id. 68; 15 Cal. 27; 25 Id. 122; 43 Id. 574; 44 Id. 246; 45 Id. 280, 597.)

By the Court, HAWLEY, J.:

This is an action of ejectment to recover a certain tract of land situated in Eureka county. The plaintiff obtained judgment and the defendants appeal.

1. It is claimed that the deed from McLeod to Paroni is void for uncertainty of description and that the description does not embrace the premises in dispute. The description in the deed is as follows: "That certain piece or parcel of timber land lying and being about forty-five miles, northerly direction, from the town of Eureka, \* \* \* and the said timber land being known as McLeod wood ranch and containing about five hundred acres more or less." The description in the complaint is as follows: "That certain wood and timber ranch situated in said county of Eureka, Nevada, about ten miles from Alpha station, on the Eureka and Palisade railroad" (here follows a description by metes and bounds) "and containing about seven hundred and twenty-six acres of land and being the ranch known as the McLeod & McFail ranch." The rule is well settled that any defect or uncertainty which may exist in the description given in a deed does not render the deed void if that event can be avoided by construction. The deed in question sufficiently

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Points decided.

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describes the property by name. (*Stanley v. Green*, 12 Cal. 148; *Haley v. Armstrong*, 44 Id. 138.) Such a description can always be rendered certain by extrinsic evidence, and the testimony, which was properly admitted, clearly shows that the property in dispute is the same that was intended to be conveyed by the deed. It was the only wood ranch owned by McLeod in the locality designated. The testimony did not, in any manner, contradict the description given in the deed. The court did not err in admitting the deed in evidence against the objections urged by appellant.

2. The acts of Paroni in taking possession of the property after the purchase of the same from McLeod, and prior to the execution and delivery of the deed, were properly admitted in evidence. The testimony shows that the defendants did not enter upon the land until the fifteenth day of September, 1877, the day of the execution and delivery of the deed. The testimony of Paroni, that he and a hired man went out to the ranch on the seventeenth day of September, and that when the hired men went to work they were ordered off by the defendants, only tended to establish the fact of ouster, and was certainly admissible for that purpose.

3. The evidence upon the question of actual possession by the plaintiff and his grantor is, in our opinion, sufficient to sustain the findings and judgment of the court.

The judgment of the district court is affirmed.

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[No. 850.]

LOUIS SOLOMON ET AL., RESPONDENTS, v. M. FULLER  
ET AL., APPELLANTS.

**NEW TRIAL—WHEN SHOULD NOT BE GRANTED.**—A new trial ought not to be granted on a motion to set aside a verdict, merely because the court had erred in finding a fact in some preliminary proceeding in the case.

**AMENDMENT OF JUDGMENT AFTER ADJOURNMENT OF TERM.**—The court has no power to amend a judgment after the adjournment of the term unless there is something in the record to amend by.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

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Opinion of the Court—Beatty, C. J.

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The facts sufficiently appear in the opinion.

*George S. Sawyer*, for Appellants:

I. The errors appearing in the judgment-roll necessitate a reversal. The court could not proceed after the death of Cardenas without repairing the breach caused by his death.

II. The court erred in amending the judgment after the term had expired at which it was rendered, upon its own motion, and when there was nothing in the record to amend by. (3 Cal. 255; 9 Id. 172; 19 Id. 227; 25 Id. 79; 27 Id. 791; 33 Id. 780.)

III. The amendment changed the parties plaintiff to the action, and ought not to have been allowed. (2 Tillinghast & Shearman Practice, 1076; 1 Van Santvoord's Pleadings, 806; 14 N. Y. 506; 9 Nev. 317; 49 Cal. 306; 4 Nev. 42; 3 Cal. 235.)

*Wells & Stewart*, of counsel for Appellants.

*A. B. Hunt*, and *Bishop & Sabin*, for Respondents:

I. The court had full power to amend the judgment in the manner in which it did. (*Leviston v. Swan*, 33 Cal. 480.)

II. The action of the court in substituting D. L. Deal as party plaintiff was right and proper, Deal being the public administrator. (1 Comp. Laws, 1079; *Judson v. Love*, 35 Cal. 463; *Shartzer v. Love*, 40 Id. 96; *Taylor v. W. P. R. R. Co.*, 45 Id. 337.)

III. If the order of the court below in directing the judgment to run in the name of L. Solomon, surviving partner, etc., was error, it was one which could not in any manner prejudice the appellant. No reversal will be had for error which does not prejudice. (*Robinson v. Imp. S. Mg. Co.*, 5 Nev. 44; *Todman v. Purdy*, 5 Id. 238; *Cahill v. Hirschman*, 6 Id. 57; *Caples v. C. P. R. R. Co.*, 6 Id. 265; *Conley v. Chedic*, 7 Id. 336.)

By the Court, BEATTY, C. J.:

There were appeals in this case from the judgment, from an order amending the judgment and from the order de-

nying a new trial. At a former term motions to dismiss the appeals and to strike out the statement on motion for a new trial were submitted. We ordered the statement stricken out and the appeal from the judgment to be dismissed, but overruled the motion to dismiss the appeals from the orders. Those appeals have now been argued and submitted.

It appears that after the commencement of the action Cardenas, one of the plaintiffs, died. The fact having been suggested to the court, an order was made substituting D. L. Deal, public administrator of Lincoln county, as the personal representative of Cardenas. Thereupon the trial of the case proceeded, and plaintiffs obtained a verdict and judgment. Defendants moved for a new trial; the motion was overruled, and at the same time the court, of its own motion, ordered the judgment to be so amended as to run in favor of Louis Solomon, surviving partner of Cardenas. These are the orders appealed from.

The order denying a new trial must be affirmed. After striking out the statement (see former opinion, 13 Nev. 276), there is nothing left to sustain the motion except the affidavits in relation to newly-discovered evidence, and they, unaided by the statement, fail to show that the evidence so discovered is material to any of the issues raised by the pleadings. It would seem to have been intended to impeach some statements made by the plaintiff Solomon as a witness; but the record in the state in which it is left fails to show that Solomon gave any testimony in the case.

One of the affidavits tends to show that the court erred in finding the fact that Deal was the administrator of Cardenas. But the finding of the court as to that fact, and the verdict of the jury upon the issues submitted to them, are totally distinct, and an affidavit which tends to show that the court erred in its finding does not support a motion to set aside the verdict of the jury, which was the motion that was made. It is unnecessary in this case to decide whether the findings of the court, upon which the order of substitution was based, were the subject of a motion for a new trial. If they were, the motion should have specified those

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findings; and this case is disposed of by saying that the motion of appellants was directed exclusively to the verdict.

It may perhaps be true that the effect of setting aside the order of substitution would have been to render a new trial necessary; but, however that may be, we are satisfied that an order for a new trial ought not to be made on a motion to set aside a verdict, merely because the court has erred in finding a fact in some preliminary proceeding in the case. The error of the court in such case can not be reviewed on that sort of a motion.

But the order of the court amending the judgment we thing was erroneous. It was made long after the expiration of the term at which the judgment was rendered, and there was nothing in the record to show that Solomon and Cardenas were partners. This order of the court is therefore reversed, and the judgment, as originally entered, affirmed.

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[No. 928.]

THE STATE OF NEVADA EX REL. H. H. BECK ET AL.,  
RELATORS, v. THE BOARD OF COUNTY COMMISSIONERS OF WASHOE COUNTY ET AL., RESPONDENTS.

**CERTIORARI—WHEN WILL NOT BE ISSUED—CLAIMS AGAINST COUNTY.**—A writ of certiorari will not be issued to review claims against a county which have been audited, allowed and paid.

**IDEM—REMEDY AT LAW.**—If the commissioners and auditor exceeded their jurisdiction in allowing and auditing the claims, their action would be null and void and the remedy would be by an action at law to recover back the money paid.

**IDEM—WHEN WRIT WILL ISSUE—COUNTY COMMISSIONERS.**—The power of county commissioners to allow accounts against a county is confined to those "legally chargeable," and a writ of certiorari will issue to review their action.

**IDEM—TRANSCRIBING TESTIMONY FOR THE GOVERNOR.**—It is the duty of the district judge to transmit the testimony in a capital case to the Governor. (1 Comp. Laws, 2088.) The statute does not authorize the clerk to perform any such duty or to make any charge therefor.

**COSTS—TAXED AGAINST RESPONDENTS.**—Where, after the issuance of the writ of certiorari, the county commissioners and county auditor canceled the claim to be reviewed: *Held*, there being nothing in the record to



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Argument for Respondents.

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show that it was the intention of such officers before the writ was issued to cancel such claim, that the cost of the proceeding should be taxed against respondents.

APPLICATION for writ of certiorari.

The facts sufficiently appear in the opinion.

*Boardman & Varian*, for Relators:

I. The board of county commissioners has no authority conferred upon it to allow any claims not legally chargeable against the county. (2 Comp. Laws, 3077; *People v. Supervisors El Dorado Co.* 8 Cal. 59; Id. 11 Id. 174; *Linden v. Case*, 46 Id. 174; *El Dorado Co. v. Elstner*, 18 Id. 148; *Robinson v. Supervisors*, 16 Id. 208; *People ex rel. Merritt v. Lawrence*, 6 Hill, 244.)

II. The fees charged by the officers are not authorized by statute. In the absence of an express statute they are not legal charges. (*Bicknell v. Amador County*, 30 Cal. 238; *Kitchell v. Madison County*, 4 Scam. 165; 2 Black. 1, 365; Comp. Laws, 1832, 1995, 2004, 2015, 2016, 2075, 2080, 2084, 2162-4, 2191, 2299, 2300, 2740, 2745, 3075; *U. S. v. Waitz*, 3 Sawyer, 473.)

*John Bowman*, District Attorney, of Washoe County, also for Relators.

*Wm. Cain*, *S. A. Mann* and *R. M. Clarke*, for Respondents:

I. The writ of certiorari will not lie unless in a case where the act complained of is the exercise of "judicial functions," and not then if there be any other plain, speedy and adequate remedy. (Comp. Laws, 1497, 1503; *State v. Commissioners of Washoe County*, 5 Nev. 317; *Hetzel v. Commissioners Eureka County*, 8 Id. 362; *Birchfield v. Harris*, 9 Id. 382, 386; *Maxwell v. Rives*, 11 Id. 213; *Phillips v. Welch, et al.*, 12 Id. 158.)

II. The board of commissioners are charged with the duty of acting on all unaudited demands against the county and allowing or rejecting the same. (Comp. Laws, 3078, 3093.) To put the functions of the board in action it is only necessary to have: 1. A meeting of the board; 2. An

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Argument for Respondents.

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unaudited demand against the county, presented within six months after due, properly authenticated. (Comp. Laws, 3093.) When such unaudited demand is presented the board must act—must allow or reject the demand: Comp. Laws, 3078, 3093; and, in case of refusal, *action* may be compelled by mandamus. (Comp. Laws, 1508; *People v. Superv. San Francisco*, 11 Cal. 42, 47; *Id.* 28 *Id.* 429, 431; *People v. Superv. Co. New York*, 21 How. Pr. 323; *People v. Superv. Courtland*, 24 *Id.* 119; *People v. Sexton*, 24 Cal. 79; *People v. Lake Co.* 33 *Id.* 487; 26 Ohio St. 364, 369; *Supervisors v. Briggs*, 2 Denio, 26.) Jurisdiction is power to hear and determine—to act concerning the matter involved. (6 Peters, 691, 709; 43 Cal. 365, 368; *Ex parte Winston*, 9 Nev. 71; *Phillips v. Welch*, 12 *Id.* 158.) The commissioners must of necessity determine what are and what are not accounts legally chargeable against the county, and such determination necessarily involves the exercise of jurisdiction. (*Hotchkiss v. Board of Supervisors*, 65 N. Y. 222, 226.)

III. The writ of certiorari will not be granted in any case where the injury is fully consummated, because: 1. It would be fruitless; 2. There is no one “beneficially interested.” (Comp. Laws, 1490; *People v. Mayor N. Y.*, 5 Barb. 43, 49; *Londonderry v. Peru*, 45 Vt. 429; *Furbush v. Cunningham*, 56 Me. 186; *People v. Tax Commissioners*, 43 Barb. 494; *People v. Commissioners of Highways*, 30 N. Y. 72; *Carroll v. Siebenthaler*, 37 Cal. 193, 196; *Andrews v. Pratt*, 44 *Id.* 309, 318.)

IV. The writ of certiorari will not lie in any case where there is any other plain, speedy and adequate remedy. (Comp. Laws, 1497; *People v. Board of Pilot Commissioners*, 37 Barb. 126; *People v. County Judge*, 40 Cal. 479; 44 *Id.* 309, 318.)

V. The writ should be denied, because the board not only had jurisdiction to act upon the claims in question, but the claims and all the items composing them were just and proper charges against the county. (Comp. Laws, 2737; 18 Johns. R. 242.)

By the Court, HAWLEY, J.:

This is an application by ten taxpayers of Washoe county for a writ of certiorari to review the action of the board of county commissioners and county auditor of Washoe county in allowing and auditing certain claims in favor of P. B. Comstock, county clerk of said county. The claims amount in the aggregate to four thousand four hundred and twenty-seven dollars and forty cents.

In an amendment to the original petition it is, among other things, alleged: "That all of said claims," excepting the claim for three hundred and seventy-three dollars for transcribing the testimony in the case of *The State v. Rover*, to be forwarded to the governor's office, "having been heretofore, and prior to the filing of the original petition, audited and allowed, and warrants for the same on the county treasury of said county, drawn by \* \* \* John B. Williams, auditor; \* \* \* that each and every of said claims, and the warrants therefor, have been, prior to the filing of the original petition by the county treasurer of said county, out of the moneys thereof, paid to the said P. B. Comstock."

So far as these claims are concerned, relators are not entitled, in this proceeding, to have the same reviewed. They would not be benefited by a review of the action of the commissioners and auditor, even if their acts were declared null and void. Under the provisions of the statute the affidavit for the writ of certiorari must show that the party applying is beneficially interested. (Stats. 1869, sec. 437.)

The several claims having been allowed, audited and paid, it would be a useless ceremony in this proceeding to review the action of the commissioners and auditor. (*People v. Commissioners*, 43 Barb. 494.)

If, as alleged in the petition, the claims were not legally chargeable, and if, in allowing and auditing the same, the commissioners and auditor exceeded their jurisdiction (questions which we do not here decide), then their action was null and void. (*People v. Lawrence*, 6 Hill, 244; *People ex rel. Hotchkiss v. Supervisors*, 65 N. Y. 225; *Carroll v.*

*Siebenthaler*, 37 Cal. 196; *Linden v. Case*, 46 Cal. 174; and the remedy would be by a suit at law, by the county against the clerk, to recover back the amount of money, if any, paid to Comstock without warrant of law. (*Board of Supervisors v. Ellis*, 59 N. Y. 620.) The petition shows that the account of three hundred and seventy-three dollars "has been \* \* \* audited and allowed by the said auditor as a just and legal claim against the said county; but that no warrant has yet been drawn therefor and the same has not yet been paid." as to this particular claim the relators are beneficially interested.

The statute creating a board of county commissioners, and defining their duties, provides, among other things, that the "commissioners shall have power and jurisdiction in their respective counties \* \* \* to examine, settle and allow all accounts legally chargeable against the county." (2 Comp. Laws, 3077.)

Prior to the adoption of this statute the supreme court of California decided, under a similar statute, that the power of the supervisors to allow accounts against the county is confined to those "legally chargeable," and that a writ of certiorari would lie to review the action of the board. (*People v. Supervisors of El Dorado County*, 8 Cal. 58; *Id.* 11 Cal. 170; *Robinson v. Board of Supervisors*, 16 Cal. 208.) The commissioners and auditor, in allowing and auditing the accounts, are limited to the powers conferred upon them by statute. (*People v. Lawrence*, 6 Hill, 244, and authorities before cited.) Their action in allowing and auditing the account in question is wholly indefensible. Therein no law authorizing the clerk to perform any such duty or to make any such charge. The claim, upon its face, clearly shows that it was not legally chargeable against the county. The statute makes it the duty of the judge of the court to transmit the testimony taken at the trial to the governor. (1 Comp. Laws, 2080.)

There is no statute authorizing any charge to be made for transcribing the testimony so taken for the purpose of transmitting it to the governor. The demurrer to the petition, in so far as it applies to all accounts which have been

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Opinion of the Court—Hawley, J.

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paid, is sustained; and in so far as it relates to the claim of three hundred and seventy-three dollars it is overruled.

The clerk will issue a writ of certiorari directed to the board of county commissioners of Washoe county and to the county auditor of said county commanding them to fully certify all the records and proceedings of said board and auditor relating to the said claim of three hundred and seventy-three dollars to this court on or before the third day of March, A. D. 1879.

OPINION upon return of writ of certiorari.

By the Court, HAWLEY, J.:

The return to the writ of certiorari, heretofore issued, shows that after the filing of the petition for the writ, by the relators, the board of county commissioners, on the application of P. B. Comstock, ordered that the claim of three hundred and seventy-three dollars, for transcribing the evidence in the *Rover case* for the governor's office, "be canceled of record by the auditor;" that the auditor, in pursuance of said order, "canceled said claim \* \* \* on the claim book, and made the necessary entry in the books of the county." The only question, therefore, for us to consider is one of costs.

It satisfactorily appears, from the return to the writ, that it was not the intention of the board of county commissioners to ever have this claim paid; that by a verbal understanding between the commissioners and the auditor the claim was audited, in order "that it might be properly presented for payment to Humboldt county, and in case the said claim was not allowed and paid by Humboldt county that no warrant should be issued \* \* \* on the treasurer of Washoe county for its payment." Upon this showing the respondents claim that the costs of this proceeding should not be taxed against them. There was nothing in the public records to show the intention of the officers in allowing and auditing this claim.

It does not appear, from the records before us, that the relators had any knowledge of such officers' intentions.

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Statement of Facts.

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They were authorized to act, and did act, upon the facts as shown by the records of Washoe county. The respondents in their brief, filed in support of their demurrer, claimed that the county commissioners and county auditor were authorized by law to allow and audit this particular account.

Under the circumstances of this case it is ordered that the writ be dismissed and that the costs of this proceeding be taxed against respondents.

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[No. 937.]

THE STATE OF NEVADA, RESPONDENT, v. FRANK CLIFFORD, APPELLANT.

**LARCENY—LOST PROPERTY FOUND IN THE HIGHWAY.**—When property is found in the highway, and the finder knows the owner, or there are any marks upon it by which the owner may be ascertained, and the finder instead of restoring it converts it to his own use, such conversion will constitute a felonious taking.

**IDEM—FELONIOUS INTENT.**—If there be a felonious intent to appropriate the property coupled with a reasonable belief that the owner could be found, it would be larceny.

**IDEM—SUBSEQUENT FELONIOUS INTENT NOT SUFFICIENT.**—If the finder takes possession of the property without intending to steal it at the time of the original taking, he can not be found guilty of larceny by any subsequent intention to convert it to his own use.

**POSSESSION OF STOLEN PROPERTY.**—Where there is no other evidence tending to establish the guilt of the defendant except the fact of his having the possession of the property stolen, and the jury believe that the defendant gives a reasonable account of such possession, it would be their duty to acquit.

**TESTIMONY—HELD SUFFICIENT TO SUSTAIN A CONVICTION FOR LARCENY.**

**APPEAL** from the District Court of the Sixth Judicial District, White Pine County.

The facts of this case are substantially as follows: On the twenty-sixth day of February, 1878, there was upon the stage of Gilmer, Saulsbury & Co., five bars of bullion. Each bar was in a leather sack, used by Wells, Fargo & Co., for the shipment of bullion. The bars were numbered and marked "Christy Mill & Mining Co.," in plain letters. The sacks were also numbered and had a tag of Wells,

## Statement of Facts.

Fargo & Co. upon them. The bars of bullion were all upon the stage when it left Prairies Ranch, and upon the arrival of the stage at Ward, in White Pine county, it was ascertained that one of the bars, marked No. 21, contained in sack No. 8, was missing. The agent of Wells, Fargo & Co. at Ward immediately notified the office in San Francisco, Cal., of the loss of the bullion. In due time posters from Wells, Fargo & Co. came back offering a reward of two hundred and fifty dollars for the recovery of the bullion. In the mean time, the local agent, aided by the private detectives and messengers of Wells, Fargo & Co., commenced search and made inquiries after the lost bar. The defendant, Clifford, went to the agent and stated that he thought the bar could be found, provided there was sufficient inducement held out. Several consultations were held upon the subject. The defendant claimed that two hundred and fifty dollars was not enough, as he would be compelled to give that amount to the parties from whom he was to get his information as to the whereabouts of the bullion, and that he was acting as a go-between and was compelled to pledge his word as to secrecy in the matter, and was also pledged not to disclose any name, and that he wanted one hundred and fifty dollars for his services. The agent and messenger of Wells, Fargo & Co. agreed that they would raise the extra one hundred and fifty dollars themselves.

They agreed to give defendant four hundred dollars for such information as would lead to the discovery of the bullion, reserving the right to prosecute any person in whose possession the bullion might be found. In pursuance of this agreement, the defendant, in company with three persons named in the agreement, started out about one o'clock A. M. to find the bullion. The defendant suggested that they had better provide themselves with a shovel or something to dig up the bar of bullion. At the lower end of town the defendant pointed out a spot where, upon digging down about six inches, the missing bar of bullion, with the marks upon it, was found.

Some four or five days subsequent to the discovery of the bullion a deputy sheriff, in company with a messenger of

which are very numerous, may be stated in general terms as follows: When property is found in the highway, and the finder knows the owner, or there be any mark upon it by which the owner may be ascertained, and the finder instead of restoring it converts it to his own use, such conversion will constitute a felonious taking. If there be no notice of the owner at the time of finding, yet if there be a felonious intention to appropriate the property, coupled with a reasonable belief that the owner could be found, it would be larceny. But the finder of lost property who takes possession of it not intending to steal it at the time of the original taking, is not rendered guilty of larceny by any subsequent felonious intention to convert it to his own use. (*People v. McGarren*, 17 Wend. 460; *Wilson v. The People*, 39 N. Y. 461; *State v. Weston*, 9 Conn. 526; *Ransom v. The State*, 22 Id. 153; *Baker v. The State*, 29 Ohio St. 184; *Bailey v. The State*, 52 Ind. 462; *Wolffington v. State*, 53 Ind. 343; *Commonwealth v. Titus*, 116 Mass. 42; *Reg. v. Thurborn*, 2 Car. & Kir. 832; *Reg. v. Moore*, 8 Cox, C. C. 416; 2 Bish. Cr. Law, sec. 882, and other authorities there cited; 2 Wharton Cr. Law, sec. 1800.)

All portions of the charge of the court or instructions given to the jury at variance with these rules are erroneous, especially those portions which convey an intimation to the jury that any subsequent felonious intention of defendant to convert the property to his own use is sufficient to authorize a conviction.

The court also erred in refusing to give the sixth instruction asked by defendant.

When property recently stolen is found in the possession of a person accused of the theft the accused person is bound to explain the possession in order to remove its effect as a circumstance indicative of guilt. (*State v. I. En.* 10 Nev. 279.) But if there is no other evidence tending to establish the guilt of the defendant, and the jury are satisfied that he gives a reasonable account of his possession of the property, then it would be their duty to acquit.

Appellant claims that the evidence, under any theory of the prosecution, is insufficient to support a conviction of



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Argument for Appellant.

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larceny; that if the defendant is guilty of any offense it could only be that of receiving stolen goods. In our opinion there is ample testimony tending to show that the defendant was guilty of the offense of grand larceny, either in stealing the bar of bullion from the stage or finding it upon the highway, knowing the owner, or, it having marks upon it by which the owner might readily be ascertained, intending at the time to convert it to his own use. If the jury believed the testimony given by the defendant, in his own behalf, to be true, he was not guilty of larceny or any other offense (unless it be that of compounding a felony).

The judgment of the district court is reversed, and the cause remanded for a new trial.

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[No. 940.]

**W. R. MUSGROVE, EXECUTOR OF THE ESTATE OF WILLIAM PATTERSON, RESPONDENT, v. ADOLPHUS WAITZ, ET AL., APPELLANTS.**

**CERTIFICATE OF ACKNOWLEDGMENT—TESTIMONY OF NOTARY.**—Where the certificate of a notary public conforms to the provisions of the statute and the notary is called as a witness and fails to state from memory the exact amount for which the mortgage was given: *Held*, that his testimony is not entitled to any greater weight than his certificate.

**DEED.**—Where the property mortgaged is situate in a compact body, and the notary and party executing the mortgage are upon the premises and the notary informs the party that the mortgage is "on all this property here:" *Held*, that this language must have been as clearly understood as if he had read the description in the mortgage.

**APPEAL** from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

*Ellis & King*, for Appellant:

A certificate of acknowledgment may be disproved by parol testimony. (*Dodge v. Hollingshead*, 6 Minn. 25, *Ann. v. Folsom*, Id. 500; Comp. Laws, 259.) The certificate must show that the wife was examined in the manner prescribed by the statute. (*Jordan v. Corey*, 2 Ind. 385.)

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Opinion of the Court—Hawley, J.

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The officer did not inform the defendant of the contents of the instrument (Comp. Laws, 250). He did not read it to her.

*T. W. W. Davies, for Respondent:*

By the Court, HAWLEY, J.:

This is an action to foreclose a mortgage executed by appellants.

The appellant, Ann Waitz, in her separate answer, denied that she ever acknowledged the execution of said mortgage; that she ever knew the contents thereof, or that the contents were ever made known to her.

The only questions presented by this appeal, which are relied upon by appellants, relate exclusively to the sufficiency of the proof upon these points. The certificate of the notary substantially conforms to the provisions of the statute (1 Comp. Laws, 250-251). It is admitted that it makes out a *prima facie* case in favor of respondent, and that it was unnecessary for him to have introduced any other proof; but upon the trial he chose to introduce the notary before whom the acknowledgment was taken, and appellants claim that his testimony contradicts his certificate and establishes the facts in their favor.

The notary testifies that he did not read the entire mortgage to Mrs. Waitz. This was unnecessary. The law only requires that she should be "made acquainted with the contents." The witness says he "informed Mrs. Waitz of the contents of the mortgage before taking her acknowledgment." He did not describe to her the property mentioned in the mortgage by the number of the lots and block as named in the mortgage. It appears that the property mortgaged is in a compact body fronting on the north side of King street, in Carson, and lying between Curry street and an alley. The notary was upon the premises at the time of taking the acknowledgment and said to Mrs. Waitz that the mortgage was "on all this property here." Situated as the parties then were, this language of the notary must have been as clearly understood by her as if he had read the

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Points decided.

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description in the mortgage. He testified upon cross-examination that he told Mrs. Waitz that the mortgage secured a note for \$1500. He was very positive as to the amount. Upon his re-examination he said: "I only had an idea that such was the amount; upon examination of the mortgage now I find the amount is \$3000, and is fully written out in words. The amount named in the mortgage is what I told her, and that is \$3000."

In the course of his testimony he said: "All the averments in the certificate of acknowledgment to this mortgage are true." This testimony shows that the recollection of the witness was in some respects at fault, and required the introduction of the mortgage to refresh his memory as to the actual facts. We apprehend there are very few of the officers authorized by law to take acknowledgments who could, after the lapse of two or three years, state from memory only the exact amount of every mortgage to which they had attached their certificate of acknowledgment. The fickle recollection of a witness, after such a period of time, is not entitled to any greater weight than his certificate, under seal, given at the time of the occurrence.

In this case the testimony not only fails to contradict the certificate of the officer in any essential particular, but in fact supports it upon every material point.

The judgment of the district court is affirmed.

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[No. 935].

**THE STATE OF NEVADA, RESPONDENT, v. AH CHUEY,  
ALIAS SAM GOOD, APPELLANT.**

**IDENTITY OF PRISONER—EXHIBITION OF TATTOO MARKS UPON THE PERSON**

**—ART. 1, SEC. 8, CONSTITUTION DISCUSSED AND CONSTRUED.**—Upon the trial, a question was raised as to the identity of the defendant. One witness testified that he knew the defendant, and knew that he had tattoo marks (a female head and bust) on his right forearm. The court thereupon compelled the defendant, against his objection, to exhibit his arm, in such a manner as to show the marks to the jury: *Held*, that this action of the court was not in violation of the clause in the State Constitution, which declares that no person shall be compelled "in any criminal case, to be a witness against himself;" that it was not prejudicial to defendant and was not erroneous. (Leonard, J., dissenting.)

## Argument for Appellant.

**CORPUS DELICTI—CIRCUMSTANTIAL EVIDENCE.**—Proof of *corpus delicti*: may be shown by circumstantial evidence.

**IDEM—SUFFICIENCY OF EVIDENCE.**—Where it was shown that the house where the dead body (claimed to be the body of Ah Tong, alleged in the indictment to have been killed by Ah Chuey) was found, was used as a Chinese wash-house; that Ah Tong was the proprietor; that he was assisted by two other Chinamen; that these three persons were usually at the house; that the wash-house was being used as usual on the day of the homicide; that some human being therein was killed; that the house was consumed by fire after the homicide occurred; that the body of the deceased was badly charred; that Ah Tong had never been seen after the homicide, and that the other occupants had been seen and were alive: *Held*, that these circumstances tended to establish the fact that the body found in the wash-house was the body of Ah Tong.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts sufficiently appear in the opinion.

*Robert M. Clarke and N. Soderberg, for Appellant.*

I. The court erred in compelling defendant to exhibit the tattoo mark on his arm to the jury. This was compelling him to testify against himself. (Cons. of Nevada, sec. 8, 18; Comp. Laws, sec. 2305, 2306; U. S. Dig. 1st series, vol. XIV., p. 693, sec. 4630, 4643, 4659; Cooley's Cons. Lim. (1868), 305; *State v. Jacobs*, 5 Jones (N. C.), L. 259; *Rex v. Worsenham*, 1 Ld. Raym. R. 705; *Reg. v. Mead*, 2 Id. 927; *Rex v. Shelly*, 3 Term R. 142; 1 Green. Ev. sec. 451; Whart, Cr. L. sec. 807; 2 Phillips Ev. 929; *Stokes v. State* (recent term case), 3 Cent. Law Jour. pp. 316-17, 36 Cal. 529; 123 Mass. 222.

II. There is an entire want of evidence of the *corpus delicti*. The only testimony in the record that Ah Tong is dead, are the extra judicial statements of defendant testified to by a hostile Chinaman, which are entirely improbable and unworthy of credence. (*Smith's case*, 21 Grat. 809; *People v. Jones*, 31 Cal. 565; 3 Green Ev. sec. 30; 1 Whar. Am. Cr. Law, sec. 745 *et seq.*, *Blackburn v. State*, 23 Ohio St. 146; 1 Green. Ev. sec. 217; *People v. Hennessy*, 15 Wend. 148; *Stringfellow v. State*, 26 Miss. 157, 32 Id. 450; 33 Id., 352; 18 (N. Y.), 179, 189.)

*Wm. Cain, District Attorney of Washoe County, for Respondent.*

I. There was sufficient proof of the *corpus delicti*. (2 Green. Ev., sec. 30; Burrill Cir. Ev., p. 677, *et seq.*; 1 Whart. Cr. Law, secs. 746-7.

II. It is always proper to identify a person by his appearance, marks upon his person, dress, stature, voice, etc. (Wills Cir. Ev.; Burrill's Cir. Ev. 635-7-8; 650.)

By the Court, HAWLEY, J.:

The constitution of this state declares that no person shall be compelled, "in any criminal case, to be a witness against himself." (Art. 1, sec. 8.)

On the trial of this case the court compelled the defendant, against his objection, to exhibit his arm so as to show certain tattoo marks thereon to the jury (a witness having previously testified that such marks were upon the defendant's arm.) Was this compelling the defendant to be a witness against himself? What is meant by the constitutional clause above referred to? Perhaps the best way of answering these questions would be to state the history which led to the adoption of this constitutional provision. A similar provision is found in the constitution of nearly every state of the union and in the constitution of the United States.

In the early history of England accused persons were compelled to testify in answer to any criminal charge brought against them. With the advancing spirit of the age it was claimed that no man ought to be compelled to accuse himself of any crime, and by degrees the rule was changed to its present state in accordance with what seemed to be the public sentiment of the country. Story, in his commentaries on the constitution of the United States, says: That the insertion of this clause "is but an affirmance of the common law privilege." It was, according to his views, adopted to prevent the evils which had resulted from the custom of other countries in compelling criminals to give evidence against themselves and of being "subjected to the rack or torture in order to procure a confession of guilt." (2 Story on the Const. 1788.)

Gladstone claims that the trial by torture was unknown to the law of England. In referring to this custom he says: "It seems astonishing that this usage of administering the torture should be said to arise from a tenderness to the lives of men; and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other foreign nations, viz.: because the laws can not endure that any man should die upon the evidence of a false or even a single witness, and, therefore, contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession, thus rating a man's virtue by the hardness of his constitution, and his guilt by the sensibility of his nerves." (4 Black. Com. 326.) This learned commentator, in order to fully expose the fallacy of this reason, quotes, with approval, the language of Tully, that notwithstanding pain governs those tortures, the questioner rules and regulates as well the mind as the body of every one; desire inclines; hope bribes; fear enfeebles; so that in such a distressed state of things no room is left for the truth. It does, indeed, seem strange, at this day, that a people as intelligent and enlightened as the Romans were did not earlier discover the utter futility of this mode of punishment to extract the truth. It may be, however, that the wisdom of future ages will discover and bring to light the errors of the system which we have adopted in the United States, in order to accomplish that very useful purpose. It has already been assailed by James Fitzjames Stephens, and other prominent and able writers on the criminal law.

I have referred to this subject, not for the purpose of pointing out or expressing any opinion upon the merits or demerits of any particular system, but to show as a fact that in all countries and in all ages, whatever the law or custom may have been, it was always claimed as a reason for its adoption that it was calculated to discover the truth, and thereby promote the ends of justice. Such is claimed to be the rule of our constitution and laws upon this question.

The object of every criminal trial is to ascertain the truth.

The constitution prohibits the state from compelling a defendant to be a witness against himself because it was believed that he might, by the flattery of hope or suspicion of fear, be induced to tell a falsehood.

None of the many reasons urged against the rack or torture or against the rule compelling a man "to be a witness against himself" can be urged against the act of compelling a defendant, upon a criminal trial, to bare his arm in the presence of the jury so as to enable them to discover whether or not a certain mark could be seen imprinted thereon. Such an examination could not, in the very nature of things, lead to a falsehood. In fact, its only object is to discover the truth; and it would be a sad commentary upon the wisdom of the framers of our Constitution to say that by the adoption of such a clause they have effectually closed the door of investigation tending to establish the truth.

Confessions of persons accused of crime, whenever obtained by the influence of hope or fear, are excluded because in considering the motives which actuate the mind of man they might be induced to make a false statement. Yet, notwithstanding the universality of this rule of law, whenever the confession, however improperly or illegally obtained, has led to the discovery of any given fact, that fact is always admitted in evidence, because the reasons which would have excluded the confession no longer exist. This is the governing and controlling principle of the law.

The constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is to testify, against himself. To use the common phrase, it "closes the mouth" of the prisoner. A defendant in a criminal case cannot be compelled to give evidence under oath or affirmation or make any statement for the purpose of proving or disproving any question at issue before any tribunal, court, judge or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but, as before stated, for the reason that in the sound judgment of the men who framed the constitution it was thought that owing

to the weakness of human nature and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not true.

*The State v. Jacobs*, 5 Jones, N. C. 259, and *Stokes v. The State* (an unreported Tennessee case referred to in a note to vol. 1, Wharton's Law of Evidence, sec. 347), have been cited and are relied upon to sustain the position that the act of compelling Ah Chuey to bare his arm was in violation of his constitutional rights.

In the *Jacobs* case the court decided that "a Judge has not the right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro." This decision was based upon two grounds: First, upon the general rule that a witness could not be compelled to furnish any evidence that would tend to criminate himself. Second, that the manner in which the defendant was compelled to exhibit himself was prejudicial to the defendant. I do not propose to deny the correctness of that decision, but I do insist that it cannot be sustained upon the first ground stated therein.

In the subsequent case of *The State v. Johnson*, 67 N. C. 58, the court, in my opinion, declare the correct principle that governed the *Jacobs* case and distinguished it from the one then under consideration, viz.: In the *Jacobs* case the defendant was compelled to exhibit himself to the jury so that the "jury might determine by inspection his quality and condition—his blood or race." That was a matter to be proved by the oath of witnesses who knew the facts, or it may be by experts.

It is a noticeable fact that in none of the subsequent cases in that state, where the *Jacobs* case was cited, have the courts sanctioned or in any manner approved of the first reasoning upon which the decision was based. Whilst they have taken especial pains to distinguish the facts in the respective cases, they have, without disturbing the decision, virtually refused to acknowledge the reasoning of the court as applicable to cases of a similar character.



In *The State v. Woodruff*, 67 N. C. 89, where an issue of bastardy was being tried, the mother of the child, when examined as a witness, held the child in her arms, and the counsel in addressing the jury called attention to its features and commented upon its resemblance to the defendant, the child being still in its mother's arms. This was held not to be error.

Now, how could the jury determine the resemblance, unless they also examined the features of the reputed father? Was he not compelled to furnish evidence against himself by exhibiting his face to the jury? Surely, if the constitution protects a defendant, it could not possibly make any difference whether the defendant exhibited himself in sitting down or standing up; in allowing the jury to look at his features or the color of his hair; to look at a mark plainly visible upon his face or examine marks upon his person concealed by his ordinary clothing. Does he not furnish as much evidence against himself in the one case as the other? Looking, then, at the facts, and applying thereto the principles of common sense, did not Woodruff in the one case furnish more evidence against himself than Jacobs did in the other? If the broad mantle of this provision of the constitution covers the one case, it certainly does the other. But the truth is, that the difference between the cases, as held by the respective courts, relates exclusively to the manner in which the defendant is compelled to exhibit himself, and is not in any way governed or controlled by the constitution.

It was admitted in the oral argument that a jury might look at the features of the defendant and examine marks upon any part of his person not concealed by his ordinary clothing, so long as he was not compelled to exhibit himself to the jury, but it was very earnestly contended that the inspection could go no further; that the defendant, under the facts of this case, could not be compelled to draw up his shirt sleeve so as to exhibit the tattoo mark upon his wrist or forearm, because such an act was compelling the defendant to furnish evidence against himself, in violation of a provision of the constitution.

From a constitutional standpoint, what does this argument amount to? If, in order to establish the identity of any defendant in a criminal case, it became necessary to examine a peculiar mark on the back of his neck, the admissibility of such an examination would, under the rule contended for, depend solely upon the size and style of his shirt collar. If he wore a turn-down collar, the mark would be visible without removing any of his ordinary clothing, and could be examined by the jury; but if he insisted upon the most approved fashion and wore a standing collar, close fitting to the neck, the mark would be concealed by his ordinary clothing and could not be examined.

In another case the defendant's hair might be long enough to conceal any scar upon his neck; but, if he had his hair cut before coming into court, the barber's shears—by clipping his curls—might destroy all protection given by the constitution.

The style of dress which men and women wear is regulated, to some extent, by the custom and fashion of the community where they reside. The admissibility of evidence of this character would, under the sound reasoning and logical view of this rule, fluctuate and change by the peculiar whims, caprice, fashion, or frivolity of the particular community where the defendant is tried. If the defendant is a woman, and the custom is for her sex to go closely veiled whenever appearing in public, if her identity is questioned and made to depend to some extent upon the presence of a peculiar scar upon her cheek, she would, under the sanctity of the constitution, be protected from removing her veil, and the jury would not be allowed to even examine the features of her face.

In *The State v. Garrett*, 71 N. C. 85, the defendant was indicted for murder. On the night of the homicide, defendant stated to the persons present that the deceased came to her death by her clothes accidentally catching fire while deceased was asleep, and that she (defendant), in attempting to put out the flames, "burnt one of her hands." At the coroner's inquest, the defendant was compelled to unwrap the hand she stated had been burnt and exhibit it

to a physician there present, "and there was no indication of any burn whatever upon it."

Upon the trial of the case, "the court ruled that anything the prisoner said at the inquest was inadmissible; but that the actual condition of her hand, although she was ordered by the coroner to unwrap it and exhibit to the doctor, was admissible as material evidence to contradict her statement to the witness on the night of the homicide." This ruling was sustained by the supreme court. How is it that the constitution would not reach this case as well as the case of Jacobs, Is it because Jacobs was compelled to exhibit his head in court, whereas Garrett was only compelled to exhibit her hand to a physician at a coroner's inquest? Is the force of the constitutional provision limited to acts within the walls of a court-room? Can it be possible that it has no application out of sight of the particular "temple of justice" where the case is tried? Could a defendant be compelled against his objection to open his mouth and testify upon his preliminary examination before a committing magistrate? Would other witnesses who were present at such examination be allowed to detail upon the trial the testimony so given? Is there not a broad and substantial distinction between the testimony given by a defendant under oath, or statements made under a false promise or improper inducement, upon the one side, and evidence of physical facts obtained from such testimony, or in any other manner, on the other side?

If the constitution was applicable to Jacobs' case, and protected him from being compelled to give evidence against himself by exhibiting his head to the jury, then it ought to have been applied to Garrett's case, and protected her from being compelled to give evidence against herself by exhibiting her hand to the physician at the coroner's inquest.

Take the case of Stokes. The prosecution sought to compel the defendant in the court-room to put his foot in a pan of mud, in order to identify the track thus made with a track found in mud of equal softness and similar character, made by a bare foot near the scene of the homicide. The

court refused to compel the defendant "to put his foot in it." On appeal, the case was reversed because this circumstance might have had an influence on the jury prejudicial to the defendant.

It is argued that the act of the prosecution tended to compel the defendant to make evidence against himself. I am of opinion that too much importance has been attached and too much prominence given to the words "compelled to make evidence against himself." The defendant Stokes, if he was the guilty person, was making evidence against himself when he put his foot in the mud near the scene of the homicide, and when arrested he could have been compelled to put his foot in that track, against his will, and if his foot corresponded with the track, that fact would have been admissible upon the trial of the case. (*State v. Graham*, 74 N. C. 646.)

In a case of homicide the defendant makes evidence against himself by being compelled to surrender the weapon with which the offense was committed, for it can always be used as evidence against him. A burglar is compelled to give evidence against himself when he is forced to surrender false keys and other burglarious instruments found in his possession. A counterfeiter is compelled to give evidence against himself when the dies he had manufactured and used are discovered and brought into court for inspection.

The application of the principle sought to be enforced upon the reasoning of the court in Jacobs' case, as being within the protection of the constitution, would, if logically carried out, apply to all these and many other similar cases.

From whatever standpoint this question can be considered, the truth forces itself upon my mind that no evidence of physical facts can, upon any established principle of law, or upon any substantial reason, be held to come within the letter or spirit of the constitution. The question of whether or not the court erred in compelling the defendant Ah Chuey to exhibit his arm must, in my opinion, be determined upon other grounds. Was the defendant compelled to exhibit himself in such a manner

as to unjustly or improperly prejudice his case before the jury? Did the act in question have a tendency to degrade, humiliate, insult or disgrace the defendant? Did the judge, by the act in question, convey to the jury the idea that he believed the defendant to be guilty of the offense charged against him? If either of these questions ought to be answered in the affirmative, then I think the defendant should be granted a new trial. A defendant in a criminal case is entitled to a fair and impartial trial, free from insult or obloquy, and courts cannot be too particular in guarding his personal rights and privileges. He should never be compelled to make any indecent or offensive exhibition of his person for any purpose whatever. The judge presiding at the trial should not express any opinion upon the facts (*State v. Tickel*, 13 Nev. 502, and the authorities there cited), or compel the defendant to do any act which would clearly convey to the jury an intimation that the defendant was guilty of the offense charged, or to exhibit himself in such a manner as to prejudice his case before the jury.

The guilt or innocence of the defendant is a question to be determined by the jury, free from any improper influence of any kind or character whatever. The cases of *The State v. Jacobs* and *Stokes v. The State* are authorities worthy of consideration upon this branch of this case. Every case, however, where these questions arise, must necessarily be decided upon its own peculiar facts and circumstances. It is not shown that there was anything indecent or offensive in the mere exhibition of defendant's arm to the jury. It does not appear to me that such an act would have a tendency to insult, degrade or humiliate the defendant.

After giving to all these questions unusual deliberation, my conclusion is that the act of the court in compelling the defendant to exhibit his arm did not tend, independent of the fact of the tattoo marks being found, to improperly influence or prejudice the defendant's case before the jury.

From time immemorial it has been the custom in this country, sanctioned by the constitution and laws of the

respective states, to identify persons accused of crime by examining the peculiar color of their hair, the peculiarity of their features, conspicuous scars upon their persons, the want of an eye or tooth, "or any other visible defect or mutilation." (Burrill on Circumstantial Evidence, 639-651.) Marks made by wounds upon the person of an offender given with a weapon in the hands of an assaulted party, corresponding with marks visible upon the person of the prisoner, have always been considered as a strong criminating circumstance tending to establish the identity and guilt of the accused person. (Burrill on Circumstantial Evidence, 641.)

In discussing the various means of identifying persons this author says: "There are cases, again, in which the identity being positively sworn to, and as positively denied, the witness resorts to another class of circumstances as tests of the accuracy of his testimony, such as marks upon the person not prominently visible, or even such as are quite concealed by the ordinary clothing, and thus invisible to any but one who has been intimately acquainted with the subject, and who consequently possesses the most complete means of knowing its identity." (Burrill on Circumstantial Evidence, 644.)

Many cases are cited in the books where evidence of this character has been admitted; and, although not always conclusive, it has frequently been very efficacious in enabling juries to satisfactorily determine the disputed question of identity. I shall refer to but one case. Joseph Parker was indicted and tried for bigamy, at the Court of Oyer and Terminer in New York, in 1804, under the name of Thomas Hoag, *alias* Joseph Parker. Numerous witnesses were examined, who stated, in positive terms, that they knew defendant was Thomas Hoag. Many peculiarities in the features, voice, style and habits were testified to; also the fact of "a scar on his forehead, partly covered by his hair, and another scar on his neck." These peculiarities were all observable in the prisoner. On the other hand witnesses were equally positive that the defendant was not Thomas Hoag, but was Joseph Parker. Finally, "among the marks

sworn to have been observed on the person of Thomas Hoag, was a large and visible scar under one of his feet, occasioned by his having trodden on a drawing-knife, which some of the witnesses swore they had seen. This proved to be a decisive circumstance in the prisoner's favor. For, on exhibiting his feet to the jury, not the least mark or scar could be seen upon either." (Burrill on Circumstantial Evidence, 650.)

This case brings to mind another view of the constitutional phase of this question.

Under the law, as it existed for many years in the several states, a defendant was not allowed to testify in his own behalf. If the principle contended for by appellant is correct Parker ought not to have been allowed to exhibit his feet to the jury, because this was allowing him to make evidence in his own behalf. Would any court in christendom, in construing such a law, refuse to allow a defendant to establish a fact in his own favor in the manner allowed in Parker's case?

To illustrate this proposition. Suppose the truth to have been that the defendant in this case was really Sam Good, as he claimed, and not Ah Chuey, as was claimed by the prosecution; that the witness Rhoades was mistaken in his testimony, and that the laws of the State prohibited a defendant from testifying in his own behalf, and the court had refused to allow the defendant to pull up his sleeve so as to exhibit his arm for the purpose of showing as a fact that there was no tattoo mark thereon as testified to by the witness Rhoades. Could such a ruling have been sustained upon the ground that the exhibition of his arm was allowing him to testify in his own behalf? Certainly not. Why? Because that law, as well as the clause of our state constitution, relates to testimony given by the defendant or statements made by him, and can not be applied to prevent the ascertainment of the truth as to the existence or non-existence of any scar or mark upon the defendant's person by allowing him in the one case or compelling him in the other to exhibit the fact to the jury.

In discussing the questions involved in this case I wish

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it to be distinctly understood that it has not been my intention in any manner, shape, or form to deny the correctness of the general and well-established principle of law that a witness can not, either in a civil or criminal case, be compelled to give any testimony which would have a tendency to convict him of any criminal offense. This principle applies as well to the production of letters or documents, the contents of which would tend to criminate him, as to his oral testimony. But of all the numerous authorities upon this point to which my attention has been called, there is but one, that of *The State v. Jacobs*, which, in my opinion, has attempted in any way to apply that principle to the facts of a case at all analogous to the one under consideration. I have endeavored to show that the Jacobs case could not be sustained upon that ground, either under the provisions of the constitution or upon any principle of the common law.

One other question remains to be considered. Is there any evidence in the record tending to establish the fact that Ah Tong (the person alleged to have been killed by Ah Chuey) is dead? Proof of the *corpus delicti* may be established by circumstantial evidence, provided it is satisfactory.

"Even in the case of homicide," says Greenleaf, "though ordinarily there ought to be testimony of persons who have seen and identified the body, yet this is not indispensably necessary in cases where the proof of the death is so strong and intense as to produce the full assurance of moral certainty." (3 Green, on Ev., sec. 30.)

Upon the question of the identity of deceased persons, Wharton says: "It may be regarded as settled law that although it is necessary, in a case of murder, that identity should be proved, yet this identity may be shown as effectively by inferences from facts, as from the positive testimony of witnesses who saw the alleged body of the deceased." (Wharton's Law of Homicide, sec. 640.)

It is shown by the testimony of white witnesses that the house where the dead body (claimed by the prosecution to be the body of Ah Tong) was found, was used as a Chinese



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wash-house; that Ah Tong was the proprietor; that he was assisted in the business by two other Chinamen; that these three persons were usually at the house; that the wash-house was being used as usual on the day of the homicide; that some human being therein was killed; that the house was consumed by fire after the homicide occurred; that the body of the deceased was badly charred by the fire; that Ah Tong had never been seen after the homicide occurred, and that the other occupants of the house had been seen and were alive.

These circumstances, without referring to any other testimony, tended to establish the fact that the body found in the wash-house was the body of Ah Tong. This being true, the verdict of the jury establishing the identity will not be disturbed. (*State v. Williams*, 7 Jones, N. C. 446.) The testimony in the bill of exceptions points directly to the defendant as the person who committed the offense.

I am of opinion that the judgment of the district court ought to be affirmed, and the court below directed to fix a day for carrying the sentence into execution.

It is so ordered.

LEONARD, J., dissenting.

Being unable to concur in the opinion and judgment of the court in this case. I deem it proper to give a more complete statement of the facts presented by the record, to the end that I may more clearly explain the grounds of my dissent.

Defendant was convicted of murder in the first degree for the killing of one Ah Tong, in Reno.

There was testimony admitted on behalf of the state which, without considering defendant's extra-judicial statement, tended, at least, to establish the fact that the defendant and another Chinaman, on the twenty-fourth day of December, 1877, at Reno, killed some human being in a wash-house, and afterwards set fire to the building, and hastily departed while it was in flames. The remains of the deceased were found, but were so burned and disfigured that identification of the body was im-

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possible; and, in fact, none was attempted by the coroner who held an inquest upon the body and buried it. In addition to the testimony already referred to, Ah Chung, a Chinese witness, after stating that Ah Tong was his cousin, testified to certain statements, claimed to have been made by the defendant in a gambling house in Virginia, on or about January 8, 1878, and overheard by the witness, which were, in substance, that when defendant was gambling and having bad luck witness heard him say, "That money no good;" that another man asked him, "Why the money was no good;" that defendant replied, "Down in Reno he killed Ah Tong;" that he, defendant, bought pepper, and another man threw it, when he, defendant, killed him; that he gave \$30 to the man who threw the pepper, and \$120 was his share.

It was necessary, of course, for the state to prove not only the *corpus delicti*, the body of the crime charged—that Ah Tong was dead, and that he came to his death by violence inflicted by human agency—but it was also necessary to prove that the defendant, Ah Chuey, was the guilty agent. The state did not pretend that the defendant killed Ah Tong unless he was the same person who, it was claimed, with another Chinaman, set fire to the wash-house after shooting the deceased.

Witnesses testified that the defendant was Ah Chuey, and that he was the same person who went towards the wash-house a few minutes before they heard two or three shots, and that he was one of the two Chinamen who ran away from the house a short time after, when the house was in flames. But the same witnesses also stated that on the twenty-fourth day of December, 1877, the defendant was a tall, light-complexioned, straight, good-looking Chinaman, while at the trial he was not so in many respects. There was testimony tending to show that between the date of the homicide and the trial, some of his features, noticeably his mouth, and his complexion, had been greatly changed, either from natural causes or by artificial means. At any rate, the general appearance of the defendant in court was very different from that of the Chinaman who, it was claimed, killed

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Ah Tong, and set fire to the wash-house. It must be borne in mind, also, that defendant denied being Ah Chuey, and gave "Sam Good" as his name. Such being the case, it became a matter of the first importance for the state to identify the defendant, to convince the jury, that although he called himself "Sam Good," and although his appearance had been changed, still he was the veritable Ah Chuey, seen and recognized by the witnesses on the day of the homicide going to and from the scene of the crime. For the purpose stated, S. H. Rhoades was called by the state and testified that he knew defendant by two names: "Tom" and "Ah Chuey;" that he had known him a year or such a matter; that the defendant had marks on his person by which he knew him; that he had an India-ink mark on his right forearm; that he knew him before his arrest; that he saw the mark on his arm in Reno before his arrest; saw him twice after, once in Reno and once in the district court in Virginia; that the mark was a female head and bust.

The district attorney then directed the defendant to exhibit his arm. His counsel "objected to the defendant being exhibited as a witness against himself, or being compelled to make an exhibition of himself as a witness against himself; that such evidence was incompetent." The court overruled the objection and defendant excepted. Defendant was then brought before the jury by the sheriff and made to exhibit his arm, which was tattooed as described by the witness.

The court's ruling in this connection is claimed to be error.

That a defendant in a criminal action can not be compelled to be a witness against himself is not questioned by counsel for the state, nor by the court; and the inquiry before us is, whether or not the compulsion complained of deprived defendant of a substantial right secured by the constitution and laws, statute and common. Had the district attorney asked the defendant whether he had on his right forearm the tattoo mark described, and had the court, against defendant's consent, compelled him to answer that he had such mark, there can be no doubt that such action

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would have been a grave error. Could the court at the trial, in the presence of the jury, by other forcible means, accomplish indirectly what it could not do by direct means? Was the compulsion complained of an infringement of the spirit of the common law and the constitution? The fact which the state desired to establish for the purpose of defendant's identification, was the existence of the mark described. There were three possible, if not proper, methods of establishing the desired fact to the satisfaction of the jury: By the testimony of witnesses who had seen the mark, the voluntary or involuntary admission of defendant that he had such mark, and by an actual inspection by the jury. The latter method was adopted in part, without the defendant's consent, and after the ruling of the court upon the competency and propriety of such method of proof, it must be admitted to have been as convincing to the jury of the fact sought to be proved as any evidence which might have resulted from either of the other methods named could possibly have been. That it would have been competent to prove the fact sought by the first method—the testimony of witnesses other than the defendant—or by the voluntary admission of the defendant, there can be no doubt. That an involuntary admission or statement of the fact by defendant before the jury would not have been competent or proper, is just as certain. We arrive then at the inevitable conclusion that a result as detrimental to defendant was reached by the method adopted, as could have come from either of the proper methods mentioned, or by the one admitted to be improper. In other words, compelling defendant to exhibit the mark to the jury, established the desired fact as conclusively, at least, as the competent testimony of witnesses, or a voluntary or compulsory admission of defendant, could have done.

So far as I am able to ascertain the fact, every state in the Union has a provision in its constitution protecting persons accused of a crime from criminating themselves, except New Jersey, Georgia and Iowa. It seems from *Higdon v. Heard*, 14 Geo. 259, that the former constitution of that state had a provision like ours; but in the new constitution, adopted

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in 1868, I find none. In some of the states the provision is like ours that "no person in a criminal case shall be compelled to be a witness against himself." In others, that such person shall not be compelled to give evidence against himself." In others, that such person "shall not be compelled to testify against himself." In Kansas it is that "no person shall be a witness against himself." In others, that "no person in a criminal case shall be compelled to furnish or give evidence against himself." In Maryland, that "no man ought to be compelled to give evidence against himself." In Rhode Island, that "no man in a court of common law shall be compelled to give evidence criminating himself." I have no doubt that the intention of the different states in adopting these provisions was the same; and yet, technically, some give greater protection than others. Prohibiting a person from being compelled to give evidence, is certainly the same as a prohibition against compelling him to be a witness. But strictly speaking, the provision that "no person in a criminal case shall be compelled to testify against himself" affords less protection than either of the others just mentioned.

As I understand, the court construes the clause in question of our constitution as though it read: "No person, etc., shall be compelled to testify or make any statement against himself;" and that it gives the accused no other protection except from acts "which have a tendency to degrade, humiliate, insult or disgrace" him. I quote from the decision: "The constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is, to testify against himself. To use the common phrase, it 'closes the mouth of the prisoner.' A defendant in a criminal case can not be compelled to give evidence under oath or affirmation for the purpose of proving or disproving any question at issue before any tribunal, court, judge, or magistrate. This is the shield under which he is protected by the strong arm of the law, and the protection was given, not for the purpose of evading the truth, but, as before stated, for the sole reason that in the sound judgment of the men who framed

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the constitution, it was thought that owing to the weakness of human nature and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not true." Again, the court says: \* \* \* "In all countries and in all ages, whatever the law or custom may have been, it was always claimed as a reason for its adoption that it was calculated to discover the truth, and thereby promote the ends of justice. Such is claimed to be the rule of our constitution and laws upon this question."

In my opinion, the court has not stated the only reason why the provision in question was placed in the constitution. Had that been the only one, there would have been a prohibition against allowing a defendant to testify for himself; because in the latter case there was and is a hundred-fold more danger of falsehood than in the former. Is there not an additional reason why this provision was adopted? Was it not, in part at least, because of the enlightened spirit of the age, that a man accused of a crime should not be compelled to furnish evidence of any kind which might tend to his conviction? Did it not come, to some extent, from the spirit of justice and humanity which established the first of all legal presumptions—that every person shall be considered innocent until proven guilty? (See *Wilkins v. Malone*, 14 Ind. 156.) Mr. Starkie says: "Upon a principle of humanity, as well as of policy, every witness is protected from answering questions by doing which he would criminate himself; of policy because it would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors." (Starkie on Evidence, 40.) It will be noticed that the author says "a witness is protected from answering questions." etc.; which, I admit, does not, in terms, cover this case; but I quote it for the purpose of showing, from him, that the reason why the provision of the constitution under consideration was inserted was not solely to prevent the accused from stating a falsehood, whether for or against himself.

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In 1853 the constitution of Arkansas provided that "in all criminal prosecutions the accused shall not be compelled to give evidence against himself." In the present constitution the provision is the same as ours. To give evidence is certainly to be a witness, and there is no substantial difference between them. In construing the provision in the old constitution (*State v. Quarles*, 13 Ark. 309) the court said: "This places a restriction upon the power of the legislature to the extent that no law can be enacted by that body to compel one accused to give evidence against himself, and by necessary implication also prohibits any law by which a witness in any prosecution should be compelled to disclose criminal matters against himself, so long as it might remain lawful that such disclosures could be afterwards produced in evidence against him in case he in turn should be the accused party. Hence it seems inevitable that, although witnesses are not expressed in the terms of the provision of the bill of rights that we are considering, yet they are substantially embraced to the full extent of a complete guarantee against self-accusation. Consequently, so long as the common law rule might prevail, that voluntary disclosures of a witness in a criminal prosecution may be used in evidence in an after prosecution against him, when he in turn had become the accused party, he would be as much entitled to this guarantee when interrogated as a witness as the accused party." The books are full of the same doctrine. (*People v. Hackley*, 24 N. Y. 75.)

In Wharton's Law of Evidence, section 536, it is said that "a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be insured;" and, also, section 731, "What is elsewhere said as to the protection of witnesses from questions which call for criminatory answers, applies to the production of criminatory documents. Neither equity nor common-law practice will compel a person to allow the inspection of either public or private documents in his custody, where the document, if produced, would criminate the party producing." (See also section 533.) And

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in Taylor's Law of Evidence, the author says in section 1351: "In accordance with the invariable rule which protects a witness or party from being compelled to furnish evidence that may expose him to a criminal charge, neither the court of queen's bench nor the court of chancery will ever oblige a person to allow the inspection of either public or private documents in his custody, where the inspection is sought for the production of supporting a prosecution against himself." In *Regina v. Mead*, 2 Ld. Raymond, the defendant and others were incorporated by the name of the surveyors of highways and were trustees of a charity. An information was preferred against the defendant for executing this office without having taken the oath as required by statute. The defendant pleaded not guilty. Counsel for the prosecution moved for a rule, that the prosecutor might have two books produced which these surveyors kept, in which they entered their elections, and also their receipts and disbursements, and that he might take copies of what he thought necessary, and that the books might be produced at the next assizes at the trial. "But *per curiam* denied, because they are perfectly of a private nature, and it would be to make a man produce evidence against himself in a criminal prosecution." (See also *Dominus Rex v. Cornelius et al.*, 2 Strange, 1210; 24 How. Pr. 21, *Bank v. Trapp*.)

If the reason stated by the court is the only one why the accused is not compelled to be a witness against himself, why is it that neither himself, nor an ordinary witness even, can be compelled either to testify or to produce any criminatory book or document? The book or paper cannot be falsified—it speaks for itself, just as did the mark on defendant's arm. Cannot "the many reasons urged against the rack or torture or against the rule compelling a man to be a witness against himself" be urged as well, and with the same propriety, against compelling criminating disclosures by the exhibition of physical peculiarities, as against the production of criminatory documents?

I think the framers of the constitution and the people who adopted it intended that at criminal trials the accused,



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if such should be his wish, should not only have the right to close his mouth, but that he might fold his arms as well, and refuse to be a witness against himself in any sense or to any extent, by furnishing or giving evidence against himself, whether testimony under oath or affirmation, or confessions or admissions without either, or proofs of a physical nature. A witness is often required to appear in court by *subpoena duces tecum*, simply for the production of a book or paper, with no intention on the part of the person calling him of having him testify, and yet he is a witness and can be punished for contempt if he wrongfully disobeys. He must submit the document to the inspection of the court, but if it will tend to criminate him it cannot be used. (See authorities before cited and Mitchell's case, 12 Abb. Pr. 258.) But aside from the constitution and the reason for the adoption of the provision under consideration, there is an additional reason why, in my opinion, the construction given by the court is incorrect. Judge Cooley, in his excellent work on Const. Limitations, says: "A constitution is not the beginning of a community nor the origin of private rights; it is not the fountain of law nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience." \* \* \* "A written constitution is, in every instance, a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition." (Marg. p. 37, 3d ed.) It is common to insert in constitutions, as a matter of extraordinary though probably useless precaution, a provision that the enumeration of rights therein shall not be construed to impair or deny others retained by the people.

Mr. Cooley says, also (Marg. p. 61), that \* \* \* "the constitutions are to be construed in the light of the common law, and of the fact that its rules are still left in force. By this we do not mean that the common law is to control the

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constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common law rules, but only that for its definitions we are to draw from that great fountain, and that in judging what it means we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system, which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes."

Can there be any doubt that, under the common law, no person was compelled either to accuse himself or to criminate himself?

In *State v. Quarles*, 13 Ark. 311, in commenting upon the constitutional provision, that "no person in a criminal case should be compelled to give evidence against himself," the court uses this language: "The privilege in question, in its greatest scope, as allowed by common law, and no one, be he witness or accused, can pretend to claim it beyond its scope of common law, never did contemplate that the witness might not be proved guilty of the very crime about which he may be called to testify; but only that the witness should not be compelled to produce the evidence to prove himself guilty of that crime. His privilege, therefore, was not an exemption from the consequences of a crime that he might have committed, but only an exemption from the necessity of producing the evidence to establish his own crime."

In *Emery's case*, 107 Massachusetts, 181, the court says, in relation to a provision similar to that in our constitution: "The principle applies equally to any compulsory disclosure of guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. \* \* \* This branch of the constitutional exemption corresponds with the common law maxim, *nemo tenetur seipsum accusare*, the interpretation and application of which has always been in accordance with what has just been stated."

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In *Mitchell's case*, 12 Abb. Pr. 258, it is said: "The principle of exemption was applied in its broadest extent to parties to actions at law, who could not be compelled to give evidence; and in respect to the production of documentary testimony, as a party to the action was not bound to give evidence, he could not be required to produce papers to be used against him as evidence." And so, in *Latimer v. Alexander*, 14 Ga. 259, this language appears: "The constitution declares that no person shall be compelled, in any criminal case, to be a witness against himself. Literally the constitution does not go as far as the common law, but its spirit and intent cover the whole ground. By it all persons are protected from furnishing evidence against themselves which may tend to subject them to criminal prosecution." And in *Wilkins v. Malone*, 14 Ind. 156: "The constitutional provision in question is thoroughly interwoven with the history and principles of the common law. It exempts no one from the consequences of a crime committed, but only from the necessity of himself producing the evidence to establish it. 'It is founded upon the general sense of enlightened man, that compulsory self-accusation of crime is not only at war with the true charities of religion, but has been proven to be impolitic by the truths of history and the experience of common life.'" I think the construction placed upon this clause of our constitution so limits the practical effects and benefits to be derived therefrom, that in this case the defendant will be deprived of a right guaranteed to him by the spirit and letter of the constitution and common law, and as a result many a defendant may be compelled to criminate himself as completely as would be the case if he should be compelled to utter words establishing his guilt. I am satisfied that the framers of that instrument and the people who adopted it did not intend that a principle which has so long excited the admiration of the most enlightened nations, and been regarded as one of the grandest monuments of liberty and humanity, should be disregarded or forgotten in the administration of criminal law. I am also unwilling to admit that the people of this state have embodied in their

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fundamental law a principle against which, in darker periods, less enlightened people have hurled their righteous anathemas. I think, also, the court is in error in deciding the case upon the constitutional provision without reference to the common law, if such a construction must be placed upon the constitutional provision under consideration.

It is undoubtedly true, as stated by the court, that a fact tending to show guilt may be proved, although it was brought to light by reason of a declaration or confession inadmissible *per se*, as having been obtained by improper influences. (1 Greenleaf's Ev., sec. 231; *State v. Garrett*, 71 N. C. 87.) Voluntary confessions are received in evidence, no matter where made, because it is presumed that persons accused of crime will not confess against their own interest, unless the confessions are true. Involuntary confessions, or those induced by some fear of personal injury or hope of personal benefit, at least by those in authority, are not received, because they cannot be depended upon as the truth. "A free and voluntary confession," says Eyre, C. B., "is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." (Greenleaf on Ev., vol. 1, 248.) Facts ascertained from an involuntary confession are received as evidence of guilt, because, although the confession alone could not be taken as true, yet the fact resulting therefrom cannot be false. But involuntary confessions made out of court are not rejected because of the constitutional provision under consideration. (See same vol. Greenleaf's Ev. p. 242 *et seq.*) This rule of law was established long before the constitution of the United States was adopted, and it does not depend upon any constitution for its existence or continuance. Such confessions are excluded upon the theory that the promises, threats or inducements held out, so overcome the mind of the accused that he is liable to speak falsely. Consequently they are excluded,

although they may oftentimes be entirely true. That is the reason, and the only one, why involuntary confessions made elsewhere than before a tribunal authorized by law to act in the premises, are rejected. If such confessions could be depended upon as the truth, they would be received the same as facts resulting therefrom, or as confessions voluntarily given. If they could be depended upon as the truth, courts would then refuse to inquire how they were obtained, as now they refuse to inquire how facts resulting from an involuntary confession were obtained. So, answering questions propounded by the court, my opinion is that the force of the constitutional provision is limited to the acts of some court, commission, legislature, or body created by and responsible to the law, having power to make inquiries or decide issues, or to take and preserve evidence for such purposes. I have no hesitation in expressing an opinion that this provision does not cover, or intend to cover, or apply to, the acts of persons who are responsible to the law, but for whose acts the law is not responsible.

In *Emery's case*, *supra*, the first question raised was, whether the constitutional privilege of exemption relied on was applicable to investigations ordered and conducted by the legislature, or either of its branches. In its decision the court said: "By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally, for the purpose of establishing facts involved in an issue between other parties." (107 Mass. 181.) In *Doe dem. Earl of Egremont v. Date*, 43 E. C. L. R. 892, I find a remark from Lord Denman, C. J., which, although *obiter*, is entitled to some consideration, at least. He says: "A party to a suit has a right to insist that no evidence shall be produced against him, except

such as can be given legally. Now, if a witness be compelled by the judge at *nisi prius* to produce a title deed which he is legally entitled to withhold, it strikes me that the party to the suit against whom the evidence is produced is affected by that which ought not to have been laid before the jury. One sees that such a question might become of the utmost importance in criminal cases. I consider the authority which the judge exercises to differ materially from that exercised by persons for whom the law is not strictly responsible."

It is undoubtedly true that the evident intent and spirit of the constitution upon this subject is in harmony with the common law; but I have endeavored to show that the protection given to accused persons does not necessarily depend upon the constitutional provision. Several of the states, as we have seen, have no such provision, and yet the common law rule is the same there as here, if in force, and protects all persons from criminating themselves against their will. At a criminal trial, courts cannot take notice of the manner of obtaining evidence out of court. If it is competent and pertinent to the issue, it will be received. If it is a forced confession alone, it will not be admitted in evidence for the reason stated above. If the confession has led to a fact that cannot be false, it will be received for that reason; but I insist that the same rule does not obtain in court, in relation to facts there disclosed by an involuntary confession, or by any compulsory disclosure tending to criminate the defendant. Suppose the proof in this case had been that defendant killed some human being, and that he had voluntarily told another Chinaman that he killed Ah Tong and buried him, without stating the place of burial; that the state, having been fearful that the jury would not believe the Chinese witness, asked the court to order the defendant to go with the sheriff and point out the body; that the court so ordered, and, against defendant's consent, compelled him to obey; that the body was pointed out, that fact having been testified to by the sheriff, and the defendant convicted. If the body had not been found, it would have been error, because the compulsion might have

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prejudiced the minds of the jury against the defendant. But, inasmuch as it was found, I am unable to perceive, from the theory of the court, why such practice would not have been proper, because the result—the fact found—could not have been false, and it would have tended to prove the confession true.

Suppose, again, that a person is accused of stealing a gold bar. The defendant goes upon his trial before it is found. The state proves the larceny and many facts tending to show defendant's guilt. A witness testifies to facts showing almost, but not quite, conclusively, that defendant has the bullion concealed about his premises. Thereupon at the request of the district attorney, the court states to the defendant that there has been testimony concerning his possession of the bullion, but of the fact he neither has an opinion nor expresses any; that he will instruct the jury that the order he is about to make is no indication that he considers the defendant guilty, and that they must so consider it. Thereupon the court says to the defendant: "If you have the bullion, and will point it out and deliver it to the sheriff, I will give you a light sentence in case you are convicted; and if you will not do so, should the jury find you guilty, I will give you the full punishment allowed by law." The defendant delivers the bullion to the sheriff, the jury is charged as promised, and a conviction follows. Is there any doubt that such conduct on the part of the court would be error? Still, in neither of the supposed cases is the defendant required to speak or testify, and in both there is no opportunity or object to falsify. The finding of the body and the bullion tell their own tales. In both cases hope and fear may have induced the confession or discovery, but in both the discovery shows evidence of guilt which can not be falsified or simulated.

If witness Rhoades had testified that he knew the defendant was Ah Chuey, because he was a good English writer and had for years kept a diary; that he wrote in it every day and signed his name, "Ah Chuey," to each entry; that he saw the book a few minutes before coming into court; that defendant then had the book upon his person,

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would any one say that the court, without error, could have compelled him to show the book to the jury? And yet, why not on principle, if he could be compelled to exhibit a private, harmless mark for the same purpose? The object would have been to ascertain the truth, and the result would have verified the statement. Suppose, instead of the head and bust of a woman, he had written upon his breast, in India ink, the words, "I am Ah Chuey;" why could those words be shown with more propriety than the words in the diary, and could they not have been shown if it was proper to compel him to exhibit the mark?

In *Commonwealth v. Dana*, 2 Met. 337, the defendant was indicted for an alleged violation of the statute prohibiting the sale of lottery tickets, or the possession of the same with intent to sell, or to offer them for sale, or the aiding and assisting in any such sale. In support of the issue joined in the case, the commonwealth offered in evidence the copy of a search warrant issued from the police court, to the admission of which defendant objected on the ground that the same had been issued improvidently and was void in law. I quote a part of the decision:

"Again, it has been urged that the seizure of the lottery tickets and material for a lottery, for the purpose of using them as evidence against the defendant, is virtually compelling him to furnish evidence against himself, in violation of another article in the declaration of rights. But the right of search and seizure does not depend on the question whether the papers or property seized were intended to be used in evidence against the offender or not. The possession of lottery tickets with the intent to sell them was a violation of law. The defendant's possession, therefore, was unlawful, and the tickets were liable to seizure as belonging to the *corpus delicti*, or for the purpose of preventing any further violation of law. \* \* \* There is another conclusive answer to all these objections. Admitting that the lottery tickets were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant was illegal, or if the officer serving the warrant exceeded his authority, the party on whose



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complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully, nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt v. Tollervy*, 14 East. 302, and *Jordan v. Lewis*, 14 East. 306, note; and we are entirely satisfied that the principle on which these cases were decided is sound and well established." Mr. Greenleaf lays down the same doctrine in his work on evidence.

The rule that I contend for does not, in its practical application, depend upon the length of hair, the style of the shirt collar, or any other peculiarity of dress. "In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court cannot proceed with the trial or receive the verdict or pronounce the final judgment." (Cooley's Cons. Lim. 318; *State v. Johnson*, 67 N. C. 59.)

Had the identifying mark been upon some portion of the body not concealed, and had the jury seen it by reason of the defendant's presence in court, I do not say they could not have acted upon the fact so observed. What I say is, that whether the mark is concealed or not, the court can not compel a defendant, for the purpose of identification, or any other, the tendency of which is to criminate, to exhibit himself or any part of himself before the jury as a link in the chain of evidence.

An accused person can not be compelled to discover a fact while on trial, nor can he be compelled to be an unwilling instrument of discovery or proof after the discovery has been made by other evidence. He may refuse to plead even, and instead of making such refusal evidence of guilt the law provides that the plea of "not guilty" shall be en-

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tered. Had the defendant been accused of a misdemeanor only, his presence in court would have been unnecessary. Under such circumstances, had he elected to remain absent from the trial, I have no hesitation in expressing an opinion that it would have been error had the court caused the sheriff to bring him into court against his will, and there exhibit the mark; nor do I think the fact that he was required to be present in court in any manner abridged the right which he would otherwise have had.

But few decided cases have been found by counsel, the court, or myself, wherein the question involved in this case has been decided directly, but all that have come under my notice sustain the conclusion to which I have arrived and endeavored to express. The first case is *State v. Jacobs*, referred to by the court. In commenting upon that case, the court says it was decided upon two grounds, the second of which was that "the manner in which the defendant was compelled to exhibit himself was prejudicial to the defendant." It is not apparent from the decision that the defendant was treated indecorously or in any way prejudicial to his case, except that he was compelled to go before the jury and submit to their inspection. This is what that court said in relation to the manner: "Another argument of more weight is that the testimony when afforded to the jury is not incompetent, though it might have been an act of tyranny in the court to compel it. But this argument proves too much, and would be equally available if admitted in favor of the competency of a deed, or other private paper, which the court might wrongfully have compelled a defendant to produce. Surely, in such a case, the manner in which the deed or paper was produced and offered would be error, although the deed or paper, if fairly brought before the jury, would be competent evidence." I submit that the "manner" spoken of by the court referred only to the fact that the defendant was compelled to exhibit himself, and thus furnish evidence against himself; that proof of his *status* as a free negro, by him, was incompetent, while if the same fact had been proven by other persons who knew him, such proof would have been competent. If such is the case, then the

second ground of reversal stated by the court was only stating the first ground in a different way. In my opinion the only point decided in that case was that it was error to compel the defendant to exhibit himself before the jury for the purpose of showing that he was a negro. The next case is the *State v. Johnson*, 67 N. C. 57. The indictment charged Johnson, a colored man, with ravishing Susan Thompson. When she was on the stand as a witness for the state she was asked by the solicitor to look around the courtroom and see if she could see the man who committed the rape on her. She pointed to the defendant and said, "That is the black rascal." It was insisted by the defendant's counsel that this was making the prisoner furnish evidence against himself. The court say: "In support of his objection the prisoner relied upon *State v. Jacobs*, in which it was decided that the defendant could not be compelled to exhibit himself to the jury that they might see whether he was within the prohibited degree of color. But that case is not like this. There he was compelled to exhibit himself to the jury, that the jury might determine, by inspection, his quality and condition, his blood or race. That was a matter to be proved by the oath of witnesses who knew the facts, or, it may be, by experts. And although the defendant could not be compelled to exhibit himself to the jury, yet it would be competent for witnesses who knew him to speak of his color and of any facts within their knowledge, and to point to him as being the identical person of whom they were speaking." Suppose it was a matter to be proved by the oath of witnesses or by experts. Was it any the less error to compel the defendant to exhibit himself to the jury and supply the place of other witnesses? It will be noticed that in Johnson's case the court reiterates what was decided in the Jacobs case, that "defendant could not be compelled to exhibit himself to the jury."

The next case is *State v. Woodruff*, 67 N. C. 90. In that case, as in Johnson's, I draw attention to the fact that the defendant was not exhibited before the jury. He sat in his place, as he had a right, and was obliged to do. The bastard child was exhibited, or rather held in its mother's arms

while she was testifying, and in his address to the jury the solicitor called attention to the child's features and commented upon its appearance, the child being still before the jury. I have nothing additional to add in relation to the right of the state to have the defendant accused of felony present in court, and the right of the jury to observe him while there; and in case of misdemeanor the right is the same if he voluntarily appears in court. Certainly the solicitor had the right to call the attention of the jury to the child's features, and that was all he did do. At any rate, the defendant was not disturbed in any manner, and if the jury gathered any additional information as to his appearance, it was the result of necessity in giving him his constitutional right to be present in court; it was not the result of compulsion by the court. Besides, if, in truth, in the Jacobs case, it did no good or harm to parade him before the jury, if they discovered nothing but what they knew before he was exhibited, still those facts would not have changed the result in the appellate court. That court could not have known that the error, if such it was, was harmless.

"It is the capability of abuse, and not the probability of it, which is to be regarded in judging of the reasons which lie at the foundation, and guide in the interpretation, of such constitutional restrictions." (Emery's Case, 107 Mass. 183).

To show that the court in Woodruff's case recognized the distinction that I am endeavoring to make between exhibiting the defendant, as was done in the Jacobs case, and allowing him to sit undisturbed in the presence of the jury, as was done in the Woodruff case, and to show by implication that the court still adhered to the opinion in the Jacobs case, I quote a few lines from the decision: "*The State v. Jacobs* has been argued as an authority to show error in this case, as if the court had ordered the defendant to stand up and exhibit himself before the jury, as was done in Jacobs' case. But the record shows no such thing, and, therefore, the argument founded on that supposition fails."

*The State v. Garrett* is the next case. The fact is not that the defendant was compelled to unwrap her hand and

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exhibit it to a physician before the coroner's jury, as such, although it was done in their presence. The jury had rendered their verdict against her before she was compelled to show her hand. Whether she could have been compelled to exhibit her hand while the jury were acting, and before their verdict, is not in the case, and that fact, at least, must appear before it can be claimed that the Garrett case should have been governed by the controlling principle enunciated in the Jacobs case. Compelling the defendant to show her hand after the verdict against her, did not change the verdict, and the effect of a disclosure at that time, and under such circumstances, was the same as though it had been compelled by any of the spectators present. At the trial the defendant objected to evidence as to the condition of her hand, and relied upon the Jacobs case. The court said: "The distinction between that and our case is, that in Jacobs' case, the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color, thus he was forced to become a witness against himself. This was held to be error. In our case, not the prisoner, but the *witnesses*, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation."

The Stokes case is the next. There the court said: "In the presence of the jury the defendant was asked to make evidence against himself;" that is, he was asked to take off his boot and make a new track to be compared with the one found near the scene of crime. I am unable to perceive how it would have been less erroneous to have asked him, in the presence of the jury, to place his foot in the track already made, or to take off his boot and show his bare foot for the same purpose. In either case the defendant would have been asked to furnish a factor necessary in arriving at a conclusion whether or not his foot made the track found near the place of homicide, and inferentially, whether or not he was the guilty party. The method adopted might have been more convincing to the jury than either of the

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others mentioned had the court held it proper, but I fail to see how it was more erroneous.

I find nothing in the quotation made by the court from Story and Blackstone against the views I entertain. Judge Story says the insertion of this clause "is but an affirmance of the common law privilege;" that it was adopted to prevent the evils which had resulted from the custom of other countries in compelling criminals to give evidence against themselves, and of being subjected to the rack or torture in order to procure a confession. A part of the object then was to prevent the giving of compulsory evidence. Surely, that is not confined to testimony or statements coming from the mouths of witnesses or accused persons. As to Hoag's case, referred to by the court, it is enough to say that it is evident from the text that his foot was exhibited to the jury by the defendant himself. Besides, the result was entirely in his favor and he was acquitted. Mr. Burrill does not intimate, nor does any other text writer, so far as I am able to find, that it would have been competent for the state to have compelled the prisoner to show his foot in court in aid of the prosecution. If the law of New York had not allowed Hoag to testify in his own behalf, and had the law been the same in this state at the time of the defendant's trial, I agree with the court that at his own request, the first could have exhibited his foot, and the last his arm, to the jury. But my conclusions from those facts are very different from those arrived at by the court. The reason why they would have been allowed to do so is because the reasons for the law's exclusion of testimony would not have existed in relation to proofs offered by them independently of their testimony. Self-interest might have prompted them to commit perjury if allowed to testify; hence, under the old rule, they would have been excluded as witnesses. But as to physical peculiarities, the reason of the rule, and hence the rule itself, would have failed. I am unable to understand why the constitutional provision, that "no person shall be compelled to be a witness against himself in a criminal case," should be construed as relating solely to testimony given, or a statement made by him, because,

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Argument for Appellant.

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under a law not allowing him to testify, he may exhibit himself for the purpose of proving a physical peculiarity independently of any testimony.

My conclusion is that under both the constitution and the common law, it was error to compel the defendant, at the trial, to make a disclosure which, with the testimony of witnesses, tended to prove him to be Ah Chuey, and indirectly to establish his guilt. I think the error is as great as it would have been had the court compelled the defendant to admit that he was Ah Chuey. It accomplished the same result. In criminal cases the state must prove guilt without the aid of the accused at the trial, unless the guaranteed rights are waived, when a waiver is permissible.

I therefore dissent from the opinion of the court.

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[No. 927.]

OSCAR ALLEN, RESPONDENT, v. JAMES MAYBERRY,  
APPELLANT.

**SUFFICIENCY OF SHERIFF'S RETURN—CLERICAL MISTAKE.**—Where the sheriff made return that he personally served the summons upon James Mayberry, and further certified that he "delivered to the said Jame May a certified copy of the complaint, etc.:" *Held*, that the word "said" preceding the words "Jame May," shows that they were written by mistake for James Mayberry, and that the return is sufficient.

**APPEAL TAKEN FOR DELAY—RULE AS TO DAMAGES ENFORCED.**

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

*Boardman & Varian*, for Appellant.

I. By the return of the officer it *affirmatively* appears that a certified copy of the complaint was not served on appellant. The statute specially provides how service shall be made. (Civ. Pr. Act, secs. 28, 29.) These provisions were not complied with, hence there is no presumption in favor of the jurisdiction. (*O'Brien v. Shaw's Flat Co.*, 10 Cal. 343; *Aiken v. Quartz Rock M. G. M. Co.*, 6 Cal. 186;

*McMillan v. Reynolds*, 11 Id. 378; *McMinn v. Whelan*, 27 Id. 312; *Forbes v. Hyde*, 31 Id. 348; *McKinlay v. Tuttle*, 42 Id. 577.)

*Thomas E. Haydon*, for Respondent.

I. The return of the officer was sufficient.

II. Judgments are only reversed for material errors. (*Quint & Hardy v. Ophir S. M. Co.*, 4 Nev. 308; Pr. Act, sec. 11; Comp. Laws, 1134.) Errors will not be *presumed*. (*People v. Best*, 39 Cal. 690; *Moore v. Massini*, 43 Cal. 389.) The error, if any, should have been brought to the attention of the court below. (*Howard v. Richards*, 2 Nev. 133; *Abel Guy v. Ed. Franklin*, 5 Cal. 417.) Defendant has not shown that the complaint and summons were not served. (*Moore v. Massini*, 43 Cal. 389, *supra*.)

By the Court, BEATTY, C. J.:

The defendant in this case appeals from a judgment rendered against him upon his default, and the only question to be considered is whether the sheriff's return shows that he was served with a certified copy of the complaint.

The following is a copy of the return:

"STATE OF NEVADA, COUNTY OF WASHOE, ss.

Sheriff's return.

"I hereby certify and return that I received the within summons on the eleventh day of May, A. D. 1878, and that I personally served the same upon the within named defendant, James Mayberry, by showing the original summons to him and delivering to him a copy of the same, in Washoe county, State of Nevada, on the eleventh day of May, A. D. 1878. And I further certify that I delivered to the said Jame May (*sic*) a certified copy of the complaint filed in said action, with a copy of the summons attached, at the same time and place. Dated this eleventh day of May, A. D. 1878.

A. K. LAMB,

"Sheriff of Washoe county, State of Nevada.

"By I. CHAMBERLAIN, Deputy Sheriff."

This shows clearly that the defendant was served with a certified copy of the complaint. The word "said" preceding the words "Jame May" shows that they were



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Argument for Petitioner.

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written by mistake for James Mayberry, he being the only person to whom the word "said" could possibly refer. The whole context proves the same thing too conclusively to admit of a moment's doubt.

The appeal was manifestly taken for delay, and the judgment must be affirmed with damages. (*Wheeler v. Floral M. and M. Co.*, 10 Nev. 203; *Escere v. Torre*, decided at the present term.)

The judgment is affirmed, with ten per cent damages in addition to costs and accruing interest.

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[No. 965.]

THE STATE OF NEVADA, EX REL. F. L. AUDE, RE-  
LATOR, v. JOHN H. KINKEAD, RESPONDENT.

DISTRICT JUDGES—ART. VI. SECTION 5 OF THE CONSTITUTION CONSTRUED.—

In construing this provision of the constitution: *Held*, that the legislature had the power to reduce the number of district judges in the first judicial district.

*Idem*—STATUTE CONSTRUED.—*Held*, that since the passage of the act of February 27, 1866 (Stat. 1866, 140, sec. 1), the first judicial district has been entitled to but one judge.

PETITION for mandamus.

The facts appear in the opinion.

*Wells & Stewart*, for Petitioner:

I. Petitioner bases his claim to a commission, and his right to hold said office of district judge of the first judicial district, upon the provisions of sec. 5, art. 6, of the constitution; and claims that all legislation intended to deprive said district of three district judges, is unconstitutional and void, under said sec. 5, art. 6, and that, therefore, his said election was regular and legal. The districting of the state in the constitution was had, in order that the judicial part of the machinery of the state government might be put in motion before it could be done by the legislature. This is obvious from the language used, and the time fixed by the section for the first district judge elected under it, to go

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Argument for Petitioner.

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into office the first Monday in December, 1864, and one week before the first meeting of the legislature under the constitution. But the next thing provided for by the framers of the constitution, after districting the whole state, was to provide means whereby that districting should not remain perpetual, but might be changed, from time to time, as the convenience of the public and the proper dispatch of business might require. Hence, this phrase was next put into the section, to wit: "The legislature may, however, provide by law for an alteration in the boundaries or divisions of the district herein provided, and also for increasing or diminishing the number of the judicial districts and judges therein." We claim that two separate and distinct propositions are contained in this sentence, to wit: 1. The power is given to retain the original nine districts, and to rebound or re-divide them, if desired by the legislature, in such way as to better subserve the business necessities and convenience of the public; and, 2. The power is given to re-district the entire state, and make of it just as many districts more or less than nine, as should be deemed necessary and convenient, so as not to affect a then incumbent of the office of district judge. But it is plain and logically indisputable, that in the exercise of the second power granted in this sentence, the legislature must, if it increase or diminish the number of judicial districts, also increase or diminish the number of judges.

II. The letter of a constitutional provision should never be interfered with, except when entirely free from doubt as to the construction given; and if the point be one involving public policy only; no equitable construction is permissible. (Sedg. on S. & Con. Law, 19 and 370 and note, 248, 251, 263, *et seq.*; Smith's Com. 831 *et seq.*) Every clause in a section of law, statutory or constitutional, must, if possible, have some effect. (Sedg. 200 and note; Smith's Com. 710; 1 Bibb. 210.)

III. The act of 1866, reducing the number of judges in the first district, is unconstitutional and void. (Sedg. 411 and note, also, 180-182; 3 Coms. 547-568.) As to purview and proviso: Sedg. 45 and 49 and note; 10 Peters, 449;

10 Wheaton 1 and 30; 2 Dwarris on Stat. 515; Smith's Com. 709 *et seq.*, and 712.

IV. Where a constitution takes away the power from the legislature to pass laws on a given subject, this is a repeal of existing laws on that subject. (Sedg. 555, 556; 4 Scann. 344; 4 Nev. 472.)

*M. A. Murphy*, Attorney-General, for Respondent, cites the following authorities: Sedg. on Cons. Law, 244, 409, 413; Cooley's Cons. Lim. 54, 58; 7 Md. 135; 54 Penn. St. 255; 49 N. Y. 284; 24 N. Y. 488; 41 Cal. 147.

By the Court, BEATTY, C. J.:

It is the official duty of the respondent, as governor, to issue commissions to those who are elected to the office of district judge. The petitioner claims to have been elected a judge of the first district at the last general election, but the respondent refuses to grant him a commission, and this proceeding has been instituted for the purpose of compelling him to do so. Respondent demurs to the petition for mandamus, and the question is whether, upon the facts alleged, the petitioner is entitled to the writ.

It appears that at the general election, held on the fifth of November, 1878, the petitioner and the Hon. Richard Rising were the only persons voted for the office of district judge of the first district; that they were both eligible to the office; that Judge Rising received the highest number of votes and petitioner the next highest. The election of Judge Rising is conceded, but the petitioner contends that, under the Constitution of the State, the first district is entitled to three judges, and consequently that he also was elected. The respondent claims that the provision of the constitution giving three judges to the first district was intended to be a merely temporary arrangement; that it was within the power of the legislature to reduce the number, and that, since the passage of the act of February 27, 1866 (Stat. 1866, pp. 139, 140, sec. 1), the first district has been entitled to but one judge. The petitioner insists that the act referred to is unconstitutional, and that, notwith-

standing its passage by the legislature, the original provision of the constitution is still in force.

The question to be decided, therefore, resolves itself into this: Could the legislature reduce the number of judges in the first district? This depends upon the proper construction of sec. 5 of art. VI. of the constitution, which is as follows:

"Sec. 5. The state is hereby divided into nine judicial districts, of which the county of Storey shall constitute the first, the county of Ormsby the second. \* \* \* The legislature may, however, provide by law for an alteration in the boundaries or divisions of the districts herein prescribed and also for increasing or diminishing the number of the judicial districts and judges therein. But no such change shall take effect, except in case of a vacancy, or the expiration of the term of an incumbent of the office. At the first general election under this constitution there shall be elected in each of the respective districts (except as in this section hereafter otherwise provided), one district judge, who shall hold office from and including the first Monday of December, A. D. 1864, and until the first Monday of January, in the year 1867; after the said first election there shall be elected at the general election which immediately precedes the expiration of the term of his predecessor, one district judge in each of the respective judicial districts (except in the first district, as in this section hereinafter provided). The district judges shall be elected by the qualified electors of their respective districts, and shall hold office for the term of four years (excepting those elected at said first election) from and including the first Monday of January next succeeding their election and qualification; *provided*, that the first judicial district shall be entitled to, and shall have, three district judges, who shall possess coextensive and concurrent jurisdiction and who shall be elected at the same times, in the same manner, and shall hold office for the like terms, as herein prescribed in relation to the judges in other judicial districts. \* \* \*"

In accordance with the provisions of this section, three

judges were elected for the first district at the first election under the constitution in November, 1864. Their term expired on the first Monday of January, 1867. To succeed them but one judge was elected in November, 1866, and but one was elected in 1870 and in 1874, the general understanding being that the act of February, 1866, above cited, reducing the number of judges in that district to one, was entirely valid. Undoubtedly the same understanding prevailed at the recent election, and but one judge was really voted for.

There is a strong presumption in favor of the constitutionality of a law passed almost contemporaneously with the adoption of the constitution, and so long and so universally acquiesced in. No court would be justified in declaring such a law invalid unless forced to do so by the most cogent and conclusive reasoning. The argument in behalf of petitioner, though elaborate and very ingenious, is still far from convincing. Its fundamental fault is that it attempts, by the application of narrow and technical rules of statutory construction, to wrest the provisions of the constitution above quoted from their obvious meaning. We shall not attempt to follow the argument in detail, or to notice particularly the various propositions upon which it is based. It will be sufficient to state our own construction of the clauses in question, and the reasons which we think are sufficient to sustain our conclusions.

In the first place, there can be no doubt as to the fact that it was the intention of the framers of the constitution to empower the legislature to reduce the number of judges in the first district. This is sufficiently proved by the debates in the constitutional convention (650, 651, 713, *passim*). If further proof were necessary, it is afforded by the circumstances in view of which the convention acted. The condition of the country at that time was such as to forbid any other than a provisional arrangement as to the number of judges to be assigned to the respective districts. In Storey county there was such an immense accumulation of old business as to require for a time an extra number of judges, but it was foreseen that as soon as the old docket

was cleared off the number might be conveniently reduced. In no other county of the State was more than one judge required at that time, but it was natural to anticipate that at some future time the state of affairs prevailing along the Comstock might find its parallel in other localities and render it necessary to increase the number of judges in other districts.

In view of these facts there is no reason for taking the following language in any other than a literal sense: "The legislature may, however, provide by law for an alteration in the boundaries or divisions of the districts herein prescribed, and also for increasing or diminishing the number of the judicial districts and judges therein." This means that the legislature may increase or diminish the number of judges in the respective districts, and not, as petitioner contends, that the number of judges in the State may be incidentally increased or diminished by increasing or diminishing the number of districts. Besides, being opposed to the natural import of the language of the constitution, this interpretation violates a cardinal rule of construction; it renders the words "and judges therein" meaningless and superfluous. For if the proposition upon which the whole argument of the petitioner rests is true—that is, that it has been established by the constitution, that, so long as it endures, the first district must have three judges, and every other district one, and only one judge—then the power to increase or diminish the number of the districts necessarily included the power to increase or diminish the number of judges in the state, and the sentence without the words "and judges therein" meant exactly as much as it is contended it means with them. We repeat, therefore, that the legislature was empowered to increase or diminish the number of the judges originally assigned to the respective districts, as provisionally organized by the constitutional convention; and we see no difficulty in answering any of the special reasons urged by the petitioner against this construction.

The proviso to section 7, article VI, which allows the legislature to designate other places than the county seat

## Points decided.

for holding court in case a county should be divided into two or more districts, does not prove, it has no tendency to prove, that the convention intended to deprive the legislature of the power to assign more than one judge to a district. That was a provision for the benefit of counties of large area, with populations gathered about different centers. It could have no application to a small county with its whole population at the county seat.

Again, the power to "diminish" the number of judges in the respective districts is not a power to entirely deprive a district of any judge; it does not apply where a district has but one judge. To diminish means to make less, not to utterly wipe out.

It is true also that our conclusion involves the admission that the legislature might "in its caprice" (if it can be presumed ever to act from caprice) assign a hundred judges to one district; but the fact that a power is capable of abuse is no argument against its existence. Power must be reposed somewhere, and wherever it is lodged it may be abused. No people could live under a constitution which denied to its functionaries every power that could possibly be misemployed.

The petition for a mandamus is dismissed.

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[No. 912.]

THE COUNTY OF WASHOE, RESPONDENT, v. THE  
COUNTY OF HUMBOLDT, APPELLANT.

**TRANSFER OF CRIMINAL CASES—IRREGULARITY IN PAYMENT OF CLAIMS.—**

Where a criminal case is transferred from one county to another, the former is liable for all costs and expenses incurred in the trial of said cause, and it cannot complain of any mere irregularity in the mode of paying the expenses, in the first instance, by the latter county. [Beatty, J., dissenting in part.]

**IDEM—ILLEGAL FEES.**—The county from which the cause was transferred has the right to show that the services charged for were never rendered, or that the fees charged are unauthorized by the statute.

**FEES OF OFFICERS.**—Officers can only demand such fees as the law has fixed and authorized for the performance of their official duties.

**ATTORNEYS' FEES—CONSTRUCTION OF STATUTE.**—In construing the statute

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Statement of Facts.

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approved March 5, 1875 (Stat. 1875, 42), relative to attorneys' fees in criminal cases: *Held*, that an attorney who defends a prisoner under appointment by the court, is entitled to a fee not exceeding fifty dollars for each trial of the cause, in whatever county the case may be tried, and an additional fee, not exceeding fifty dollars, if the case is followed into the supreme court.

**ALLOWANCE OF FEES FOR SUMMONING JURY—WHEN PROPER.**—The county from which a criminal case is transferred is liable for the fees of the sheriff in summoning a jury upon a special venire for that particular case.

**SHERIFFS' FEES—SUMMONING A JURY—MILEAGE.**—When a venire is issued to a sheriff for thirty jurors, and he finds only twenty-four: *Held*, that he was entitled to his fees "for miles actually traveled in attempting to find and serve jurors whose names appeared upon the venire, but who could not be found and served."

**IDEM—TAKING PRISONERS BEFORE COURT.**—The sheriff is not entitled to any compensation for bringing the defendant into court during the trial.

**IDEM—ATTENDANCE ON COURT.**—The sheriff is entitled to five dollars for each day's attendance. He cannot charge extra for a night session.

**IDEM—SERVICE OF SUBPOENA IN ANOTHER COUNTY.**—The sheriff is not authorized by the statute to serve a subpoena upon witnesses residing in any other county, except it is within the same judicial district.

**CLERKS' FEES—JURORS' CERTIFICATES.**—The clerk is not entitled to any fees from the county, for issuing time checks or certificates to each individual juror.

**IDEM—MOTIONS AND ORDERS.**—The clerk is only entitled to charge for such motions and orders as are properly entered in the records of the court.

**JURORS' FEES—ATTENDANCE FIRST DAY.**—The county from which a criminal cause is transferred is properly chargeable for one day's attendance of each juror present on the first day of the trial of the case.

**REPORTERS' FEES.**—Where the court is authorized to appoint a short-hand reporter, and there is no statute regulating his fees, he is entitled to a reasonable compensation for his services.

**SURVEYORS' FEES.**—Where it is necessary to have a survey of the premises where the crime was committed, in order to properly present the case to the jury, the county commissioners are authorized to allow a reasonable compensation for such survey.

**VERIFICATION OF CLAIMS—UNAUDITED ACCOUNTS—JURISDICTION.**—Where the expenses of a criminal trial have been properly audited in the county where the trial was had, it is unnecessary to have the same claims verified and presented as unaudited accounts to the commissioners of the county from which the cause was transferred. [Beatty, J., dissenting.]

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.



## Argument for Respondent.

George P. Harding, District Attorney of Humboldt County, for Appellant.

I. The treasurer of Washoe county had no authority to pay the witness fees. The order for their payment was made by the judge instead of by the court. (1 Comp. L., 2169.)

II. The allowance of attorneys' fee for three hundred dollars was illegal. (Stat. 1875, 142; *Rowe et al. v. Yuba Co.*, 17 Cal. 61.)

III. County commissioners have no jurisdiction to examine, settle, or allow any accounts not legally chargeable against the county. (2 Comp. L., 3077; *People ex rel. Raun et al. v. Supervisors of El Dorado Co.*, 11 Cal. 170; *Robinson v. Supervisors of Sacramento Co.*, 16 Id. 208; *Williams v. Bidleman*, 7 Nev. 68.) Their action must appear to be in conformity with the provisions of the law creating and defining their powers and duties. (*Finch v. Supervisors of Tehama Co.*, 29 Cal. 454; *Linden v. Case*, 46 Id. 171; *State v. Commissioners of Washoe Co.*, 5 Nev. 319; *Swift v. Commissioners of Ormsby Co.*, 6 Id. 97; *Hess v. Commissioners of Washoe Co.*, 6 Id. 109; *State v. C. P. R. R. Co.*, 9 Id. 79; 2 Comp. L., 3078, 3079, 3081, 3093, 3095; *Connor v. Morris*, 23 Cal. 447; *McCormick v. Tuolumne Co.*, 37 Id. 257; *Fox v. Supervisors*, 49 Id. 563; 37 Id. 193.)

Robert M. Clarke, for Respondent.

I. The law makes the officials of plaintiff the agents for the defendant, and in the allowance and payment of all charges and expenses incurred substitutes the plaintiff for defendant, and plaintiff's allowance and payment is in legal effect the allowance and payment by defendant, and binds the defendant, and is conclusive upon it. The authorities of the defendant have nothing to do with the allowance of the claims in the first instance. The original claims are not to be submitted to it and can not be passed upon by it. If the officials of the plaintiff, acting within the scope of their authority, and having jurisdiction to act, have made mistakes or committed errors, such mistakes or errors can not be reviewed by the defendant or by the courts in this form of action.

Wm. Cain, District Attorney of Washoe County, also for Respondent.

By the Court, HAWLEY, J.:

The case of *The State v. Rover* (indicted for murder) was transferred from the county of Humboldt to the county of Washoe for trial. It was twice tried in Washoe county.

This action was commenced to recover the sum of three thousand six hundred and forty-five dollars and five cents, the amount of indebtedness alleged to have been legally incurred by Washoe county upon the trials of said case. It was tried before the court without a jury and a judgment was rendered in favor of Washoe county in the sum of three thousand five hundred and seventy-three dollars and twenty-five cents.

Several of the items objected to relate exclusively to alleged irregularities in the form and manner of the presentation and allowance of certain claims by the officers of respondent and it becomes material to ascertain, in advance, whether or not appellant can complain of such irregularities, if any exist.

By the transfer of the Rover case it became the duty of the respondent to act for appellant, and for all services rendered by any of its officers, or other parties, or costs incurred, relating to the trials of said case, the appellant became liable (1 Comp. Laws, 2300; *ex parte Taylor*, 4 Ind. 479), and it is not in a position to complain that the treasurer of respondent paid certain claims that were informally or irregularly presented to him for payment.

The material questions involved on this appeal are whether the accounts complained of were necessarily incurred during the trials of the Rover case and constitute legal charges against appellant, and not whether the treasurer of respondent could or should have objected to the payment of the same because certain orders for the payment of witness fees were indorsed upon the affidavits presented by the witnesses who were entitled to compensation, and were signed "S. H. Wright, District Judge," instead of "being spread upon the minutes of the court," as required by

statute (1 Comp. Laws, 2169, 2170), or because some of the other claims were not indorsed in the manner provided for by the statute.

But appellant is not bound to pay every claim because it was presented to, examined, allowed, and paid by the respondent. It had the right to show, if it could, that the services charged for were never in fact rendered, or that the fees charged were unauthorized by the statute.

There is a preliminary objection against the examination of any of the accounts complained of. There are no findings containing an itemized statement of the disallowed accounts.

In order to have the accounts reviewed by this court appellant ought to have asked for a specific finding as to the particular accounts allowed or disallowed by the district court. (*Young v. Clute*, 12 Nev. 37.)

This objection, however, was not urged by the respondent's counsel, and hence we shall proceed to examine and dispose of all the objections to such accounts as come within the rule above stated.

Prior to such examination it is proper to state, in general terms, that where the accounts depend solely upon the question whether the same are, or are not, reasonable, no argument has been advanced by appellant's counsel which, in our opinion, calls for any reduction of the amounts allowed by the county commissioners of Washoe county.

1. Attorneys' Fees. The language of the second section of the act entitled "An Act to provide for the payment of attorneys in certain cases," approved March 5, 1875 (Stat. 1875, 142), being ambiguous, it becomes our duty to determine the real intention of the legislature.

Section 1 provides that any attorney appointed by the court to defend a prisoner is entitled to "such fee as the court may fix, not to exceed fifty dollars."

Section 2 provides that the attorney so appointed can not "be compelled to follow a case to another county or into the supreme court." But if he does follow the case he "may recover an enlarged compensation, to be graduated on a scale corresponding to the prices allowed."

Now, if this section invests the court with discretionary

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Opinion of the Court—Hawley, J.

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power in fixing the fees to take into consideration the inconvenience and expense resulting from the attorney's absence from his professional duties at home, then the allowances made in this case were reasonable and should not be disturbed. But we are of opinion that it was not the intention of the legislature to invest the courts with any such discretionary power.

Without any action on the part of the legislature, it would be the duty of an attorney appointed by the court to defend the prisoner without any compensation. (*Rowe v. Yuba County*, 17 Cal. 61; *Lamont v. Solano County*, 49 Cal. 158; *Samuels v. The County of Dubuque*, 13 Iowa, 536; *Johnston v. Lewis and Clarke County*, 2 Montana, 159; *Elam v. Johnson*, 48 Ga. 348.)

By the act in question, the legislature very properly made provision for some compensation, but expressly limited the amount to be allowed. By the express terms of the act it is left optional with the attorney to follow the case to another county, or into the supreme court, or to refuse to do so.

We are of opinion that it was the intention of the legislature to provide for the payment of a fee, not exceeding fifty dollars, to every attorney who defends a prisoner charged with crime, under appointment from the court; that an attorney appointed to defend a prisoner charged with any of the offenses specified in section one is entitled to a fee, not exceeding fifty dollars, for defending the case in the county where the prisoner is indicted, and if, after the trial in that county, the cause is transferred to another county, and the attorney thus appointed voluntarily follows the case and defends the prisoner, he would be entitled to an additional compensation, not to exceed the sum of fifty dollars. If the case was thereafter followed to the supreme court, the attorney would be entitled to a further compensation, not to exceed fifty dollars. In other words, the attorney voluntarily following the case stands upon the same footing, so far as the fee is concerned, as any other attorney would who might be appointed by the court in the county to which the case is transferred.

Under the provisions of the statute, he has the right to follow the case and claim the enlarged compensation. If he refuses to follow the case, it would be the duty of the court to appoint some other attorney, who would be entitled to a fee not exceeding fifty dollars.

The only service, therefore, which the second section of the act performs is to give the attorney first appointed the privilege of following the case to another county, or into the supreme court, and claiming the enlarged compensation.

From this construction of the law it follows that Messrs. Bonnifield and Davies were each entitled to a fee, to be fixed by the court, in a sum not exceeding fifty dollars for each trial of the case in Washoe county. The amount allowed in excess thereof is unauthorized by the statute, and must be rejected.

The allowance of twenty-five dollars to T. W. W. Davies for arguing the motion in arrest of judgment is clearly erroneous. The court has no authority, under the provisions of the statute, to fix any fee, except for defending the case, which necessarily includes all the motions to be made therein.

2. Sheriffs' Fees. We are of opinion that the charges made by the sheriff for summoning jurors for the trial of Rover were properly allowed.

We agree with appellant's counsel that it ought not to be charged with the fees of the sheriff for summoning the regular panel of jurors for either term of the court when the Rover case was tried (unless it was the only case to be tried), but no valid reason can be urged why appellant should not be held liable for the sheriff's fees in serving any venire for additional jurors especially required for the trial of the Rover case, and it is only for such services that the charges were made. It is true that the venires did not upon their face purport to have been issued for the Rover case. The law, however, does not require the fact to be stated in any venire that it is issued or made returnable for any particular case. (1 Comp. L. 1054, 1055.) These facts can only be made to appear by the testimony of the officers

having personal knowledge of the same. From the testimony adduced upon the trial of this case, it does affirmatively appear that the additional venires (charged for) were issued specially for and on account of the Rover case. It might be claimed that the fees of the sheriff for such services are not necessarily costs taxable in any particular case. In a literal sense this is correct, but it must be borne in mind that in the ordinary administration of justice the charges for such services, being fixed by statute, must be paid by somebody. If the trials of Rover had occurred in Humboldt county, it would have been compelled to pay for such services, and in the absence of any express statute upon the subject, it affirmatively appearing to our satisfaction that the services were necessarily rendered on account of the Rover case, we think that these charges against the county of Humboldt were, as we have already stated, properly allowed. (*Shawnee County v. Wabaunsee County*, 4 Kansas, 312.)

The members of this court do not agree upon some of the questions concerning the allowance of the claim under discussion, but in the opinion of a majority, the mere fact that the record shows that some of the jurors named in the venire charged for were retained by the court for the trial of other causes at the same term, in which appellant had no interest, does not constitute a sufficient reason to induce the court to reject the claim as being an illegal or improper charge against the county of Humboldt.

On the second trial, the venire placed in the hands of the sheriff called for thirty jurors, and it is claimed that he is only entitled to charge for mileage for twenty-four. The record shows that he found only twenty-four jurors, that he traveled three hundred and ninety-seven miles in serving the twenty-four jurors, and thirty-seven additional miles were charged "for miles actually traveled in attempting to find and serve jurors whose names appeared upon the venire, but who could not be found and served."

The sheriff was entitled to fees and mileage for serving the twenty-four jurors, and in the event of the jurors living in different directions, the statute (Stat. 1875, 147) au-

thorizes the allowance of mileage whether the jurors named in the venire be found or not. The mileage in such cases is necessarily made in "serving such venire."

The charges made by the sheriff for taking the prisoner before the court were unauthorized by law and must be rejected. It is only in "bringing up a prisoner on *habeas corpus*" that a sheriff is entitled to any compensation for bringing a prisoner before the court. (Stat. 1875, 148.) The charges for attendance on the district court for "one day and night, ten dollars," must be reduced to five dollars each.

The fee bill authorizes the sheriff to charge five dollars for each day's attendance upon the court. He is entitled to the five dollars if he is only detained one minute, and he cannot charge any more if he is kept in attendance for the entire twenty-four hours.

No rule of law is better settled than the one under consideration, that an officer can only demand such fees as the law has fixed and authorized for the performance of his official duties. (*Board of Commissioners of Jay County v. Templer*, 34 Ind. 322; *Crittenden County v. Crump*, 25 Ark. 235; *Massing v. The State*, 14 Wis. 502; *The Town of Carlyle v. Sharp*, 51 Ills. 71; *Briggs v. City of Taunton*, 110 Mass. 423.)

In the opinion of a majority of the members of this court, the fees and mileage of the sheriff for the service of subpoenas upon witnesses residing in Humboldt county ought not to have been allowed.

The statute only provides for the service of process by the sheriff within his county (2 Comp. Laws, 2956) except where another county is attached to the same judicial district. (2 Comp. Laws, 2967.) It provides that "a peace officer must serve within his county or district any subpoena delivered to him for service." (1 Comp. Laws, 2167.) The district court had no authority to order the sheriff of Washoe county to serve the subpoena in the county of Humboldt, that county not being within his judicial district. The statute compels witnesses from other counties to attend the place of trial whenever the judge of the court where the

cause is to be tried or a justice of the supreme court shall indorse on the subpoena an order for the attendance of witnesses (1 Comp. Laws, 2171); but in such cases the service must be made in the manner pointed out by the other provisions of the statute which we have cited.

It is true, as was argued by respondent's counsel, that it is the duty of the sheriff of every county "to obey all lawful orders and directions of" the district court "in his county," and "to execute the process, writs, or warrants of courts of justice \* \* \* when delivered to him for that purpose." (2 Comp. Laws, 2957.) But the officer is not required to obey any order which is not authorized by law, and although we are convinced that the court in the case under consideration acted in good faith in directing the sheriff of Washoe county to make the service, under the belief that it was actually necessary in order to promote the ends of justice, and that the sheriff also acted in good faith, believing it to be his duty to obey such order and direction of the court; yet we are not authorized to go behind the statute and allow this charge upon any such ground.

The county of Humboldt had the right to anticipate, when the Rover case was transferred, that in the trial of the case the county of Washoe would not incur any expense not authorized by law, and it can not and ought not to be held liable for any such charge or expense.

3. Clerks' Fees. The charges of the clerk for issuing "time checks" or certificates to each juror should not have been allowed. The statute makes it the duty of the clerk "to keep an accurate account of the attendance of each juror during the term of the court, and at the close of the term to ascertain the amount due each juror for mileage and attendance, after deducting the amount received by him as fees in civil cases." (Stat. 1875, 138.)

The object of the legislature in requiring the clerk to keep such a record was to enable the county commissioners to ascertain the amount to be paid each juror "from the general fund of the county." A general certificate from the clerk, for which he would be entitled to charge one dollar, would be all that is necessary to accomplish that purpose.



If any juror demanded a certificate of his time, attendance, and mileage, the clerk would, under the general fee bill, be authorized to charge him one dollar for the certificate; but he is not authorized to make any such charge against the county.

The clerk's charges for motions and orders entered and oaths administered are, in part, illegal.

The record shows "that the thirty motions and orders charged for by the clerk were actually made and entered in a memorandum book kept by the clerk in open court; but no more than eighteen of said numbers were ever actually entered in the regular court record;" that "the clerk actually administered forty-two oaths to the officers during the trial of the case, all of which appear upon his memorandum book kept in court, and only twenty-seven of which were ever formally entered in the regular court record."

We are of opinion that the records of the court are the best evidence to establish facts of this character.

The record is silent as to the character of the motions and orders entered in the memorandum book and not transcribed in the records of the court. They may or may not have been such motions and orders as would, if properly entered, have constituted legal charges.

There may be orders made by the judge during the progress of every trial that ought not to be entered in the record book. For instance, to cite extreme cases, the court might order a bystander to take off his hat or to be seated. He might order a witness to change his position, so that the court, jury or counsel could more distinctly hear his testimony. It would, however, be absurd to charge for such orders or to enter them in the record book. It is the duty of the clerk to keep a correct record of all the proceedings of the court legitimately pertaining to the trial of every case. It is the duty of the court to exercise a supervisory power over its own records and to see that the record book is not incumbered with improper or irrelevant matter.

The clerk is entitled to fifty cents for entering every motion, exception, rule, or order in the minutes of the court and is not entitled to any charge for the entry of such

motions or orders in the memorandum book kept by the clerk for his own convenience.

If the clerk omitted to keep a correct record of all the proceedings of the trial he certainly ought not to complain of the court for refusing to allow him any compensation for the non-performance of his official duties.

4. Jurors' Fees. The objections of appellant to the charges for one day's attendance of all the jurors present on the first day of each of the trials of the Rover case are not well taken. The jurors were required to be present in court at that time and were each entitled to a fee for such attendance, whether then discharged or not.

For the reasons previously stated in allowing the sheriff's fees for summoning the jury, we are satisfied that the court did not err in allowing the amount claimed for mileage and per diem of jurors.

5. Reporters' Fees. The court did not err in excluding the question asked of the witness Soderberg by appellant's counsel. It being admitted that the court was authorized to appoint a short-hand reporter, and there being no statute regulating his charges, the only material question to be determined was whether or not the amount claimed was reasonable.

6. Surveyors' Fees. The certificate given by the counsel for the state justifies the action of the board of county commissioners and of the district court in allowing the bill presented by the surveyor.

In order to establish the guilt of Rover, the state was compelled to rely, to a great extent, upon circumstantial evidence. Much depended upon the truth or falsity of Rover's own statement, made before a justice of the peace on his preliminary examination, declaring his innocence and charging the crime for which he was indicted upon the principal witness for the state. To determine that question, as well as some others, it became important to ascertain the exact distances between certain specified points and the relative positions of certain fixed objects, and of given localities at and near the scene of the homicide. If the statement of Rover was true, a correct map of the premises would ma-

terially assist the defense in establishing his innocence. If his testimony was false a correct map would materially assist the prosecution in establishing his guilt. Any important fact which tends to establish either the guilt or innocence of a human being upon trial for his life should always be procured, if within the reach of the court, and presented to the jury, regardless of the question of expense to the county.

The circumstances which surrounded the Rover case establish beyond all controversy the truth of the certificate given by the attorneys for the state, that the survey and map were absolutely necessary for the proper presentation of the case to the jury.

7. Finally, it is contended by appellant's counsel that respondent cannot maintain this action because the claim if presented to the county commissioners of Humboldt county was not verified as required by the statute. (2 Comp. L. 3093, 3094.) This argument is not well founded. The claim in question is not governed by the provisions of the statute referred to, but is controlled by the provisions of the criminal practice act. When a criminal action is removed to another county for trial, the costs accruing upon such removal and trial shall be a charge against the county in which the cause of indictment occurred. (1 Comp. L. 2300.)

The next section provides for the auditing of such claims by the county to which such action was removed.

The various items of the claim presented to the county commissioners of Humboldt county, with the exception of the witness fees, which are regulated by sections 544 and 545 (1 Comp. L. 2169, 2170), had been properly audited by the commissioners of Washoe county in the manner required by the statute. (*Ex parte Taylor*, 4 Ind. 479.) It is, therefore, evident that it was not the intention of the legislature to have claims of this character classed with the unaudited claims and accounts which are presented to the county commissioners in the ordinary transactions of county business, and provided for by the act defining the duties of county commissioners. (2 Comp. L. 3093, 3094.)

## Opinion of the Court—Hawley, J.

8. Modifications of Judgment. In accordance with the views expressed in this opinion, the following reductions must be made, viz.:

Attorney's fees .....	\$425.00
Sheriff's fees—taking prisoner before court .....	\$ 7.50
Sheriff's attendance on court ten night sessions .....	50.00
Sheriff's mileage to Humboldt county for witnesses .....	69.40
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	126.90
Clerk's Fees—time checks to jurors .....	\$49.00
Clerk's fees—motions and orders .....	12.00
Clerk's fees—oaths to officers .....	3.75
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	64.75
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Total .....	\$616.05

As we have no means of ascertaining the particular accounts disallowed by the district judge, and have, therefore, been compelled to notice all the accounts objected to by appellant, the reduction must be made from the amount claimed in the complaint.

The judgment of the district court is modified by reducing the amount to three thousand and twenty-eight dollars and forty cents, and as so modified the judgment is affirmed.

BEATTY, C. J., dissenting:

I concur in the views of the court upon most of the points discussed in the foregoing opinion, but in some particulars I feel obliged to dissent, and especially from the conclusion reached upon the seventh point. In my opinion it is a fatal objection to respondent's right to recover, that its claim, as presented to Humboldt county, was never verified as required by law. "No person shall sue a county in any case for any demand, unless he or she shall first present his or her claim or demand to the board of county commissioners and county auditor for allowance and approval," etc. (C. L., sec. 3092.)

Of course, to satisfy this provision of the statute, the claim must be presented in such form as will authorize the board to allow it in case it is found to be legal and just. If the commissioners have no authority to allow an unverified claim, and it is presented without being verified, this, it will be conceded, is no compliance with the law, and the

rejection of the claim under such circumstances will not entitle the holder to sue the county. It is not, and it cannot be, denied that all unaudited claims must be "sworn to," in order to give the board of commissioners and county auditor any authority to audit and allow them (C. L., secs. 2993, 3093, 3094); but it is held by the court that the claim against Humboldt county was not an unaudited claim, within the meaning of the statute. Upon this point I differ with the court. It is true that the aggregate of the sum claimed was made up of various other claims that had been audited and allowed by the commissioners of Washoe county, but it was, nevertheless, something new and logically distinct from those claims. It was a claim by a different party against a different party, and depending for its validity upon facts which the commissioners of Humboldt not only had the right to investigate, but which they were bound to investigate. The commissioners of Washoe audited the claims against that county, but they neither did not could audit their own claim against Humboldt.

It is not denied—on the contrary, it is expressly conceded in the opinion of the court, that the audit in Washoe county was not binding upon Humboldt. It is there held that "appellant is not bound to pay every claim because it was presented to, examined, allowed, and paid by the respondent. It had the right to show, if it could, that the services charged for were never in fact rendered, or that the fees charged were unauthorized by the statute." Upon each of these grounds several considerable deductions are made from the amount of the judgment recovered in the district court. It appears to me that the decision upon this point is opposed to the conclusion that the claim against Humboldt county was ever audited in the sense of the statute—that is to say, examined and allowed by the commissioners and auditor. If the liability of Humboldt county depended upon the legality of the fees charged, and upon the fact that the services charged for had been actually rendered, it seems to follow necessarily that these were questions which the commissioners of Humboldt were bound to determine before they could allow the claim, and the examination of such

questions—that is, of all questions of law and fact upon which the validity of a claim depends—is what is meant by the statute when it speaks of the auditing of claims.

The sections of the criminal practice act, referred to by the court, do not, in my opinion, control or affect the manner of presenting claims of one county against another. By the first (C. L. 2300) the county from which a criminal cause is transferred is made liable for the costs; and by the second (C. L. 2301) it is provided that the claim for costs shall be allowed in the first instance, and paid by the county in which the trial is had. From this it results merely that the county of Washoe had a valid claim against Humboldt county for the costs of the Rover trials; but I can see no reason why it was not bound to present its claim as other unaudited claims must be presented. Confessedly, it was not payable as a matter of course. There were questions both of law and fact to be decided before the commissioners of Humboldt could determine what, if anything, was due, and the examination and decision of such questions is what the statute means by the auditing of claims.

For these reasons, I think the plaintiff should have been nonsuited, and that the judgment should have been reversed. I differ with the court also in regard to the charge for summoning the panel of jurors. The evidence, in my opinion, not only fails to show that any extra jurors were required or summoned for the first trial of Rover, but the contrary is conclusively proven. Rover's case stood first on the calendar, and was followed by a number of other cases, particularly by the case of *The State v. La Point*. It seems that thirty-one jurors had been summoned for the term. The court ordered an additional venire for ten more jurors, and made it returnable on the day that Rover's case was set for trial. This is the sole reason why the county clerk (not the judge, who alone could know), chose to charge the cost of the venire to the Rover case. But, manifestly, this of itself is no reason at all. Nothing is more natural than that the panel of jurors should be directed to attend on the day when the first issue of fact on the calendar is set for trial—it is, I presume, the universal practice—but no

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Opinion of the Court—Hawley, J.

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one has ever supposed that it was therefore to be inferred that the cost of the venire was chargeable to that case. Still, it might be true, and if true it might be shown that an extra number of jurors was rendered necessary by the pendency of some particular case; but the burden of proving the fact would lie upon whoever asserted it. Here there is no proof that any extra jurors were required for the Rover case, but, on the contrary, it was proved and admitted that forty jurors were in attendance on the day it was set for trial; that of these only twenty were sworn on *voir dire* in order to obtain the trial jury; that the whole forty were kept for the trial of other cases, and that additional venires for a large number of jurors were issued specially for the La Point case. This shows that not only the panel of forty, but other additional jurors were required by Washoe county for its own purposes, and that the pendency of the Rover case put it to no expense on that account.

As to the second trial, the case is not so clear; but here again the opinion of the county clerk is all that the plaintiff could offer in support of its claim.

Upon another point, also, I dissent from the views of the court. The expenses of witnesses who attend upon a criminal trial from without the county must be allowed by the court, and the allowance must be evidenced by an order entered upon the minutes of the court. (C. L. 2169, 2170.) Upon the trial of this case, orders of the judge made out of court were admitted against defendant's objection to prove such allowances. I think the evidence was incompetent, and that it was error to admit it. The material question was not whether the witnesses had been paid by the treasurer of Washoe, but whether the allowances had been made. No one will pretend that any sum the treasurer chose to pay to the witnesses was recoverable from Humboldt county merely because he had paid it and the amount was not unreasonable. There must also have been an allowance by the proper authority, and if the statute requires, as it plainly does, that the allowance when made shall be evidenced by an order spread upon the minutes of the court, that evidence, and that alone, was admissible to prove the fact.

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Argument for Relator.

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For these reasons, I think that if the respondent could recover anything, the amount of the judgment should be still further reduced than it has been by the order of the court.

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[No. 953.]

THE STATE OF NEVADA EX REL. M. C. LAKE, RELATOR, v. THE COUNTY COMMISSIONERS OF WASHOE COUNTY, RESPONDENT.

**JURISDICTION OF BOARD OF EQUALIZATION TO RAISE ASSESSMENT—CERTIORARI.**—If the board of equalization acts without jurisdiction in raising an assessment, that is a good defense *pro tanto* in any suit for the tax, and in such a case the writ of certiorari ought not to be issued to review the action of the board.

**IDEM—WRITTEN COMPLAINT NOT NECESSARY.**—The law does not require that a written complaint shall be filed in order to authorize the board of equalization to raise an assessment.

**IDEM—PUBLICATION OF NAMES MERELY DIRECTORY.**—The law requiring a list of persons, the valuation of whose property has been raised by the board of equalization, is merely directory. It is not a defense in a tax suit unless it has actually injured the defendant.

PETITION for writ of certiorari.

The facts are sufficiently stated in the opinion.

*Boardman & Varian*, for Relator.

I. The petition shows upon its face that Lake is the party beneficially interested. The action, though in the name of the state, is substantially brought for Lake's benefit.

II. The affidavit of Hymer can not be considered. The statute does not provide for the preservation of testimony in these cases. (*C. P. R. R. Co. v. Placer Co.*, 34 Cal. 352.)

III. No record facts to show that any complaint, oral or written, was presented. The commissioners had no jurisdiction. (*Swift v. Ormsby Co.*, 6 Nev. 97.)

IV. The law gave Lake the right, after publication, to have a hearing. There was no publication as required by law. (2 Comp. L. 3139.)



*John Bowman, District Attorney of Washoe County, and Wm. Cain, for Respondent.*

I. The writ of certiorari ought to be dismissed, because the state of Nevada is not the party beneficially interested. (*Board of Co. Com. Washoe Co. v. Hatch*, 9 Nev. 357; Vol. 1 Comp. Laws, sec. 1498; *Tyler v. Houghton*, 25 Cal. 26; *People v. Pacheco*, 29 Id. 210; *People v. County Judge*, 40 Id. 479; *Paxson v. Holt*, Id. 466; *Maxwell v. Rives*, 11 Nev. [214.]

II. The action of the board was entirely legal. They had jurisdiction over the subject-matter, generally, and an oral complaint was sufficient to give them jurisdiction in this case. It is not claimed by relator that an injustice has been done in raising the taxes on his land. (*State v. N. Belle*, 12 Nev. 91.)

By the Court, BEATTY, C. J.:

The respondents, sitting as a board of equalization, made an order adding to the assessed value of petitioner's property. He seeks by certiorari to have that order set aside and declared void upon the ground that the board had no jurisdiction to act. It is alleged that the order was made without any complaint of undervaluation, either oral or written, having been laid before the board. Upon presentation of the petition we ordered the writ to issue, and the respondents have made their return thereto, which shows that no written complaint was filed, and that there is nothing in the minutes of the board to show that even an oral complaint was made. The return is, however, accompanied by an affidavit of the chairman of the board to the effect that such a complaint was made, but that a recital of the fact was inadvertently left out of the minutes of their proceedings.

The petitioner objects to the consideration of this affidavit on the ground that it is not a part of the record. The objection is probably well founded as the case stands; but we think very respectable authority might be found for ordering the board to amend its record so as to conform to the facts, and to make a return of its record as amended.

This, however, is a question of some nicety; and, as the case may be disposed of upon other grounds, we abstain from deciding or discussing it. Assuming for the present that we cannot, in this proceeding, look beyond the minutes and files of the board, we are all the more convinced that we ought not to have issued the writ. It should have been denied upon the ground that the petitioner had another plain, speedy, and adequate remedy. If the board acted without jurisdiction in raising his assessment, that is a good defense *pro tanto* in any suit for the tax; and since, as we assume, we cannot in this form of action make a full inquiry into the facts upon which their jurisdiction depended, it is all the more necessary that the petitioner should be remitted to that mode of redress in which the facts may be more fully shown. Another weighty consideration impelling us to the same conclusion is the fact that the State, although not a party to this proceeding, would be bound by any order we might make annulling the action of the board, and would be precluded from proving, in its suit for the tax, that a sufficient complaint was made to authorize the action of the board. (*State v. C. P. R. R.*, 10 Nev. 79, 80.)

It was claimed by petitioner, at the time of presenting his petition, that section 32 of the revenue law (C. L. 3156), which excludes all except certain enumerated defenses in tax suits, would prevent him from relying upon the want of jurisdiction in the board to raise his assessment. But this is a mistake. The concluding sentence of that section, "and no other answer shall be permitted," must be understood with this qualification, that it does not exclude the direct denial of any allegation of the complaint necessary to be proved in order to entitle the state to recover. The assessment is one of the facts which the state is bound to prove, and if the commissioners had no jurisdiction to raise petitioner's assessment, their act was void, and can be collaterally attacked. (*People v. Reynolds*, 28 Cal. 108; *People v. Flint*, 39 Id. 670; *People v. Goldtree*, 44 Id. 323; *Beck v. Commissioners of Washoe*, recently decided in this court.)

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Points decided.

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We intimated in the case of *The State v. Northern Belle Company* (12 Nev. 92, 93), that an oral complaint was sufficient to authorize action by the board of equalization. We know of no decision to the contrary, unless it can be said that it was so held in *People v. Goldtree, supra*. But the point was not really involved in that case, as it was decided upon the ground that there was no complaint of any sort made to the board. All that was said, moreover, was that it had been held in *People v. Reynolds*, and affirmed in *People v. Flint*, "that the filing of a complaint was necessary." By reference to those cases, however, it will be seen that the point was not decided in either of them. In the first there was no sort of complaint made, and all that was decided or intimated was that some sort of complaint was necessary. In the second case a written complaint had been filed, but it was held to be defective in substance. The truth is, the point has never been directly passed upon in California, and we find nothing in either the letter or spirit of the statute requiring a written complaint.

We have not noticed the other point relied upon by the petitioner, that is, that the clerk failed to publish a list of the persons the valuation of whose property had been raised by the board, for the reason that in our opinion it does not affect the question of jurisdiction. The publication of such notice is one of those acts "between the assessment and commencement of suit" which are expressly declared to be "directory merely," and a non-performance of which is not ground of defense in a tax suit unless it has actually injured the defendant. (C. L. 3156; *State v. C. P. R. R.*, 10 Nev. 61.)

The writ having been improvidently issued is hereby set aside and the proceeding dismissed.

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[No. 943.]

J. T. JEFFREE, ADMINISTRATOR, APPELLANT, v. JAMES WALSH ET AL., RESPONDENTS.

**SURETIES—OFFICIAL BOND—PLEADING.**—In an action brought against the sureties on the official bond of the public administrator. the complaint

## Argument for Appellant.

will be defective if there is no obligation that the defendants executed the bond.

**NEW TRIAL, WHEN COURT CHANGES ITS RULING.**—If the court makes a ruling during the progress of the trial, the party in whose favor the ruling is made, is entitled to have the case decided according to the ruling in all cases where, if the ruling had been against him, he might have been able to remove the objections made by the other party.

**AMENDMENT TO PLEADINGS.**—If evidence is objected to because the pleadings are defective, the court should allow the pleadings to be amended.

**TESTIMONY IMPROPERLY ADMITTED.**—Where testimony has been improperly admitted, under the pleadings it ought not to be considered for any purpose.

**APPEAL** from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

*Branson & Tilden*, for Appellant.

I. The complaint was sufficient. (*Gutridge v. Vanatta*, 27 Ohio St. 366; 1 Comp. Laws, 1116; *Union Bank v. Bell*, 14 Ohio St. 208; *Trustees v. Odlin*, 8 Id. 293; *Lewis v. Coulter*, 10 Id. 451; *Slaterly v. Hall*, 43 Cal. 191; *Hiemmelman v. Spanigal*, 39 Id. 401; *Reynolds v. Hosmer*, 45 Id. 616; *Treadway v. Wilder*, 8 Nev. 91.)

II. Appellant was led astray by the ruling of the district court, on the general demurrer. He had a right to rely on the sufficiency of his complaint. The findings of the court is a reversal of the court's former decision. The court had the power and should have allowed an amendment of the complaint in this respect, so as to conform to the proof made; and his refusal to do so was an abuse of discretion. (Practice Act, sec. 68, 70, 71; *McMannus v. The Ophir Silver Mining Company*, 4 Nev. 15; 1 Van Sanford's Pleadings, 834; *Treadway v. Wilder*, 8 Nev. 91; *Smith v. Yreka Water Company*, 14 Cal. 201; *Connolly v. Peck*, 3d Id. 75; *Barth v. Walther*, 4 Duer, 228; *Sherman v. Fream*, 8 Abbott, 33; *Pollock v. Hunt*, 2 Cal. 193; *Cooke v. Spears*, Id. 409; *Stearns v. Martin*, 4 Id. 227; *Clark v. Phoenix Ins. Co.*, 36 Id. 168; *Stringer v. Davis*, 30 Id. 318; *Kirstein v. Madden*, 38 Id. 158.)

*Seely & Woodburn*, for Respondents.

By the Court, HAWLEY, J.:

It is claimed by appellant that the defendants were sureties upon the official bond of S. Symons, as public administrator of Storey County; that as such sureties they became, and are, liable to the estate of William L. Williams, deceased, for a certain amount of money alleged to have been embezzled from said estate by said public administrator.

The only allegation in plaintiff's complaint tending to connect the defendants, or either of them, with the subject matter in controversy, is as follows:

"That at the general election held in the State of Nevada on the third day of November, 1868, Samuel Symons \* \* \* was duly elected to the office of public administrator in and for the county of Storey \* \* \* and on the nineteenth day of December, A. D. 1868, the said Samuel Symons made and executed his official bond, a copy of which, with the indorsements thereon, is hereunto annexed, marked 'Exhibit A,' and made a part of this complaint; that on the twenty-second day of December, A. D. 1868, the said Samuel Symons did qualify as such public administrator, and on the date last aforesaid the said official bond was duly approved by the board of county commissioners, in and for the said county of Storey, and the same was \* \* \* filed for record in the office of the county clerk \* \* \* and was \* \* \* duly recorded in the said office, according to law."

Exhibit "A" contains the names of the defendants as sureties.

The defendants when served with process appeared separately and demurred to said complaint upon the ground, among others, that: "The complaint does not state facts sufficient to constitute a cause of action either in favor of said plaintiff against all or any of the defendants, or against all or any of the defendants in favor of any one."

The demurrers were overruled by the court, and, after issue joined, the case was tried before the court without a jury.

All the evidence offered by the plaintiff was admitted  
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subject to the defendants' objection, that the same was irrelevant to any issue raised by the pleadings.

No evidence was offered by the defendants.

The court rendered a judgment in favor of defendants for their costs.

The statement on motion for a new trial shows that the court rendered this judgment upon the ground: "That the plaintiffs complaint nowhere stated or alleged that defendants had ever executed the official bond of Samuel Symons as public administrator, and that otherwise the court found a good cause of action on the merits."

After the court had rendered its decision plaintiff's counsel "asked leave to so amend his complaint as to allege, in terms, that defendants had executed the said bond in accordance with the proofs in the case. The court declined to allow plaintiff to so amend his said complaint for the reason that it was too late, because the case had been submitted and decided."

Upon this statement of facts it is evident: First, that the court erred in not sustaining the demurrers interposed by the defendants; second, that upon the trial, or at least before rendering its decision, the court became convinced of its error, for it rendered a judgment in favor of the defendants on the very ground upon which it ought to have sustained the demurrers in the first instance. The plaintiff was misled by this action of the court.

If the demurrers had been sustained, the plaintiff would then have had an opportunity to amend his complaint so as to state a cause of action against the defendants; but having overruled the demurrers, the plaintiff had the right to anticipate that the court would adhere to its ruling, and he ought not to be compelled to incur the additional expense of another action.

We are of opinion that the court erred in refusing to grant a new trial for the purpose of allowing plaintiff to amend his complaint.

This conclusion is fully sustained by the decision of the supreme court of California in *Carpentier v. Small*. The action was ejectment to recover certain lands. The de-

defendants undertook, in their answers, to set up a claim—to have the value of certain improvements set off against the damages. On the trial they offered evidence in support of this branch of their answers, to which the plaintiffs objected on the ground of “incompetency and immateriality, because no sufficient foundation for such evidence was laid in the pleadings.”

This objection was overruled and the evidence admitted.

In the findings of the court the conclusion of law upon this point was: “That under the pleadings none of the defendants are entitled to have the value of these improvements allowed as a set-off against the damages for withholding the property.”

Upon this state of facts the court said: “After the testimony was admitted, then, the court, when the findings came to be drawn, and after further reflection, must have come to a different conclusion from that entertained when the evidence was admitted. This change of opinion may have worked great injustice to the defendants. They made an attempt to set up a valid claim for improvements in their answers. The plaintiff did not demur for insufficiency, but did raise the question on that ground by objection to the introduction of evidence under it. The court then deemed the answer sufficient and admitted evidence. The ruling was with the defendants on that point. There was, therefore, in view of the ruling of the court, no occasion to amend, and no leave to amend was asked. Had the ruling been the other way the defendants might have obviated the objection by amendment. But, relying on the ruling, the subsequent change in the view of the court has deprived them of an opportunity to correct the defect in their pleadings, and they may lose the value of their improvements in consequence of the action of the court, when it was too late to remedy it. We think the defendants were entitled to rely upon the ruling, and since a different view finally prevailed, that they should have an opportunity to obviate the defect in the pleadings, otherwise great injustice may result.” (35 Cal. 362.)

We are asked by appellant to examine the testimony and

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Argument for Appellants.

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decide this case upon its merits. For obvious reasons this would be improper.

The defendants, relying upon their demurrers and objections to the testimony offered by plaintiff, made no defense upon the trial. They are entitled to their day in court for the purpose of making a defense upon the merits. It would be as great an act of injustice to deprive them of the opportunity to be heard as it would be to deprive plaintiff of the opportunity of correcting his pleading.

The testimony having been improperly admitted, under the pleadings, will not be considered for any purpose whatever. The judgment of the district court and its order refusing a new trial are reversed, and the cause remanded for a new trial, with leave to plaintiff to amend his complaint.

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[No. 884.]

**E. D. BARKER, SUBSTITUTED IN THE PLACE OF JOHN B. HELM, RESPONDENT, v. ANGUS McLEOD ET AL., APPELLANTS.**

**SHERIFFS' FEES—CONTRACT.**—If a sheriff, for the sake of obtaining employment, agrees in advance to render official services for a party to a suit, and to receive nothing unless such party recovers in the action, he will be bound by his agreement and cannot recover his fees without showing that such party did recover in the suit.

**IDEM—DISSOLUTION OF ATTACHMENT—PROCEEDINGS IN BANKRUPTCY.**—The adjudication of bankruptcy dissolves an attachment and vests the title to the property in the assignee. The sheriff is not thereafter entitled to recover any costs for keeping the property.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda county.

The facts are stated in the opinion.

*A. W. Crocker and Wells & Stewart*, for Appellants.

I. The court erred in charging the jury that the sheriff could recover if he received nothing on his contract.

II. The courts of bankruptcy are not dependent to any extent upon the state courts. Their orders are effective *per*



se, so that when property of a bankrupt is assigned in bankruptcy, if under attachment not four months old, the attachment is at once dissolved, and this dissolution relates back to the time of the filing the petition in bankruptcy. (9th ed. Bump's Bankruptcy, p. 480, sec. 5044; same, p. 501; title, dissolution of attachments.)

*D. J. Lewis and T. W. W. Davies, for Respondent.*

I. If the contract which the defendants in their answer have attempted to set up as matter of abatement ever was made, supported by a good and sufficient consideration, and was in all respects lawful, the defendants, as to their part of the contract, have failed to show any exercise of due diligence in complying with its terms and requirements. The special contract attempted to be pleaded in abatement by the defendants is not a lawful contract.

II. There is no proof that Helm had actual knowledge of the bankruptcy of the Columbus M. and M. Co. until he was advised thereof by the order of the district court of the eighth judicial district, in and for Esmeralda county, Nevada, served upon him June 14, 1875. (Bump's Bankruptcy, 502; citing 8 B. R. 533; S. C. 1 Wool, 324; 11 B. R. 317.)

The sheriff must look to the party that employed him for his fees; he has no claim against the opposite party. (*Zeiber v. Hill*, 8 B. R. 239; 1 Sawyer, S. C. R. 268.)

The officer cannot look to the assignee of the bankrupt. (Bump's Bank, 496, 497, cites 39 Ga. 29; 2 B. R. 662; S. C. Lowell, 306; 7 B. R. 346; 6 B. R. 545; and see Crocker on Sheriffs, sec. 471.)

By the Court, BEATTY, C. J.:

This is an action by a former sheriff of Esmeralda county to recover his fees and keeper's charges for attaching and keeping the property of the Columbus Mill and Mining Company in a suit brought by these defendants. The plaintiff had judgment in the district court and the defendants have appealed from the judgment and the order of the court overruling their motion for a new trial.

It will not be necessary to notice more than two of the points made in support of the appeal.

I. The defendants allege in their answer that plaintiff's services in the attachment case were rendered in pursuance of an express agreement that he was to receive nothing therefor except in case, and to the extent, that there should be a recovery in the action; and they allege that nothing was recovered by reason of the fact that the Columbus Mill and Mining Company was adjudicated bankrupt within less than four months after the issuance of the attachment.

On the trial it was admitted that the attachment in question was issued May 12, 1874, and levied May 14th; that on July 16th following, the Columbus Mill and Mining Company was adjudicated bankrupt; that a receiver was appointed and qualified, and that due notice of the proceedings in bankruptcy was filed in the court where the attachment was pending on July 21st. It was also shown by uncontradicted testimony that the property attached was finally turned over to the receiver in bankruptcy. As to whether the sheriff made the alleged agreement for a contingent compensation the evidence was conflicting.

No question was made in the district court as to the validity of such a contract, but the case was tried and the issue submitted to the jury upon the theory that the alleged agreement, if proved, was binding on the plaintiff. In this court counsel for respondent have suggested in argument that an agreement by a sheriff, that the payment of his fees for serving process should be contingent upon the success of the plaintiff, would be contrary to good morals and public policy, and therefore void. The point, however, has not been presented or argued in a manner to justify us in deciding it at this time. It is sufficient for the present purpose to say that, admitting the correctness of respondent's proposition, it would not affect our conclusion, that the judgment of the district court must be reversed. For under the instruction to the jury, which we are about to notice, their verdict must have been in favor of the plaintiff, notwithstanding they were satisfied his services were rendered

in pursuance of this supposed illegal and fraudulent contract; whereas the law is settled, so far as this court is concerned, that such a contract can never be enforced. (*McCausland v. Ralston*, 12 Nev. 195.)

We propose, however, to examine the rulings of the district judge in the light of the theory upon which the case was tried, and, assuming that the alleged agreement, if made, was not illegal, to determine whether the following instruction was erroneous: "If you believe that the plaintiff agreed to receive his pay for services rendered only in the event that defendants (plaintiffs in the action, *McLeod et al. v. Columbus M. and M. Co.*) recovered from defendant in said action, and plaintiffs gave him nothing, nor promised him nothing for so agreeing, then you will find for the plaintiff."

This instruction, to the giving of which the defendants excepted, is awkwardly expressed, but its meaning is apparent except as to the words "services rendered," which, in the light of the testimony, must have been understood in the sense of services to be rendered. So construed, the instruction was erroneous. The right of a sheriff to be paid for his services is of no higher or more sacred character than that of a private person. If either is unconditionally requested to perform a service for another, the law implies a promise to pay, in one case the reasonable value, in the other the legally ascertained value, of the service. If the service is performed, the employer is bound to pay because, and only because, he has promised to pay. But if, for the sake of obtaining an employment, a private person expressly stipulates for a contingent reward, it can not be doubted that he is bound by his agreement; the obtaining of the employment is all the consideration necessary to support it, and there is no reason (aside from the question of morality above alluded to) why a sheriff may not bind himself by a similar stipulation. In such case, when he comes to demand payment, the question will be, not whether he was paid or promised anything for agreeing to serve for a contingent reward, but whether the condition upon which the employer agreed to be bound, has been fulfilled; if it has

not, no payment is due. The position of a sheriff under such contract may be worse, but can not be better than that of a private person. He must recover, if at all, under the contract; if the contract is in violation of his official duty, it is void.

II. Nearly one thousand dollars of the amount recovered by the plaintiff in the district court was on account of keeper's charges for keeping the property attached after the Columbus Milling and Mining Company had been adjudicated bankrupt. Appellants contend that the receiver of the estate was alone liable for those charges.

The facts in relation to this branch of the case are that the receiver, immediately upon his appointment, notified the keeper of the property and requested him to keep it for him. The keeper made no response to this proposition, and, it seems, failed to inform the sheriff. The result was that the property remained in his charge for nearly a year after the attachment had been dissolved before there was any order of court to turn it over to the receiver. Upon this state of the case the district judge instructed the jury in effect that the sheriff, being compelled to hold the property in obedience to the writ of attachment until relieved by order of that court, was entitled to recover his charges from the attaching creditors.

This was error. The adjudication of bankruptcy dissolved the attachment and vested the title to the property in the assignee. (R. S. sec. 5044). It may have been the duty of the sheriff to hold the property till ordered by the court to turn it over (*Johnson v. Bishop*, 8 N. B. R. 533), but from the date of the dissolution of the attachment he, or his keeper, became divested of all official relation thereto and became a simple bailee thereof to the use of the assignee, who thereupon became liable for the cost of preserving it. (*In re Preston*, 6 N. B. R. 545; *Gardner v. Cook*, 7 Id. 346; *Zeiber v. Hill*, 8 Id. 239; *In re Fortune*, 2 Id. 662.) The attaching creditors, if liable at all under their contract with the sheriff, were liable only for the costs accruing before the dissolution of the attachment. If this rule ever works a hardship upon the officer who has levied an attachment,

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Points decided.

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such cases must be of very infrequent occurrence, for ordinarily he is fully protected by the liability of the assignee; and any other rule would almost invariably be productive of much greater hardship to the attaching creditor. But whatever may be the operation of the rule in general, in this case it is vindicated by the result. If the sheriff did not have actual knowledge of the bankruptcy of the Columbus Milling and Mining Company he is at least chargeable with the actual knowledge of the keeper, who was his chosen agent, and if he was going to hold the attaching creditors for the costs of keeping the property, on the plea that he was bound to keep it until relieved by an order of court, then it was his duty to inform them of the demand of the receiver so that they might save themselves further useless expense by releasing the attachment. He excuses himself for not informing them upon the ground that the keeper did not inform him; but, as above stated, the fault of his chosen agent is imputable to him, and besides it does not appear that he has ever paid the keeper. In every view the merits of the case, so far as this point is concerned, appear to be on the side of the appellants.

The judgment and order appealed from are reversed and the cause remanded for a new trial.

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JOSEPH B. GOSSAGE ET AL., APPELLANTS, v. CROWN  
POINT GOLD AND SILVER MINING COM-  
PANY, RESPONDENT.

HEIRS—RIGHT TO MAINTAIN EJECTMENT—ESTATES OF DECEASED PERSONS—

STATUTES CONSTRUED.—In Construing section 116 of the act to regulate the settlement of the estates of deceased persons (1 Comp. L. 596) *Held*, where there are no creditors to be affected, no debts outstanding against the estate, no equity in favor of the administrator, that the heirs of the estate have the right of possession, and may bring an action of ejectment in their own name to recover any property belonging to the estate.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

*John A. McQuaid, H. O. Beatty, and T. W. Healy, for Appellants.*

The heir can bring suit in ejectment before distribution of estate. (Comp. L. Mich., vol. 2, 882; Comp. L., sec. 2904, ed. 1857; *Updegraff v. Trask*, 18 Cal. 458; *Beckett v. Selover*, 7 Id. 215, 229; *Streeter v. Paton*, 7 Mich. 341; *Marvin v. Schilling*, 12 Id. 356; *Campau v. Campau*, 19 Id. 116; *Masterson v. Girard's Heirs*, 10 Ala. (N. S.) 61; *Carruthers v. Bailey*, 3 Kelly (Ga. Sup. Ct.) 105; *Hubbard v. Ricart*, 3 Vt. 207; *Maltonner v. Dimmick*, 4 Barb. 566; *Austin v. Bailey*, 37 Vt. 222; *Gibson v. Farley*, 16 Mass. 280; *Lynch et al. v. Baxter*, 4 Tex. 431; *Easterling v. Blythe*, 7 Id. 210; *Lacey v. Williams*, 8 Id. 182; *Blair v. Cisneros*, 10 Id. 34; *Homutte v. Zapp*, 20 Id. 807; *Patton v. Gregory*, 21 Id. 513; *Thomas v. Greer*, 6 Id. 372; *Bufford v. Holliman*, 10 Id. 560; *McIntyre v. Chappell*, 4 Id. 187.)

At common law, the land or real estate held in fee by an intestate descended immediately to the heir at law; the administrator had nothing to do with it. (Hill. on Real Property, vol. 2, 189.) For this doctrine generally, see 4 Bac. Abr., Tit. "Heir and Ancestor," Letter "F." p. 616 *et seq.*; 7 Cal. 229, 238-9; 39 Id. 188; Bac. Abr., vol. 9, p. 648.

*Seely & Woodburn, for Respondent.*

I. Under the statute of this State, the right to the possession of real property of an estate remains exclusively with the administrator until the estate is settled or distribution is directed by order of the district court; and until then, neither the heirs nor their grantees can maintain ejectment for any portion of such property. (C. L., sec. 116; *Meeks v. Hahn*, 20 Cal. 620; *Meeks v. Kirby*, 47 Id. 168; *Chapman v. Hollister*, 42 Id. 463.)

II. The administrator is a necessary party to all suits affecting the estate of a deceased person. (*Harwood v. Marye*, 8 Cal. 580.)

By the Court, HAWLEY, J.:

The plaintiffs in this action are heirs of the estate of

John Gossage, deceased, and brought this suit to recover fifteen feet, undivided, in the Crown Point mine.

The allegations of the complaint, in so far as they relate to the questions raised by the demurrer, are substantially as follows:

That John Gossage died intestate in Storey county, Nevada, on the eighth day of February, 1862; that on the sixteenth of November, 1864, Cornelius Reiffer, the first administrator of the estate, rendered his final account; that at that time all the debts of said estate had been paid; that there had never been any indebtedness or claim of any kind against said estate since that time; that at that time N. W. Winton was appointed administrator of said estate, and immediately after his qualification as such administrator he left the state and has never since returned, and has never at any time exercised any of the functions or performed any of the duties of administrator of said estate; that on the fifteenth of May, 1875, S. H. Robinson was duly appointed administrator of said estate in place of said Winton, and is now the administrator thereof; that said Robinson did at the time of the commencement of this suit decline to commence the same as administrator of said estate, or any suit whatever, to protect the rights of plaintiffs, and did waive, and has ever since, and still does waive, all rights which he might have as such administrator to bring or maintain this suit in favor of these plaintiffs. This complaint is verified by the administrator, S. H. Robinson.

A demurrer was interposed to the complaint upon the grounds "that plaintiffs have not the legal capacity to sue, for that it appears upon the face of their complaint that there was at the date thereof an administrator of the estate of John Gossage, deceased, who is lawfully entitled to the possession of the mining ground sought to be recovered.

"Second—That there is a defect of parties plaintiff herein for that S. H. Robinson, administrator of the estate of John Gossage, deceased, should have been made plaintiff."

The court sustained the demurrer and rendered judgment in favor of the defendant for its costs.

This appeal calls for a construction of section 116 of the act to regulate the settlement of the estates of deceased persons, which reads as follows: "The executor or administrator shall have a right to the possession of all the real, as well as personal, estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled, or until delivered over by order of the probate court to the heirs or devisees." (1 Comp. Laws, 596.)

It is claimed by the respondent that under the provisions of this section the right to the possession of real property remains exclusively with the administrator until the estate shall be settled or until delivered over as in said section provided. This view of the case is fully sustained by the decisions of the supreme court of California. (*Meeks v. Hahn*, 20 Cal. 620; *Chapman v. Hollister*, 42 Id. 463; *Meeks v. Kirby*, 47 Id. 168.)

The statute of California is identical with the statute of this state, and for that reason it is argued that the decisions of that state should be followed. It so happens, however, that California is not the only state where the statute is the same.

The statute of Michigan reads "rents, issues, and profits" instead of "rents and profits," and "shall have been settled" instead of "shall be settled." In all other respects the language is identical with the statute of this state. The words changed do not affect the interpretation as to the right of the heirs to the possession of the property.

The supreme court of Michigan, in construing this section of the statute, have decided that the right of the possession is in the heir until the executor or administrator takes possession, or otherwise claims his rights under the statute. (*Streeter v. Paton*, 7 Mich. 341; *Marvin v. Schilling*, 12 Id. 356; *Chapman v. Chapman*, 19 Id. 116.)

All the decisions in the respective states, where the question is alluded to, concede the proposition that in construing this section of the statute, the entire probate system relative to the settlement of the estates of deceased persons, as well as the statute concerning descents and distribution, must be considered. There can not be any controversy as



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Opinion of the Court—Hawley, J.

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to the correctness of this general rule. The rights of the relative parties ought always to be considered, and such an interpretation given as would afford the protection intended to be reached by the legislature.

In *Meeks v. Hahn*, the supreme court of California refer to the various sections of the probate act, and of descents and distribution, and from the language of the entire acts come to the conclusion heretofore announced.

In *Chapman v. Hollister*, the court add as a reason for following the decision in *Meeks v. Hahn*, that if the heir or devisee should be held entitled to the possession, it would lead to great perplexity in the settlement of estates, would tend to promote litigation, and embarrass the administration of estates, without increasing the security of creditors and heirs.

In *Streeter v. Paton*, the various sections of the statute of Michigan were considered and elaborately reviewed. It was there held that the object of this particular section of the statute was to prevent injustice to creditors, and to have the rents as well as the proceeds of the sale of the real estate applied to the payment of debts; that the language of the section is not imperative, but gives a right which the administrator or executor may or may not exercise; that it is the duty of the personal representative to take possession of the real estate, when it, or the rents and profits, may be needed in the settlement of the estate; but when this is not the case although he may do so under the statute, it is not imperative on him; that there is no valid reason why it should be imperative; that the personal estate may be more than ample for all the purposes of administration, and years may be required in settling the estate; that it would be a harsh construction of the statute that would deprive the heir of his inheritance in the mean time. This decision was rendered prior to the adoption of our statute, the California decisions being subsequent, hence the presumption of law is in favor of the construction given by the supreme court of Michigan. (*Williams v. Glasgow*, 1 Nev. 533; *McLane v. Abrams*, 2 Id. 199; *Ash v. Parkinson*, 5 Id. 15; *Hess v. Pegg*, 7 Id. 28; *State v. Robey*, 8 Id. 312.)

But in deciding the question involved in this case, we propose to give to the decisions of California equal weight and equal consideration, and determine for ourselves which view of the case is best sustained upon reason or sanctioned by the authority of analogous cases.

It is acknowledged by all the authorities, that under the provisions of the statute, the real estate of an intestate vests in the heirs, subject only to the lien of the administrator for the payment of debts and the expenses of the administration. (*Beckett v. Selover*, 7 Cal. 238; *Chapman v. Hollister*, 42 Id. 463.)

If there is no administration upon the estate, the heirs may maintain ejectment for the real estate of the intestate. (*Updegraff v. Trask*, 18 Cal. 458; *Lacy v. Williams*, 8 Tex. 187.)

If there is an administrator, it is his duty to take charge of the estate for the purpose of paying the debts, and when the claims against the estate have all been satisfied it is his duty to pass it over to the heir whose absolute property it then becomes. (*Brenham v. Storey*, 39 Cal. 186.)

The possession of the property given by the statute to the administrator is for the benefit of the creditors and the heirs. It is given for the purposes of the administration, and ought only to be exercised as the exigencies of the case may require. (*Easterling v. Blythe*, 7 Tex. 213; *King v. Boyd*, 4 Or. 326; *Humphreys v. Taylor*, 5 Id. 260.)

The supreme court of Texas, in *Patten v. Gregory*, following their previous decisions in *McIntyre v. Chappell*, 4 Tex. 192; *Blair v. Cisneros*, 10 Id. 55; and *Bufford v. Holliman*, Id. 575, say: "By law the whole of an estate vests in the heirs testate, or *ab intestato*, at the death of a person deceased. It passes from them *sub modo* for the purposes of administration, and the administration is required to be speedy, so that the remainder, if any, may be returned to its real owners, the heirs. The neglect of an administrator for six years would, perhaps, of itself, be sufficient ground for the heirs to sue, and this, in connection with the positive refusal of the administrator to bring the action, we believe to be good ground for an exception to the general rule, and

that the demurrer, for the want of parties, was properly overruled." (21 Tex. 518.)

In Alabama, it has been decided that the heir "is invested with the title, and may exert it with all its incidents until the administrator, by notice to the tenant, or by actual suit, indicates his intention to assert the power reposed in him by the statute;" that "the title and right of the heir is subject to the exercise of the statute power, but where the power is not asserted or exercised by the administrator \* \* \* the heir is entitled to the estate and its incidents, as at common law." (*Masterson v. Girard's Heirs*, 10 Ala. 62.)

In Georgia it has been decided "that on the death of the ancestor intestate, the title to his land is cast upon his heirs-at-law, subject to the payment of the debts of the intestate;" that "the heirs have such a title as will enable them to maintain ejectment to recover the possession of the land against a mere wrong-doer;" that "the administrator can maintain the action of ejectment also, to recover the possession of the land, so as to enable him, as the agent of the law, to perform the duties enjoined upon him by the law, and for that purpose only." (*Carruthers v. Bailey*, 3 Kelly, 111.)

In Wisconsin, where the section of the statute is substantially the same as the statute of this state, of California, and of Michigan, the supreme court, in considering the question as to the construction that ought to be given to the statute, although the question was not directly at issue, say: "The intent doubtless is to place the whole estate, real and personal, in the possession and under the control of the executor or administrator in proper cases to enable him to pay debts against the estate and legacies. Where there are no such debts or legacies to be paid, there is no valid reason why the executor or administrator should have possession of the real estate. Hence the provision that if the estate is settled, that is, if there are no claims against it, none in its favor, no personal property belonging to it, and the real property which once constituted a portion of it has passed into the possession of the devisees thereof

and those claiming under them, the executor or administrator has no longer any right to the possession of the real estate. To hold that the statute is not applicable to this case because those results were not worked out through the slow and expensive processes of administration, and probate orders and decrees, would be to sacrifice substance to mere form, and to disregard entirely the plain and obvious intention of the statute." (*Flood v. Pilgrim*, 32 Wis. 379.)

Taking into consideration the peculiar facts of this case, it is apparent that no rights of the administrator, or of any creditor, would in any manner be embarrassed by allowing the heirs to maintain this action in their own name. They are the real parties in interest. They alone will be benefited or injured, as the case may be, by the result of the suit. There are no creditors to be affected. No costs or debts of any kind outstanding against the estate. Neither is there any existing equity of any character in favor of the administrator. Moreover, if any legal or equitable right existed in his favor, he has waived the same in favor of the heirs. If any objection, therefore, exists against the right of the heir to maintain this suit, it must be found in the plain language, spirit and intent of the statute. There is no other reason that could be advanced why the heirs should be compelled to go through the formula and delay of procuring the appointment of a special administrator. It is not pretended that the defendant would be subjected to any peculiar hardship or injustice if the heirs were allowed to maintain this suit instead of the administrator.

If we were confined solely to the phraseology of section 116, it does in terms give support to the conclusions reached by the supreme court of California. But, on the other hand, if we look, as it is our duty to do, at the general scope, object, and intent of the statute regulating the settlement of the estates of deceased persons as an entirety, it supports the opposite view. In our opinion the substantial reason of the law and the great weight of the decided cases—as well as the presumptions of the law—are clearly in favor

## Argument for Appellants.

of the right of the plaintiffs to maintain this suit in their own name.

The judgment appealed from is reversed and the cause remanded. The district court will fix a reasonable time within which the defendant will be allowed to appear and file an answer to plaintiffs complaint.

BEATTY, C. J., did not participate in the foregoing decision, being disqualified by consanguinity to a party in interest.

[No. 203.]

THOMAS M. DICK ET AL., RESPONDENTS, v. B. B. BIRD  
ET AL., APPELLANTS,

**APPEAL FROM PART OF A JUDGMENT—JURISDICTION.**—Where the notice of appeal specifies only a part of the judgment, and is served only upon the parties whose interests would be affected by a reversal of the part specified: *Held*, that this court has no jurisdiction over the other parties, or over the judgment in so far as it affects them.

**WATER RIGHTS—FINDINGS SUSTAINED BY THE EVIDENCE—ASSIGNMENT OF ERRORS.**—In reviewing the evidence as to the appropriation of water by the respective parties: *Held*, that certain findings were sustained by the evidence, except in immaterial particulars; and that other findings were not incorrect for any reason specified in the assignment of errors.

**ISSUE—STATEMENT—PARTICULARS MUST BE STATED.**—A statement must specify the particulars in which the evidence is alleged to be insufficient, or it will be disregarded.

**TITLE BY PRESCRIPTION.**—Defendants used water from a certain stream for more than five years prior to the commencement of this action; plaintiffs had been using water from the same stream for a longer period. It did not appear that the use by defendants was adverse to the claims of plaintiffs for more than one or two years immediately prior to the commencement of this suit: *Held*, that defendants could not claim any title to the water by prescription.

APPEAL from the District Court of the Sixth Judicial District, White Pine County.

The facts sufficiently appear in the opinion.

*Robert M. Clarke*, for Appellants.

I. The decree in this case is void for uncertainty. It is essential to the validity of any decree or judgment that it  
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Opinion of the Court—Beatty, C. J.

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should show with reasonable certainty the nature and extent of the relief granted. (Freeman on Judgments, sec. 50; 1 Bailey (S. C.) 7; 16 Iowa, 47; *Honore v. Colmesnil*, 1 J. J. Marsh. 525.)

II. The testimony shows an adverse, open, continuous, notorious, and exclusive possession by appellants of the land described in their answer, and the water appropriated by them and their predecessors in interest for more than five years next preceding the commencement of this action.

III. The decree does not conform to the prayer of the bill, and is therefor erroneous. (*Ward v. Enders*, 29 Ill. 519; *Ohling v. Luitjens*, 32 Id. 23; *Fergus v. Tinkham*, 38 Id. 407; 39 Cal. 688.)

*J. B. Barker*, also for Appellants.

*A. M. Hillhouse*, for Respondent.

The notice of appeal in this case is only a complaint that Bird and Fitzhugh failed to get a prescriptive title, and an appeal from the order denying the motion for a new trial. Under this appeal, upon this statement there is nothing for this court to pass upon. (See 4 Nev. 456; *McWilliams v. Hirschman*, 5 Id. 363; Id. 205; *Caldwell v. Greeley*, Id. 258; *Sherman v. Shaw*, 9 Id. 148; *Irwin v. Samson*, 10 Id. 282, 283; 12 Id. 81, 84.)

By the Court, BEATTY, C. J.:

This is a suit in equity to determine the order of priority among numerous appropriators of the waters of Duck creek, in White Pine county.

Two of the defendants, Bird & Fitzhugh, moved for a new trial on the grounds: First, that the evidence was insufficient to justify the findings of the court to the effect that their appropriation was subsequent to the appropriations found to have been made by the plaintiffs and their co-defendant, Horton; and second, that the decision of the court was against law, because it was clearly proven upon the trial that they (Bird & Fitzhugh) were the first appropriators of two hundred inches of the stream, and had by use acquired title thereto by prescription.

Their motion for a new trial was denied, and they have appealed from that order, and also from so much of the judgment as decrees priority of right to Dick and Horton, and from so much thereof as deprives them of the amount of water they claim by prescription.

In support of this appeal two points have been urged by counsel for appellant, which, we think, can not be considered. They contend that the decree is void for uncertainty, because, instead of distributing the water by inches, it takes, as the basis of apportionment, the quantity necessary to irrigate an acre of ground; and that it is erroneous because it does not conform to the prayer of the complaint, the prayer being for a certain number of inches of water, and the decree being for sufficient water to irrigate a certain number of acres.

These are objections which go to the whole judgment and would, if sustained, reverse it completely, not only as against these respondents, Dick and Horton, but also as to numerous other parties whose rights have been litigated in the action and established by the decree, but upon whom no notice of appeal has been served.

A notice of appeal must be served upon the adverse party or his attorney (C. L., 1392), and must state whether the appeal is from the judgment or a part thereof. (Id.) If the appeal is from the whole judgment, every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment, is an "adverse party" in the sense of the code, and is entitled to notice of the appeal. (*Senter v. De Bernal*, 38 Cal. 640-1). For two reasons, then, there is in this case no appeal which would authorize us to reverse the whole judgment, even if we thought the objections of appellants were well founded. The notice of appeal specifies only a part of the judgment, and it was served only upon the parties whose interests would be affected by a reversal or modification of the part specified. We have no jurisdiction over the other parties, or over the judgment, so far as it affects them.

The notice of motion for new trial, also, was addressed to

and served on Dick and Horton alone, and there is, in fact, no complaint of the findings or conclusions of the court, except in so far as they affect the relative rights of the parties to this appeal. We shall therefore confine our inquiry strictly to the points made in support of the motion for a new trial.

There is an objection by counsel for respondent to a consideration of those points, upon the ground that the statement on motion for a new trial did not contain a specification of the particulars in which the evidence failed to justify the findings. This objection, however, is not well founded. The specifications in the statement, although not made in the form usually followed, are, nevertheless, clear and explicit, and respondents were fully advised thereby as to the points to be relied on in support of the motion.

The first objection to the findings is as follows: "The defendants, Bird & Fitzhugh, except to so much of the fifth finding of fact as finds that 'the defendants, Bird & Fitzhugh, and their predecessors in interest, in 1869, used very little, if any, water, but in 1870 used enough to irrigate fifty or sixty acres of grass land, the ditch to convey water not being built until that time. In 1871 and 1872, about the same and ten acres of grain and vegetables,' because the same is contrary to the evidence given on the trial of this cause in this," etc.

This finding is fully supported by the evidence except in one particular. The evidence shows that the predecessors of Bird & Fitzhugh irrigated ten acres of grain and vegetables in 1870, and not that they used water for that purpose in 1871 for the first time. But the error in the finding is immaterial, for it is found, and the evidence fully sustains the findings, that the plaintiff Dick and the defendant Horton made their appropriations earlier in 1870 than the predecessors of Bird & Fitzhugh made theirs on the most favorable view of their testimony. In other words, if the finding of the court had been that Bird & Fitzhugh appropriated water to irrigate ten acres of grain in the spring of 1870, the result, as between them and Dick and Horton, would have been the same, for the evidence fully sustains



the finding of the court that they had made their appropriations even earlier than that, and there is no finding that they increased their original appropriations prior to 1872.

The second finding complained of is to the effect that Dick's appropriation of water sufficient to irrigate two hundred and fifty acres of meadow and one hundred acres of grain, and Horton's appropriation of water sufficient to irrigate two hundred and fifty acres of meadow were prior to any appropriation by the predecessors of Bird & Fitzhugh. The specifications against this finding are as follows: "Because the same is contrary to the evidence given on the trial of this cause in this: That the evidence shows that defendants, Bird & Fitzhugh, appropriated the water of said creek in the month of May, 1869, and that the said William Horton and his predecessors in interest made no appropriation until after that date, and that the said plaintiff, Thomas M. Dick, made no appropriation of the waters of said creek until after the month of May, 1869."

It is true that neither Dick nor Horton claims under an appropriation as early as May, 1869; but Horton's appropriation dates back to the fall of 1869, and Dick's to February, 1870, while Bird & Fitzhugh's is not shown to have been made earlier than May, 1870. These facts are clearly shown by the evidence in the statement, and therefore the finding is not incorrect for any reason assigned in the specification above quoted. Counsel for appellant, however, contends in argument that the finding was erroneous for a reason not assigned in the statement, that is to say, because it gives priority to Dick for a larger amount of water than he had appropriated before Bird & Fitzhugh's appropriation was made. The statement may sustain this point, but it can not be considered. The positive rule of the statute (C. L. 1258) forbids it, and the reasons for enforcing the rule are as strong in this case as they ever are. Dick's stipulation that the statement is correct is qualified by the specifications, and we do not know that he would not have proposed and secured amendments as to the extent of his original appropriation if his attention had been called to that particular point. Under the specifications contained

in the statement he was bound to propose amendments, if necessary, to show the priority of his appropriation, but he was not bound to see to it, that the testimony as to the exact amount of his first appropriation was all fully set out. For these reasons we think appellant is not entitled to be heard on this point.

The next two exceptions of the appellants are to the refusal of the district judge to find that they made a larger and earlier appropriation than was actually found. As we have before said, the findings of the court upon this point were as favorable to appellants, except in one immaterial particular, as the evidence warranted, and the findings requested were properly refused.

The last exception is to the refusal of the court to find in favor of appellants upon their plea of title by prescription. The evidence in the statement justifies the court in refusing this finding. It is true that the evidence shows, and the court finds, that Bird & Fitzhugh were using water during more than five years prior to the commencement of this action, but it is also true that Dick and Horton were using water for a longer period still, and there is nothing to show that the use by Bird & Fitzhugh was to any extent adverse to the claims of Dick and Horton for more than one or two seasons immediately prior to the commencement of the suit. They were increasing their appropriation year by year, and towards the last Dick and Horton began to experience a scarcity on account of the diversion of water by Bird & Fitzhugh and others who occupy lands above them on the stream. The evidence is, however, all consistent with the view that Bird & Fitzhugh did not, before the irrigating season of 1874, use more water than remained in the stream after deducting all that is claimed by Dick and Horton and the other parties whose appropriations were made prior to their own. If such was the case their use to that extent was subordinate to and entirely consistent with the prior rights of Dick and Horton, and gives no support to a claim by prescription.

The record in our opinion discloses no error prejudicial to the appellants, and the judgment and orders appealed from are affirmed.

[No. 904.]

THOMAS M. DICK, RESPONDENT, v. E. CALDWELL,  
APPELLANT.

DICK v. BIRD affirmed. The points decided in this case are substantially the same as in *Dick v. Bird*, *ante*, 161.

APPROPRIATION OF WATER—BENEFICIAL PURPOSE.—A party cannot acquire any right to water not used for any beneficial purpose.

APPEAL from the District Court of the Sixth Judicial District, White Pine county.

The facts appear in the opinion.

*Robert M. Clarke and J. B. Barker*, for Appellant.

*A. M. Hillhouse*, for respondent.

By the Court, LEONARD, J.

There were twenty defendants in this case, including Bird & Fitzhugh and E. Caldwell. Bird & Fitzhugh appealed from the decree, etc., and that appeal has been recently decided by this court. Defendant Caldwell also moved for a new trial. That motion was overruled, and he now appeals from the order denying the same, and from "so much of the judgment rendered as gives the said Dick any of the waters of Duck creek used by said E. Caldwell and his grantors, for the period of five years prior to the commencement of this suit, under claim of right, and adverse to the claim of said T. M. Dick."

The notice of motion for a new trial was directed to plaintiff Dick and defendant Horton, but so far as the record shows the facts, it was not served on defendant Horton. The notice of appeal was directed to and served on plaintiff Dick alone. By the decree affirmative relief and definite rights were awarded to the other defendants. Such being the case, the decision in the appeal of Bird and Fitzhugh is decisive of several points raised by appellant: First, that the decree is void for uncertainty, because it takes as the basis of apportionment the quantity of water necessary to irrigate an acre of ground instead of distributing the water by inches; second, that it is erroneous

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Opinion of the Court—Leonard, J.

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because it does not conform to the prayer of the complaint for a certain number of inches of water, the decree being for a sufficient quantity of water to irrigate a certain number of acres. It is sufficient to say that, upon the authority of that opinion, and for the reasons there stated, the two points mentioned are not well taken.

The motion for a new trial was made on the grounds of insufficiency of evidence to justify the decision of the court, and that the same was against law.

The appellant excepted to this portion of the fifth finding of fact, to wit: "That defendant, E. Caldwell, or his grantor, D. R. Pierce, used water from said Duck creek to cultivate six acres of vegetables in 1869, fifteen acres of grain and vegetables in, 1871 twenty acres, in 1872, 1873, 1874 about forty-five acres, in 1875 fifty-seven acres, and during all this time irrigated about ten acres of grass land, and has used the same ever since," "because the same is contrary to the evidence given on the trial of said cause in this," etc. The court evidently intended to find, and did find, the number of acres cultivated and irrigated by appellant each year from 1869 to and including the year 1875. For the years 1869, 1871, 1872, 1873, 1874, and 1875 the findings are clear and definite, and they are fully sustained by the evidence, including the testimony of appellant himself. It is evident that after the words "fifteen acres in grain and vegetables in," the court intended to insert the year—that is, 1870—but by a clerical error the year was left out. No other year could have been intended, and appellant testified that he cultivated fifteen acres in 1870. But it can make no difference if the court did in fact fail to find the number of acres cultivated and irrigated in 1870, for the reason, as we shall see, that as between himself and plaintiff, appellant was awarded the first right to all the water that he appropriated to a beneficial use during the whole period from 1869 to 1875 inclusive.

The next exception is to the court's finding that "plaintiff, Dick, used water to irrigate from two hundred and fifty to three hundred acres of grass land in 1869; this was meadow land upon which the stream naturally flowed; that is to say,

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Dick cut hay from said number of acres which he had taken up. In 1870 and 1871, besides cutting hay, he cultivated fourteen or fifteen acres of vegetables, and in 1872 about ninety acres of grain and vegetables, and has used the same ever since, except when prevented for want of water." The exception is as follows: "Defendant, E. Caldwell, excepts to so much of the fifth finding of fact as finds that the plaintiff, Thomas M. Dick, appropriated any land on Duck creek, or any of the water of said Duck creek in the year 1869, because the same is contrary to the evidence given on the trial in this cause, in this," etc. Although the facts did not justify the exception as stated, yet it makes no difference if they did. It is a matter that does not concern appellant. If he received all the rights that belonged to him he cannot complain, even though it is a fact that plaintiff received more than he was entitled to. The next exception is to the refusal of the court to find as a fact, that "appellant and his grantor in July, 1869, appropriated two hundred and seven inches of the water of Duck creek, by cutting one ditch carrying seventy-five inches of water, and one other ditch carrying one hundred and thirty-two inches of water; that the water was diverted from said creek and used by appellant to irrigate vegetables and meadow land in 1869, and in 1870 to irrigate fifteen acres of grain and vegetables and ten acres of grass land; that said amount of water was used continually from July, 1869, to the commencement of this suit, and was necessary, each season, to irrigate the land cultivated by him."

The court took as the basis of apportionment the quantity necessary to irrigate an acre of ground, instead of distributing the water by inches. It was therefore unnecessary to find the number of inches diverted and appropriated by appellant, even though the proof warranted the finding that he did divert two hundred and seven inches, and did continue to divert the same from 1869 to 1875. Such a finding would not have assisted the court in rendering its decree, apportioning to each party water for such number of acres as he was entitled to. Besides, the court was justified in refusing to find that all water diverted by appellant from

1869 to 1875, inclusive, was necessary to irrigate land cultivated by him. Such was not the fact shown by the testimony. The court finds that in 1874 and 1875, appellant used more water than he was entitled to use, and that he wasted large quantities thereof, to which the plaintiff and several of the defendants were entitled, and no exception was taken to that finding.

The last exception is to the refusal of the court to find for appellant upon his plea by title of prescription. The facts relating to that question are the same in this appeal as they were in Bird and Fitzhugh's, and for the reasons there stated, we must hold that the exception is not supported by the facts.

As we have seen, so far as plaintiff is concerned, appellant is awarded the first right to water from Duck creek for the irrigation of fifty-seven acres of grain and vegetables, and ten acres of grass.

It is plain from his own testimony that he was entitled to no more, because, during that whole period, he did not cultivate or irrigate but that number of acres, and he could not have used beneficially any more water than was necessary to irrigate the same. He did not appropriate, in a legal sense, any water except such as he used beneficially. Turning water out of the stream for no useful purpose did not give him any additional rights. If he had, from 1869 to and including 1875, turned two hundred and seven inches of water from the stream and made no use of any portion of it, it can not be claimed that he would have been entitled to a decree for any amount by reason of actual appropriation. Turning more water from the stream than he used was waste, not appropriation. He received water for every acre he cultivated in grain or vegetables, or irrigated for grass, from 1869 to the commencement of the suit. Certainly he can claim no more. Plaintiff received water, subject to appellant's first use, for no greater number of acres than he had cultivated and irrigated from the creek. We think appellant has no just complaint against the decree as between him and respondent, and we find no errors prejudicial to him.

The order and judgment appealed from are affirmed.

[No. 914.]

**R. S. GAMMANS, APPELLANT, v. M. A. ROUSSELL ET AL., RESPONDENTS.**

**CONFLICT OF EVIDENCE—FINDINGS.**—Where there is a substantial conflict of evidence, the findings of the lower court will not be disturbed.

**STATEMENT NOT CONTAINING ALL THE EVIDENCE.**—Where the statement does not show that it contains all the evidence, it will be presumed that the findings were supported by the evidence.

**APPEAL FOR DELAY—RULE AS TO DAMAGES ENFORCED.**

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

*W. Webster* and *R. M. Clarke*, for Appellant.

*Thomas E. Haydon*, for Respondent.

By the Court, LEONARD, J.:

This is an action to determine the ownership and right of possession of an undivided one-sixth part of a certain water-ditch known as the "big ditch," in Washoe county. The case was tried by the court without a jury. The findings were all in favor of the defendants, who had judgment against plaintiff upon the merits and for their costs.

Plaintiff moved for a new trial on the grounds, first, that the findings of the court were not sustained by the evidence; second, that the judgment was against law and the evidence; third, error in law occurring at the trial and excepted to by plaintiff. The motion for a new trial was denied "upon the grounds that the statement as settled and certified after its engrossment does not show any particulars in which the evidence is insufficient to justify the findings and decree; that it does not show that it contains all the evidence given upon the trial, and does not disclose any error in law occurring at the trial, excepted to by the plaintiff, that is material, or for which such findings and decree should be set aside." There was an attempt to put in the statement a specification of particulars in which the evidence was alleged to have been insufficient. But we need not stop to

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Points decided.

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inquire whether or not such specifications are sufficient to justify us in considering the statement. If they are deemed sufficient upon the point that the findings are against the evidence, still the fact plainly appears that the evidence of plaintiff and defendants conflicts upon the most material questions in the case. The findings, therefore, cannot be disturbed. Besides, it does not appear that the statement contains all the evidence; consequently, the findings will be presumed to have been supported by the evidence. The only error in law complained of, and the only specification thereof, is as follows: "The court erred in that the judgment is against law, because of plaintiff's right to the water in question, because of his title thereto being already established." If that can be regarded as a specification of error in law, still it is useless, because it is based upon the evidence in the case, and, as before stated, it does not appear that it is all contained in the statement. This appeal is without any merit, and in my opinion it was taken purely for delay. The judgment and order appealed from are affirmed, and each of the defendants is allowed and awarded ten per cent. on the amount of his judgment as damages for the delay occasioned.

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[No. 924.]

ELIAS JONES, APPELLANT, v. THE SAN FRANCISCO  
SULPHUR COMPANY, RESPONDENT.

DEFAULT—MISTAKEN IN NAME OF CORPORATION—SECTION 68 PRACTICE ACT.—

Defendant was sued and served with process as "The San Francisco Sulphur Company." It suffered default. At a subsequent term it specially appeared under its true name of "The San Francisco Sulphur Mining Company," and moved to set aside the default, upon the ground of the technical mistake in its name: *Held*, it appearing that defendant had not complied with the law by filing a copy of its certificate of incorporation, that the practice act was only intended to apply for the benefit of those who have a meritorious defense, and who offer to make it, and not to those who offer a mere technical excuse for not answering in time.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.



The facts are stated in the opinion.

*Bonnifield & French and R. M. Clarke*, for Appellant.

*A. W. Fisk*, for Respondent.

By the Court, BEATTY, C. J.:

This action was commenced in the fourth district court, Humboldt county, at the June term, 1877. The complaint was filed August 6th, and according to the sheriff's return, the summons, together with a certified copy of the complaint, was served on E. McWorthy, "superintendent and agent" of defendant in Humboldt county, on the seventh day of August. Copies of the summons and complaint were also mailed to the defendant at San Francisco, its principal place of business. There was no appearance on the part of defendant, and on the sixth of September its default was entered. The following day judgment was taken for the amount demanded in the complaint, and on the eighth of September execution issued. All this took place at the June term. On the seventeenth day of January, 1878, during the October term of the court, "the San Francisco Sulphur Mining Company" served upon plaintiff's attorney the following notice:

"You will please take notice that on the fourth day of March, A. D. 1878, at the court-room of the above-entitled court, at the court-house in Winnemucca, at 10 o'clock A. M. of said day, or so soon thereafter as counsel can be heard, the San Francisco Sulphur Mining Company, a corporation, will, by its attorneys, appearing specially for that purpose only, move the court to vacate and set aside the judgment and default and to quash the execution heretofore entered and issued at the instance and request of the above-named Elias Jones as plaintiff, in an action entitled, *Elias Jones v. The San Francisco Sulphur Company*, and to vacate and annul all orders and proceedings had in said action subsequent to the filing of the complaint and the issuing of summons therein, and for costs, on the ground that, by said action, it was intended to sue the San Francisco Sulphur Mining Company; and there is not now, nor ever was, any

company or corporation known as the San Francisco Sulphur Company; that no service of summons in said action was ever had or made upon the San Francisco Sulphur Mining Company; that said corporation never, in any way, appeared in said action, and that the said court never had jurisdiction of said corporation."

On the sixteenth of April, 1878, and at the February term of the court, an order was made which, after reciting the special appearance of the San Francisco Sulphur Mining Company, sustained its motion on the grounds stated in the notice. The statement on appeal shows that, on the hearing of the motion, a good deal of evidence was produced going to show that the defendant is a California corporation, called, in its certificate of incorporation, the San Francisco Sulphur Mining Company, but that in Humboldt county, where its sulphur mine is situated, it calls itself, and is generally known as, the San Francisco Sulphur Company, as it is designated in the complaint. It does not appear to have ever complied with the law (Stats. 1869, p. 115), by filing a copy of its certificate of incorporation with the recorder of Humboldt county. It was also proven that E. McWorthy was not the regular superintendent of the company, although he was actually in charge of its business at the sulphur mine at the time he was served with summons. It was conclusively shown on the other hand, and not denied, that the officers of the corporation actually received the copies of the complaint and summons which were mailed to San Francisco, and that they were well advised of the pendency and nature of the action before the time for answering had elapsed.

Upon this state of facts we think the district court erred in sustaining defendant's motion. The general rule is that a court can not set aside or modify a judgment after the lapse of the term at which it was rendered, unless a motion to that effect was made during the term. (*Daniels v. Daniels*, 12 Nev. 118.) The sole exception to this rule is the case provided for in the last clause of section 68 of the practice act, where the defendant has not been personally served with summons. (*Casement v. Ringgold*, 28 Cal. 336.) But

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Argument for Appellant.

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in that case the court is only authorized to allow the defendant to "answer to the original merits of the action." This defendant has asked for no such relief, nor has it made any showing which would entitle it to relief under the provision in question, which was intended for the benefit of those who have a meritorious defense and who offer to make it, who for that purpose acknowledge and submit themselves to the jurisdiction of the court by appearing generally in the action, and who are able to offer a substantial, and not a merely technical excuse, for failing to answer in time. It was not intended to help those who, like this defendant, having actual knowledge of the pendency of the suit, and relying upon a misnomer or some such technical objection to the process, have waited until judgment has been entered, execution issued and large expenses incurred, and have then appeared specially for the mere purpose of moving to quash the proceedings with no other apparent object than to subject the plaintiff to useless costs and vexatious delays.

The order appealed from is reversed.

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[No. 907.]

H. A. GASTON, RESPONDENT, v. F. V. DRAKE,  
APPELLANT.

**AGREEMENT TO DIVIDE THE FEES OF AN OFFICE VOID, AS AGAINST PUBLIC POLICY.**—An agreement made before election to divide the salary, fees, and emoluments of the office of district attorney—the consideration for said agreement being that the plaintiff should use all his influence to secure the election of the defendant to said office, is void, as against public policy.

**APPEAL** from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

*Lindsay & Dickson*, for Appellant.

I. The contract between plaintiff and defendant is opposed to public policy, in contravention of the election law of this state, and wholly void.

## Argument for Appellant.

The salary of an office of trust, or of an office concerning the administration of justice, are not the subject of sale; such sale is opposed to public policy and void at the common law. (*Wells v. Foster*, 8 M. & W. 148; *Palmer v. Bate*, 2 B. & B. 673; E. C. L. R. vol. 6; *Flarity v. Odum*, 3 T. R. 681; *Lidderdale v. Duke of Montrose*, 4 T. R. 248; *Aston v. Guinnell*, 3 Y. & J. 147; Story on Contracts, vol. 1, sec. 709; *Spense v. Harvey*, 22 Cal. 340; *Faurie v. Morin*, 6 Amer. Dec. 701; *Eddy v. Capron*, 4 Rh. Isl'd, 394.)

Such contracts tend to corrupt electors, poison the source of political power, and are therefore void. (*Martin v. Wade et al.*, 37 Cal. 168; *Nichols v. Mudgett*, 32 W. 546; *Swayze v. Hall*, 3 Hal. 54.)

II. A promise to use one's influence with the appointing power to secure the appointment of another to a public office in consideration of a portion of the salary and emoluments of the office, is a void contract. (*Lewis v. Knox*, 2 Bibb. 453; *Carlton v. Whicher*, 5 N. H. 196; *Meacham v. Dow*, 32 W. 721; *Gray v. Hook*, 4 N. Y. 449; *Ferris v. Adams*, 23 Vt. 136; *Haas v. Fenlon*, 8 Kan. 601; *Faurie v. Morin*, 6 Amer. Dec. 701.)

The courts should be vigilant in seeking to insure purity in elections, upon which the stability of the government itself depends. (*Mills v. Dolsen*, 40 N. Y. 543.)

It matters not how pure the intentions of the parties may be in entering into a contract of this kind, the answer to the inquiry, Is there anything pernicious in its tendency? must determine the question of its legality. (*Mills v. Dolsen*, *supra*; *Atcheson v. Mallon*, 43 N. Y. 147; *Tool Co. v. Norris*, 2 Wal. 45; 18 Pick. 472; 34 Vt. 281; 48 N. Y. 348; *Weed & Clark v. Black*, 3 Cent. L. J. 34.)

III. Such contracts are in contravention of the election law of this state. (C. L. Nev., secs. 2591, 2592, 2593, 2594.)

IV. The contract is entire. If part therefore of the consideration is illegal the whole contract is void. (2 Chitty Con. (Am. ed.), p. 973, and cases cited in note G.; 1 Pars. Con. (sixth ed.), p. 456 *et seq.*)

V. In the absence of an agreement there would be no partnership in the office. (*King v. Whiton*, 15 Wis. 684.)

*Lewis & Deal*, for Respondent.

I. The finding of fact relied upon by appellant was utterly unwarranted by the pleadings and issues and is therefore nugatory. Findings of fact should always be simply the conclusions arrived at by the court upon the issues of fact presented by the pleadings. (*Morenhout v. Barron*, 42 Cal. 605; *Gregory v. Nelson*, 41 Id. 284; *Burnett v. Stearns*, 33 Id. 474.)

II. If the fact that Gaston agreed to aid Drake in securing his election be a material fact, and rendered the agreement void, that fact should have been pleaded. If the contract independent of that element was valid, then defendant should have alleged the fact that such promise was a part of the contract, and that by reason thereof the entire contract was rendered void.

III. The evidence does not bring the case within the provisions of section 2592, section 2593, or 2594, of the compiled laws.

IV. These provisions of the statute are penal; the court must therefore construe them strictly. By the rules of construction of such statutes only such cases are held to be within them as come within the very letter of the law. (23 Iowa, 304; *Lair v. Killmer*, 1 Dutch, 522; *Dwarris on Statutes*, 634.) To hold that the contract entered into between these parties is void under the statute necessarily involves the conviction of the defendant of a very serious crime, when as a matter of fact no one can believe, after examining the evidence, that anything criminal or wrong was thought of by either party.

V. A contract for the division of fees is valid and must be upheld. (*Mott v. Robbins*, 1 Hill. 21; *Becker v. Ten Eyck*, 6 Paige, 68; 7 Bac. Abr. 301; 3 Minn. 413.)

*Lindsay & Dickson*, in Reply.

The respondent made no exception to the findings, did not move for a new trial, nor has he appealed, therefore he can not be heard to allege any error committed by the court below, nor to object to any finding, nor to the want of a finding. (*Jackson v. F. R. Water Co.*, 14 Cal. 18; *Seward Nev.* Vol. XIV.—12.)

v. *Malotte*, 15 Id. 304; *Paul v. Magee*, 18 Id. 698; *Poppe v. Athearn*, 42 Id. 606.)

By the Court, LEONARD, J.:

It is alleged in the complaint that plaintiff and defendant, on or about February 3, 1876, formed and entered into a copartnership to practice law in Storey county and state of Nevada; that by the terms of the contract of partnership, each was to share equally, share and share alike, in all the labors of practice, and in the fees and profits arising therefrom; that in the fall of 1876, by and with the advice and consent of plaintiff, defendant became a candidate for the office of district attorney of Storey county; that it was agreed between plaintiff and defendant that if defendant should be elected to said office, the said copartnership should continue upon the terms above stated, and that said partners should share equally, share and share alike, in the profits, fees, and emoluments of said office and business; that defendant was elected on the seventh day of November, 1876, and on the second day of January, 1877, he duly qualified and entered upon the discharge of the duties of said office; that from time to time thereafter plaintiff greatly assisted defendant in performing the duties of said office, upon the request of the latter, and upon his promise to divide the proceeds equally with plaintiff; that plaintiff has performed his every duty in said partnership and in said office, and has divided equally with defendant all fees and moneys which came into his hands belonging to said partnership; that during its existence, defendant received about the sum of thirteen thousand two hundred and twenty-five dollars and twenty-four cents as fees belonging to said partnership, in excess of his just share; that though often requested so to do, he has refused and failed to settle and account with plaintiff, or to pay to plaintiff any part of said proceeds of said partnership. Plaintiff prays for an accounting and settlement, and that defendant be required to pay over to him one half of the fees and profits of the partnership stated in the complaint, to wit, six thousand six hundred and twelve dollars and sixty-two cents. Defendant demurred to

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the complaint generally and specifically, and the demurrers were overruled. In his answer he admits the contract of partnership first alleged, but denies specifically each and every material allegation of the complaint in relation to the alleged contract, or any contract or agreement concerning the office of district attorney, or any division of fees or profits thereof.

The court called a jury to decide this special issue, to-wit: "Did the plaintiff and defendant enter into an agreement, or have an understanding, that they should divide equally the profits and emoluments of district attorney of Storey county?" Upon the issue submitted, the jury found for plaintiff. It is said by defendant that they so found in consequence of an instruction claimed to be erroneous; but as we view the case, that need not be considered. The court, in terms, adopted and confirmed the verdict, and an accounting was ordered and had between the parties. Among other facts, the court found the following: "That on or about September 1, 1876, after the defendant had become a candidate for the office of district attorney of Storey county, and before he was elected thereto, the plaintiff and defendant entered into an agreement to divide the salary, fees, and emoluments of said office; that the consideration for said agreement was that the plaintiff should use all his influence to secure the election of the defendant to said office, and in the event of the election of defendant to said office, to assist him in the performance of the duties of said office; that said partnership and agreement terminated on the fifth day of April, 1877; that about said date, plaintiff notified defendant that he was ready to assist in closing all business then pending; that upon full accounting there was in the hands of plaintiff, or had been collected by him, of the partnership assets, the sum of six hundred and ninety dollars, and by defendant, of partnership assets and salary and fees belonging to said office of district attorney, the sum of seven thousand one hundred and fifty-six dollars, of which six thousand seven hundred and five dollars were derived and collected from the salary and fees of said office; that there was then due from defendant to plaintiff the sum

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of three thousand two hundred and thirty-three dollars, being one half of the balance in his hands, over and above what was collected by plaintiff." As a conclusion of law, the court found that plaintiff was entitled to judgment against defendant for the sum of three thousand two hundred and thirty-three dollars, together with his costs. Judgment was entered accordingly, and this appeal is taken from an order overruling defendant's motion for a new trial, and from the judgment.

It is proper to state that it appears from the complaint that the sum of thirteen thousand two hundred and twenty-five dollars and twenty-four cents, one-half of which was claimed as being due to plaintiff, was made up of fees appertaining to the district attorney's office. Of the six hundred and ninety dollars collected by plaintiff, it does not appear that any came from fees of that office; while from the court's findings, it appears there were four hundred and fifty-one dollars in defendant's hands that did not come from that source.

It is urged by counsel for defendant that the contract alleged to have been entered into between plaintiff and defendant, and that found by the court, were and are opposed to public policy, in contravention of the election law of the state, and wholly void.

It is claimed, on the other hand, by counsel for plaintiff: 1. "That the finding, that a part of the consideration for the contract was a promise by plaintiff to use all his influence to secure the election of defendant, was unwarranted by the pleadings, is wholly nugatory, and can not be considered by this court; that if the fact that plaintiff agreed to use his influence was a material fact, and rendered the agreement void, it should have been pleaded; that defendant should have alleged that such promise was made, and that by reason thereof, the entire contract was rendered void; 2. That the contract set out in the complaint, and the only one the court had power to find, is valid." For reasons that will subsequently appear, we think it unnecessary to decide whether or not, in fact, the findings of the court above stated and objected to by the plaintiff's counsel were



within the issues made by the pleadings. All of plaintiff's testimony showing the agreement and the consideration therefor is in the statement, and it is not said and can not be claimed, that there is no evidence to sustain the court in its findings. Plaintiff's testimony in chief was voluntarily given by him, and no objection was made, or could have been made, to any question asked upon his cross-examination. Keeping in mind these facts, we will first consider plaintiff's objection to the court's finding, and to a consideration of the same by this court.

It cannot be doubted at this day, nor is it denied, that a contract will not be enforced if it is against public policy, or that, if a part of the consideration of an entire contract is illegal as against public policy or sound morals, the whole contract is void. (*Garforth v. Fearon*, 1 H. Bl. 327; *Powers v. Skinner*, 34 Vt. 281; *Story's Eq. Jur.* vol. 1, secs. 296, 298; *Carlton v. Whitcher*, 5 N. H. 198; *McCausland v. Ralston*, 12 Nev. 212.) Nor does it matter that nothing improper or illegal was done, or was expected to be done, under the contract; the principle is controlled by the tendency of the contract. (*Powers v. Skinner*, *supra*; *Atcheson v. Mallon*, 43 N. Y. 149; *Richardson v. Crandall*, 48 Id. 362; *Clippinger v. Hepbaugh*, 5 Watts & S. 321; *Spence v. Harvey*, 22 Cal. 389.)

Courts refuse to assist either party to such contracts, and they refuse to hear such cases, in the interest of the public, not for the sake of plaintiff or defendant. (*Holman v. Johnson*, 1 Cowp. 343.) No principles are better settled than those above stated.

*Valentine v. Stewart*, 15 Cal. 389, was a suit in equity to compel a specific performance of a contract concerning lands. After the testimony was, in the court below, of its own motion, dismissed the case, on the ground that the agreement, or a part of it was in, violation of public policy.

In that case, counsel for appellant advanced the views that counsel for plaintiff do in this case. They said in their briefs: "But the court below founded its decree upon supposed facts nowhere alleged in the pleadings. This was clearly erroneous. A court of equity can not found its de-

cree upon a fact not alleged in the pleadings, however clearly it may be made out in evidence. \* \* \* But it is contended \* \* \* that whenever it appears to a court that a contract which is brought before it is against public policy, it will refuse to entertain any suit upon it. \* \* \*

"It is true that when it so appears to the court the court will eject the cause; but then, nothing appears to the court that is not on the record. But if it is meant to assert that a court will decide a contract to be *turpis contractus* when no fact is alleged upon the record which makes it so, there is no foundation for the assertion."

Counsel for respondent, in their brief, said: "The only question is, whether the fact appearing by evidence properly given under the issues raised by the pleadings, that the consideration was an immoral one, and the contract one which is against public policy, the court should refuse to enforce performance, where the objection is not specifically raised and made a ground of defense."

We have quoted from the briefs of the respective counsel for the purpose of showing that the point raised there was like the one urged by counsel for plaintiff in this case, and now being considered. In that case the contract set up in the bill was legal, but contemporaneously an illegal contract touching the same matter was executed by the same parties, which was decided to be against public policy, and void. The contract last named was not set out in the bill, but was disclosed by the proofs. The court said: "This is a case of more than ordinary importance, and presents features of peculiar interest. The plaintiffs file a bill for the specific execution of a certain agreement which they set out. Upon the pleadings and proof the district judge dismissed the bill upon the ground that the agreement, as disclosed in the proofs and the facts connected therewith, showed the contract sought to be enforced was in contravention of public policy and void, and that the court would refuse to execute it, though this defense was not specifically or otherwise set up in the pleadings."

After considering the nature of the cotemporaneous contract, and deciding that it was void for the reason men-

tioned, and that the contract which plaintiff was endeavoring to enforce was void also, for the reason that it was wholly or in part executed in consideration of the making of the void contract cotemporaneously made, the court further said: "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. \* \* \* The authorities and the reason of the rule leave no question as to the right of a court, and its duty, to dismiss from its consideration a case based upon a consideration which contravenes public policy. Courts do not sit to give effect to such illegal contracts. The law is not to be subsidized to overthrow itself, though the parties to the litigation may not object to such a meretricious exercise of power. If the public time and the authority of law were thus at the mercy of litigants, the sense of dignity and obligation to the laws, from which the court derives its powers, would constrain it to desist from the suicidal task of subverting the laws which it was organized to preserve and administer." (See, also, response to petition for rehearing in same case, and *Abbe v. Marr*, 14 Cal. 211; *Hatzfeld v. Gulden*, 7 Watts, 154; *Holman v. Newland*, 1 Cowp. 341.)

We fully agree with the views expressed in the decision from which we have quoted so liberally. It is undoubtedly the general rule in law and equity that the findings must be warranted by the pleadings. So the cases cited by respondent hold. (42 Cal. 605; 41 Id. 284; 33 Id. 474.) But in neither of those cases was it claimed or held that the contract sued on was opposed to public policy. In neither was the public especially interested. Admitting that in such cases the court must base its findings upon the issues made by the pleadings, it does not follow that it must do so in cases where relief is denied, not for the sake of the defendant, but because it is for the public interest to refuse

to entertain the case. All the authorities hold that contracts against public policy should not be enforced, because it is for the public good to leave the parties where they have voluntarily placed themselves. In such cases the court must act for the public, if the defendant does not, and refuse to assist either, "if from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*."

The court having found that a portion of the consideration of the contract on the part of plaintiff was that he should use all his influence to secure defendant's election (as it was its duty to do if the evidence justified such a finding), it then became its duty to dismiss the suit if such a contract was opposed to public policy. It becomes necessary, then, to ascertain the nature of such an agreement.

We shall first consider it as found by the court, including the portion objected to; and second, with that part excluded, or as it is alleged in the complaint.

It is hardly claimed by counsel for plaintiff that a contract like the one found by the court, a part of the consideration of which was an agreement by plaintiff to use all his influence to secure defendant's election, can be sustained or enforced. But it is urged, as before stated, that such a finding was nugatory, and cannot be considered by this court. Having arrived at an opposite conclusion upon that point, we shall content ourselves with a summary disposition of the question as to the validity of the contract found by the court. It is undoubtedly void, as contrary to public policy. It was in terms a promise to use not only personal effort, but personal influence, among the voters of Storey county to secure defendant's election. Its influence upon plaintiff was the same as though defendant had promised to give him a definite sum of money in case of election. Success would bring reward, while defeat would result, not only in loss of coveted profits, but time and labor as well. By it plaintiff's love of gain was stimulated, and a great temptation placed before him to promote his own interests regardless of public good. In *Gray v. Hook*, 4 Comst. 454, Hook agreed to withdraw his application for an office and

aid Gray in securing the appointment, in consideration of which Gray was to allow Hook one half of the fees and emoluments of the office as long as Gray held it. The court said (p. 457): "I think that this contract was void, because it stipulated that Hook should have a pecuniary compensation for withdrawing his application, by which he had probably driven off all competition and contributed to reduce the number of applicants to himself and Gray. I have no doubt that it is void, because it is stipulated that Hook should have a pecuniary compensation for aiding Gray to obtain the appointment. And I have no doubt that any agreement between two citizens by which one stipulates to pay the other a proportion of the fees and emoluments of a public office which he is seeking, in consideration that the other will aid him in obtaining it, is void."

In *Clippinger v. Hepbaugh*, 5 Watts & S. 315, it is said that "a contract to procure, or endeavor to procure, the passage of an act of the legislature by any sinister means, or even by using personal influence with members, is void, as being inconsistent with public policy and the integrity of our public institutions. And any agreement for a contingent fee, to be paid on the passage of a legislative act, would be illegal and void, because it would be a strong incentive to the exercise of personal and sinister influences to effect the object."

*Mills v. Mills*, 40 New York, 543, was an action upon a contract to convey certain lands to plaintiff, the consideration of which was that plaintiff "should give all the aid in his power, spend such reasonable time as might be necessary, and generally use his influence and exertions to procure the passage into a law" of a certain bill. The defendants put the principal allegations of the complaint in issue by their answers, and upon the hearing, the pleadings and agreement were read in evidence. Defendants moved to dismiss, and the motion was granted upon the ground that the agreement was illegal and void. Judgment was entered, and on appeal it was affirmed.

See also *Powers v. Skinner*, 34 Vt. 280; *Fuller v. Dane*,

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18 Pick. 479, 481; *Wood v. McCann*, 6 Dana (Ky.), 369, 370; vol. 1 Story's Eq. Ju., sec. 293, b.; *Faurie v. Morin*, 4 Martin, 39; *Carlton v. Whitchee*, 5 N. H. 196; *Nicholls v. Mudgett*, 32 Vt. 546; *Marshall v. Baltimore and Ohio Railroad Co.*, 16 How. (U. S. R.), 333; *Haas v. Fenlon*, 8 Kan. 604; *Martin v. Wade*, 37 Cal. 174.

The tendency of a contract for a contingent reward, to use one's influence to secure another's election to a public office, is as certainly detrimental to the public interest as is a contract to use personal influence to procure the passage of a law, or to obtain a pardon.

This brings us to a consideration of the contract as stated in the complaint, stripped of the illegal promise just noticed. And with the circumstances attending its making, it may be stated thus: A short time before the primary election, when plaintiff and defendant were partners in the practice of law, both being of the opinion that if defendant should be elected, their business, both civil and criminal, would be greatly increased, they agreed that defendant should run for the office of district attorney, and if elected, they should share, equally, the labors and profits; or, to state it in the language of counsel for plaintiff, they agreed that "if Drake was elected, Gaston was to aid him in the business of the office, for which services he was to receive one half of the fees," etc. Was such a contract valid, or void, as against public policy? What was its tendency, whether entered into by honest, or by designing and corrupt men? We are referred by counsel for plaintiff to cases decided under statutes against buying and selling offices, wherein it is held that a principal holding an office may to himself, and give the balance to his deputy for services. (*Mott v. Robbins*, 1 Hill, 21; *Becker v. Ten Eyck*, 6 Paige, 68; 7 Bac. Abr. 301.) Also, that a sheriff may give to his deputy all the fees pertaining to the services he may render as such. (*Printing Co. v. Sanborn*, 3 Minn. 418.). But in all of those cases the deputation was made after the election of the principal, and therefore the appointment or

promise to appoint could not have had an influence upon his election.

We shall not discuss the question whether the contract now under consideration would have been valid or void if made after election. That is not our case. Plaintiff testified, among other things, that when defendant first spoke to him about running for the office, defendant said: "I think if you and I stand in for the office together, we have got friends enough to secure the nomination and election. I wish you would think it over till to-morrow, and if, on reflection, you are willing, we will stand in for it;" that plaintiff replied: "Mr. Drake, the idea strikes me favorably, and suppose I should come to a favorable conclusion, what effect is it going to have on our partnership?" That defendant replied: "The only effect it would have, it will bring in more business, all the business we can attend to. \* \* \* The salary is two thousand dollars per year, and five hundred dollars coming in every three months is no little item to be divided; and the salary and tax suits and the business of the criminal cases, together with the civil business that will naturally come to us, will build up a business that will amount to thousands of dollars per year." \* \* \*

Plaintiff says he thought the matter over until the next morning, when he told defendant that he had come to a favorable conclusion; that he then said to defendant that he "had a great many old California friends that lived here, \* \* \* and old Washoe friends, and he thought they would do anything honorable to advance his interests, irrespective of party principles;" that defendant then said to him: "If we go in for this office and I am to be a candidate, I shall want all my time from now till election." He says he gave him all his time and attended to the business himself; that he let defendant use all the money that they had on hand and all that came into the office, to use for his election. He further testified that he did use all his influence to secure defendant's election, and he stated the reason why he did so, although he said, at last, that there was no agreement that he should do so. The reason he gave why he used all his influence was, that he "supposed he was pro-

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noting his own interests." Then, so far as plaintiff was concerned, the incentive that moved him was self-interest and not the general good; and, too, he was induced to do what he did do, by the fact that he was to share the profits, and that defendant's election would increase their business. So, in this case, at least, the tendency of the contract stated in the complaint was to induce plaintiff to use all his influence for defendant's election, even though he did not agree to do so, as found by the court. And such was its natural tendency. This arrangement may have induced him to influence ten men, or a hundred, to vote for defendant in opposition to preconceived political principles, and fixed ideas of right and duty; and, too, when they may have preferred his opponent as an incumbent of the office. Such a contract can not be upheld. Its tendency was to corrupt the people upon whose integrity and intelligence the safety to the state and nation depends—to lead voters to work for individual interests rather than the public welfare. In my opinion, in the majority of cases, men will work as industriously, under an agreement that they shall assist in performing the labors, and share in the profits, of an office, if another is elected, as they would if a promise to use all their influence should be subjoined. With most men, self-interest is among the strongest incentives to effort, and it requires no added promise to act as a stimulating influence.

In *Mood v. McCann*, *supra*, the court said: "There having been no plea or defense in the court below, the only clue to a decision of the case is furnished by the declaration and note as described in it; and had these shown that the fee, or any portion of it, depended on the passage of the legislative acts, or either of them, we should be clearly of the opinion that the contract should be deemed illegal and void; because a contingent fee is a direct and strong incentive to the exertion of not merely personal, but sinister, influence upon the legislature, and therefore public policy forbids the legal recognition of any such contracts, upon the same principle on which it interdicts wagers on elections and contracts for procuring pardons."

And in *Fuller v. Dame*, *supra*, it is said that "the law goes



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Opinion of Beatty, C. J., concurring.

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further than merely to annul contracts where the obvious and avowed purpose is to do or cause the doing of unlawful acts; it avoids contracts and promises made with a view to place one under wrong influences—those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons." See authorities before cited. If there are any contracts upon which courts should "put the stamp of their disapprobation," it is those curtailing or tending to curtail a free exercise of the elective franchise. The contract stated in the complaint, as well as that found by the court, were of that character, and neither can be upheld or enforced.

The judgment and order appealed from are therefore reversed, and the court below is directed to enter a judgment of dismissal, defendant to recover his costs.

BEATTY, C. J. concurring:

The evidence in this case did not, in my opinion, warrant the finding of the district court, to the effect that Gaston's promise to use his influence to procure Drake's election was a part of the consideration for the promise of the latter to divide the emoluments of the office. The parties were practicing law in partnership at the time when Drake asked Gaston's advice as to his becoming a candidate for the office of district attorney. Gaston first inquired what effect it would have on their partnership if Drake should be elected. The reply was, in substance, that it would have no other effect than to increase their business by the addition of the business and profits of the district attorney's office.

It was thus definitely settled that in the case of Drake's election their partnership should continue, and should embrace the fees and salary of the office before a word had been said about Gaston's helping him to win the election, and before it had even been decided that he should run. On the following day Gaston, having weighed the chances of success, advised Drake to come forward as a candidate, and promised his hearty support and assistance. He did assist him to the best of his ability, and frankly stated that

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Opinion of Beatty, C. J., concurring.

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one motive for his doing so was his belief that he was thereby advancing his own interests. This is the sum and substance of the testimony, and to my mind it completely fails to show that Drake promised to divide the profits of the office because Gaston promised to help him to get it. What he did was to promise to divide the profits if Gaston would help him perform the duties of the office. If this promise had been made after the election, instead of before the election, it would have been entirely free from any taint of illegality; and if it must be held void and incapable of enforcement, it is not because there is any evidence that Drake expressly bargained for Gaston's influence in aid of his election, but because, and only because, courts are bound to discountenance contracts of this character on account of their tendency to induce the exertion of improper influences upon the election of public officers. Upon this point—the last discussed in the foregoing opinion—I concur in the conclusions and judgment of the court. Upon the others I express no opinion.

REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,

APRIL TERM, 1879.

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[No. 910.]

FREDERICK FREVERT, RESPONDENT, v. CHARLES  
HENRY, APPELLANT.

JUDGMENT MUST CORRESPOND WITH PLEADINGS.—A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered.

ISSUE—JUDGMENT-ROLL.—An objection that the judgment is not authorized by the pleadings may be taken upon the judgment-roll alone.

PROMISSORY NOTE—PAYMENT OF BY SURETY—RIGHTS OF SURETY.—Where a surety pays a promissory note, and has the same assigned to him, and commences an action upon the note: *Held*, that he is entitled to maintain an action of implied assumpsit for the amount paid, but he cannot sustain an action upon the note.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

*T. Coffin and Ellis & King*, for Appellant:

I. The objection that the judgment is not supported by the pleadings can be taken and heard upon the judgment-roll alone. (*Putnam v. Lamphier*, 36 Cal. 151, 158; *Jones v. Petaluma*, 36 Cal. 230; *Bachman v. Sepulveda*, 39 Cal. 688.)

II. The payment of a note by any one of the makers, extinguishes the note, and renders it *functus officio*. The

## Argument for Respondent.

surety can not sue upon the contract expressed in the note to recover money of the principal which he has been compelled to pay. He can only recover upon the contract which the law implies from the circumstances. (*Gordon v. Wansey*, 21 Cal. 77; *Smith v. Johnson*, 23 Id. 64; 2 Pars. on N. & B. 237; *Bryant v. Smith*, 10 Cush. 169; *Pray v. Maine*, 7 Id. 253; *Long v. Bank of Cyntiana*, 1 Litt. (Ky.) 291; *Stevens v. West*, 1 How. (Miss.) 308; *Holliman v. Rogers*, 6 Tex. 91-7; *Odlin v. Greenleaf*, 3 N. H. 270; *Cochran v. Wheeler*, 7 Id. 202; *Blake v. Sewell*, 3 Mass. 556; *Boylston v. Green*, 8 Id. 465; *Hopkins v. Farwell*, 32 N. H. 425; *Batchelder v. Fiske*, 17 Mass. 467; *Lansing v. Gaine*, 2 Johns. 303; Story on Prom. Notes, secs. 180, 381, 384; *Burridge v. Manners*, 3 Comp. 194; *Callow v. Lawrence*, 3 M. & Sel. 97; *Norton v. Coons*, 3 Denio, 130; *Powers v. Nash*, 37 Maine, 322.)

III. The allegation of plaintiff of an assignment to him of the joint note of himself and Henry is the exact equivalent in law of an allegation of payment of the note by plaintiff. (*Gordon v. Wansey*, 21 Cal. 77; *Long v. Bank of C.*, 1 Litt. Ky. 291; *Bryant v. Smith*, 10 Cush. 169.)

N. Soderberg, for Respondent.

I. The statement on motion for a new trial should be stricken out and disregarded. (*Corbett v. Swift*, 6 Nev. 194.)

II. The complaint being verified, and defendant having failed to specifically controvert the assignment and indorsement of the note to plaintiff, his ownership thereof, non-payment, and the amount due thereon, the judgment of the court below must be affirmed, whether the statement be considered or not. This is a material allegation. (C. L. sec. 1128; *Frisch v. Caler*, 21 Cal. 71.)

III. The findings, not being embodied in the statement, are no part of the record. (C. L. sec. 1266.)

IV. The doctrine invoked by appellant that the note became extinguished when paid by the surety is unjust, illiberal, technical, and against public policy. There is no more reason for applying such a rule against a surety, than

against an indorser. (*Rockingham Bank v. Claggett*, 29 N. H. 292; Story on Bills, p. 246; note 2 and cases cited; *Guild v. Eager*, 17 Mass. 615.)

By the Court, LEONARD, J.:

It is alleged in the complaint that defendant made his certain promissory note with plaintiff as surety, in words and figures following, to wit:

"\$450.

"On the first day of February next, for value received, we jointly and severally promise to pay Whitesides & Sacridier the sum of four hundred and fifty dollars in United States gold coin, with interest at two per cent per month, until paid.

CHARLES HENRY,  
FRED. FREVERT.

"Genoa, September 28, 1865."

"That said note was then and there delivered to the payees named therein, who indorsed and transferred the same to one Henry Epstein, by whom it was held and owned when it became due and payable, on the first day of February, 1866; that defendant failed and refused to pay the amount due on said note, or any part thereof, when it became due; that immediately thereafter said Henry Epstein duly notified plaintiff, as surety upon said note, that defendant had failed and refused to pay any part of said note; that both principal and interest remained due and payable from said maker to said indorsee; that he, the said indorsee, should look to plaintiff as such surety to pay the same, and then and there demanded of and from plaintiff the payment thereof; that subsequently, to wit, about March 16, 1866, plaintiff, as such surety, was compelled to, and did, pay to said Epstein, the lawful holder and owner of said note, the sum of one hundred dollars, United States gold coin, which sum, thus paid, was paid for and on behalf of defendant, on account of said note, and in part payment of the principal and interest; that subsequently, to wit, about the — day of May, 1866, plaintiff, as such surety, was compelled to, and did, pay to said Henry Epstein, who was still the

lawful holder and owner of said note, the further sum of four hundred and fifty dollars and fifty cents, United States gold coin, which said further sum thus paid, was paid for and on behalf of said defendant, and on account of said note, and in full payment of the principal and interest of said note, and thereupon said indorsee duly indorsed, assigned, and delivered said note to plaintiff, who is now, and ever since has been, the lawful holder and owner of the same; that no part has been paid, and there is now due from defendant to plaintiff, on account of said note and said moneys paid as before stated, with interest thereon, the sum of one thousand seven hundred dollars, in United States gold coin."

Other facts are pleaded, showing that the action is not barred by the statute of limitation, and the prayer is for judgment for one thousand seven hundred dollars, besides interest upon the sum of four hundred and fifty dollars, at two per cent. per month, from the commencement of the action until judgment, and costs of suit.

By his answer defendant admitted the making and delivery of the note as alleged, but denied payment by defendant, or that one thousand seven hundred dollars or any other sum was due as alleged or otherwise. He also pleaded entire failure of consideration.

Plaintiff recovered judgment for one thousand eight hundred and one dollars and fifty cents, with interest upon four hundred and fifty dollars at the rate of two per cent. per month from the date thereof until paid, and costs of the action.

Defendant moved for a new trial, which was denied; and this appeal is taken from that order and from the judgment. At the oral argument, counsel for plaintiff made several preliminary motions, one of which was to strike out the statement on motion for a new trial, for reasons then stated. Inasmuch as our opinion will be based upon errors claimed by counsel for appellant to appear upon the judgment roll, which will necessitate a reversal or modification of the judgment, it is unnecessary to pass upon the preliminary motions. In cases of this character a judgment must

accord with, and be warranted by, the pleadings of the party in whose favor it is rendered, and if such is not the case the judgment is as fatally defective as one not sustained by the findings or verdict. (*Bachman v. Sepulveda*, 39 Cal. 688.)

An objection that the judgment is not authorized by the pleadings may be taken upon the judgment roll alone, whether there is a statement on motion for a new trial or not. (*Putnam v. Lamphier*, 36 Cal. 158.)

Upon an appeal from a judgment, any error appearing in the judgment roll may be corrected in the appellate court without a statement on appeal. (*Klein v. Allenbach*, 6 Nev. 162.)

Let us ascertain, then, the full extent of relief to which plaintiff was entitled, according to the case made by his complaint, and for what amount he could have taken a valid judgment, if defendant had failed to appear and answer. And first, what is the nature of this action? Is it an action upon the promissory note proper, or is it to recover, on implied assumpsit, for money paid by plaintiff for defendant's use and benefit, as surety, in satisfaction of the note? I think it is the latter. Plaintiff had no right to bring any other action, and all the facts necessary to support such an one are pleaded. It is true that there are certain immaterial allegations which are proper to be inserted, and are material, in an action upon a promissory note; but those allegations, when considered with previous ones, cannot be true in the sense apparently expressed, whether the action was intended to be upon the promissory note proper, or for money paid for defendant's use and benefit.

That is to say, plaintiff having alleged that he paid five hundred and fifty dollars and fifty cents, for and on behalf of defendant, on account of said note, and in full payment of said note, principal and interest, it is an insertion of mere surplusage to allege, in addition, "that Epstein then indorsed, assigned, and delivered said note to plaintiff; that plaintiff is and ever since then has been the lawful holder and owner thereof, and that no part has been paid."

Plaintiff could not be the "owner and holder," after

payment, except as evidence of the fact that he has paid the note. If, a joint maker, although in fact only surety, he paid the note to Epstein, it was no longer negotiable. Had he passed it by indorsement to another, his indorsee could not have recovered upon the note, nor could plaintiff recover upon it in his own name. By his payment, as alleged, to Epstein, the note was satisfied and became *functus officio*, as to both plaintiff and defendant. There was, thereafter, no debt due from either to Epstein; but, by reason of plaintiff's payment, defendant became indebted to him for the amount due and paid.

It is said by counsel for plaintiff that "the complaint being verified and the defendant having failed to controvert specifically the assignment and indorsement to the plaintiff, his ownership thereof and non-payment, the judgment must be affirmed whether the statement be considered or not."

It may be admitted, generally, that in an action upon a promissory note, an allegation of non-payment is a material averment, and consequently, in such an action, should be denied if the fact of payment be relied on. But here the allegations are that after payment had been made to Epstein by plaintiff, one of the joint makers, Epstein then assigned and delivered the note to plaintiff, and that defendant has not paid the same to him. Such an allegation, upon the facts disclosed by the complaint, falls of its own weight and requires no denial. Upon the facts stated, that plaintiff paid the note, principal and interest, to Epstein, the law declares that defendant need not pay, and cannot be compelled to pay, the note as such; but that he ought to pay, and can be made to pay, to plaintiff, the amount due and paid by him.

In *Holliman v. Rogers*, 6 Tex. 97, the court says: "It will be recollected that the notes sued on in this case were the joint notes of the defendant Holliman, Grace, and O'Neal. The record does not disclose whether the two last-named were securities of the former or not. But to put it on the footing that Grace put it on himself, in speaking of the payment of the notes, which testimony was ruled out by the court, that he had paid the notes as



security of Holliman, such payment amounted to an extinguishment of the original liability, and no suit could be maintained on the notes in the name of either Grace or his agent Rogers. Grace would have a right of action against Holliman for the money or the amount paid, but not founded on the notes, because they had been paid off and the debt secured by them extinguished. The right of action would have been founded on an implied assumpsit, to which there could have been no other party plaintiff but the security, Grace, who had paid the money."

It has been held in some cases that when a note has been paid by one who is merely collaterally interested, as an indorser, its negotiability is not destroyed, and the note remains good as against the maker. (*Cochran v. Wheeler*, 7 N. H. 202; *Guild v. Eager*, 17 Mass. 615.) In *Davis v. Stevens*, 10 N. H. 188, the court comments upon those cases thus:

"Where a note is taken up under such circumstances, it is not, in fact, paid. An individual discharges his liability as guarantee merely, but the general promise of the note remains unextinguished. But such is not this case. Here, if payment is made at all, it is made by a co-signer. But where one of two joint promisors, who is liable directly upon the note for its whole amount, pays such note, the note is necessarily extinguished. Whenever he discharges himself from the note by such payment, the payment goes to the whole promise of the note, and when the entire promise of the note is met and extinguished, it cannot afterwards be revived as a subsisting contract against a co-signer. New rights and liabilities arise betwixt the co-signers, but the original contract is at an end." (See, also, *Hopkins v. Farwell & Scott*, 32 N. H. 429; *Long et al v. Bank of Cynthia*, 1 Little (Ky.) 291; *Bryant v. Smith, executrix*, 10 Cush. 171; *Pray v. Maine*, 7 Id. 253; *Stevens & Pillet v. West & Hamilton*, 1 Howard (Miss.) 310; *Smith v. Johnson*, 23 Cal. 64; 2 Para. on Notes and Bills, 237.)

Upon the facts stated in the complaint, plaintiff was entitled to maintain an action of implied assumpsit for the amount paid, but he could not sustain an action upon the

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Opinion of the Court—Leonard, J.

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note. We think it appears upon the judgment-roll that the court erred in giving judgment for any sum greater than the amount paid by plaintiff in satisfaction of the note, to wit, five hundred and fifty dollars and fifty cents, together with legal interest thereon from the date of payment until judgment. This conclusion necessarily follows from the allegations contained in the complaint, and the consequent legal conclusions of a total satisfaction of the note and extinguishment of the debt arising therefrom. The law implies a promise on the part of defendant to repay plaintiff, but it does not imply a promise to pay him any interest beyond ten per cent. per annum, the legal rate allowed by the statute in such cases. That provides that parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due, on any contract, and when there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum. If there was any contract or agreement in writing between plaintiff and defendant that plaintiff should receive more than the legal rate of interest, that fact should have been pleaded, and in the absence of such allegation, he was not entitled to receive interest in excess of ten per cent. per annum from the date of payment. The only error complained of, and the only one shown, even though we should examine the statement, is that judgment was rendered for a higher rate of interest than the law allows. Under such circumstances, it is proper that the judgment be modified. The court below is directed to so modify the judgment herein as to allow the plaintiff the sum of five hundred and fifty dollars and fifty cents, together with interest thereon at the rate of ten per cent. per annum from the dates of payment until judgment, and legal interest upon said sum of five hundred and fifty dollars and fifty cents from date of judgment until it is paid, together with costs of suit, all in gold coin of the United States; and as so modified the judgment will stand affirmed. The plaintiff will pay the costs of appeal.

[No. 978.]

## CERESA GEREMIA ET AL., RESPONDENTS, v. JAMES MAYBERRY, APPELLANT.

## RULE AS TO CONFLICT AND WEIGHT OF EVIDENCE ENFORCED.

**CONTRACT—COLLATERAL EVIDENCE INADMISSIBLE.**—When there is a conflict of evidence as to whether plaintiff was to receive one dollar and ninety cents or two dollars per cord for cutting wood: *Held*, that testimony that defendant let contracts to other parties for one dollar and ninety cents per cord was inadmissible.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

*Boardman & Varian*, for Appellant:

*A. C. Ellis*, for Respondent:

By the Court, BEATTY, C. J.:

Plaintiffs in this case sue for a balance claimed to be due on a contract for cutting wood. It is alleged in the complaint that the contract price was two dollars per cord. Defendant admits that the larger part of the wood was cut under a contract for two dollars per cord, but alleges that eleven thousand cords and upwards were cut at an agreed price of one dollar and ninety cents. Upon this issue the jury found for the plaintiffs, allowing two dollars per cord for all the wood cut.

Defendant moved for a new trial upon the grounds, first, that the finding of the jury as to the contract price was contrary to the evidence; and second, that the court had erred in excluding certain evidence offered by the defendant for the purpose of proving his side of the issue.

The motion for a new trial was overruled, and the defendant, on appeal from that order and from the judgment, relies entirely upon the two grounds stated in support of his motion for a new trial.

As to the first ground we can only say that, although the district court might have been justified in setting aside the verdict upon the ground that it was against the preponder-

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Opinion of the Court—Beatty, C. J.

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ance of the evidence, there is no such decided preponderance against it as to authorize this court to interfere. The finding in question is fully supported by the testimony of one of the plaintiffs. He is flatly contradicted by the defendant and the agent of the latter. The apparent weight of the testimony, as presented by the statement of the case, is certainly against the verdict; but this is the most that can be said of it, and it is settled by a long line of decision in this court that we cannot reverse the finding of a jury on the ground that it is against evidence, unless the preponderance against it is so great as to satisfy us that there was either an absolute mistake on the part of the jury, or that they acted under the influence of prejudice, passion or corruption. (See 4 Nev. 156, 304, 395; 5 Id. 415, 281; 6 Id. 203, 215; 9 Id. 67; 11 Id. 96.)

The mere fact that the defendant was corroborated by his agent in his contradiction of plaintiffs' testimony is not sufficient to satisfy us that the finding of the jury was the result of mistake, passion, prejudice or corruption.

As to the second point, the alleged error of the court consisted in the rejection of defendant's offer to prove that he had made a number of contracts with third parties for cutting wood from the same tract from which plaintiffs cut the eleven thousand and odd cords in dispute, and that the highest price paid to such third parties was a dollar and ninety cents per cord.

We do not think the court erred in excluding this testimony. Its only tendency was to prove that others were willing to cut wood at that rate; it had no tendency to prove that these plaintiffs had agreed to do so. It is argued with some plausibility that if others were willing to cut wood at a dollar and ninety cents on section 14, that fact renders it improbable that defendant would have agreed to pay plaintiffs two dollars for cutting wood on the same section, and hence that the evidence ought to have been admitted for the purpose of sustaining the direct testimony of defendant and his witnesses and of enabling the jury to determine as to its credibility.

It is easy to conceive of a case in which evidence of this

character would have great weight and in which it might materially assist in arriving at a correct solution of the matter in dispute. But the rule of evidence is against the admission of proof of collateral facts for the purpose indicated (1 Gr. Ev., sec. 52), and it has been applied in cases in which it might have been relaxed with greater propriety and safety than in cases like this.

In *Hollingham v. Head*, 4 Com. B. N. S. 388, the defendant was sued for the price of a quantity of artificial manure. His defense was that he was not to pay for it unless it proved to be equal to Peruvian guano. It was shown that the manure was worthless; and, for the purpose of corroborating his testimony as to the terms of the contract, the defendant offered to prove that the plaintiff had made sales to other persons, agreeing that he was not to be paid unless the manure proved to be equal to Peruvian guano. That case was stronger than this, for the reason that the offer there was to prove what the plaintiff had consented to, while in this case the offer was to prove what had been done by third parties. The court, however, excluded the testimony and upheld the rule upon the ground that the admission of such speculative evidence would be fraught with great danger; in other words, that it would do more harm than good in the long run.

There is a special reason why counsel for appellant contends that he should have the advantage of a different rule in this case. One of the plaintiffs' witnesses testified that he had a contract for cutting on section 14 for two dollars a cord, and it is argued that defendant was entitled to introduce evidence of the same character. It is a sufficient answer to this to say that the testimony referred to was not drawn out by the plaintiff, but by the defendant on cross-examination.

We find no error in the judgment or order appealed from, and they are therefore affirmed.

## Argument for Relators.

[No. 975.]

THE STATE OF NEVADA *EX REL.* KEYSER & ELROD,  
RELATORS, v. J. F. HALLOCK, STATE CONTROL-  
LER, RESPONDENT.

**ACT TO ESTABLISH STATE ASYLUM UNCONSTITUTIONAL.**—The act entitled "An act to establish and maintain a state asylum for the indigent poor and maimed of this state" (stat. 1879, 142), is in plain conflict with section 3, art. 13, of the constitution.

**IDEM—REPEAL OF STATUTES.**—When the provisions of an unconstitutional act attempt to repeal a former statute: *Held*, that the repealing clause falls with the act.

## APPLICATION for mandamus.

The facts appear in the opinion.

*R. H. Taylor and H. R. Whitehill*, for Relators.

I. The act approved March 17, 1879, is constitutional. (Secs. 1, 3, art. XIII; Sec. 2, Art. XVII., of Con.; *Devlin v. Coleman*, 50 N. Y. 531; *Exline v. Smith*, 5 Cal. 112.)

II. The constitution must be so construed as to give effect to all of its provisions. (*State v. Scott*, 9 Ark. (4 Eng.) 277, 282; *State v. Dayton T. R. Co.*, 10 Nev. 160.)

III. The contemplated asylum is an institution required by the public good. The legislative *dictum* upon that subject shuts out all debate. The court must look to the words of the instrument, and say *ita lex scripta est.*) *People v. Morrell*, 21 Wend. 584; *State v. Scott*, 9 Ark. 276; 1 Story on Constitution, sec. 425; *Holman Heirs v. B. of Norfolk*, 12 Ala., E. S. 418; *Maize v. State*, 4 Ind. 344; *Com. v. McWilliams*, 11 Penn. St. (1 J.) 70; *Bourland v. Hildreth*, 26 Cal. 180; *Stock. & V. R. R. Co. v. Stockton*, 41 Id. 158.)

IV. All presumptions are in favor of the validity of legislative enactments. (*State v. Brennan's Liquors*, 25 Conn. 288; *Hartford Br. Co. v. Union Ferry Co.*, 29 Id. 227; *Maize v. State*, 4 Ind. 344; *Brown v. Buzan*, 24 Id. 196; *Groesch v. State*, 42 Id. 547; *Lucas v. Commissioners Tip. Co.*, 44 Id. 530; *Taylor v. Flint*, 35 Ga. 124; *Armstrong v. Jones*, 34 Id. 309; *Adam v. Howe*, 14 Mass. 340; *Ex parte McCollom*, 1 Cowen, 564; *Clark v. People*, 26 Wend. 605; *Newell v. Peo-*

## Argument for Respondent.

ple, 7 N. Y. 109; *Lane v. Dorman*, 3 Scam. 240; *Emerick v. Harris*, 1 Binn. 416; *Com. v. Smith*, 4 Id. 123; *Com. v. McWilliams*, 11 Penn. St. 70; *Farmer and Mec. Bank v. Smith*, 3 Serg. & R. 73; *Fletcher v. Peck*, 6 Cranch, 128; *Gibbons v. Ogden*, 9 Wheat. 187; *Hobart v. Sup. Butte Co.*, 17 Cal. 30; *Stock. & Vis. R. R. Co. v. Stockton*, 41 Id. 159; *Ash v. Parkinson*, 5 Nev. 35.)

V. When an act of the legislature is assailed as unconstitutional, the objector assumes the burden of showing either that it is an exercise of authority not legislative in its nature, or that it is inconsistent with some provision of the federal or state constitution. (*Dorman v. State*, 34 Ala. N. S. 231; *Hobart v. Supervisors*, 17 Cal. 30; *Cohen v. Wright*, 22 Id. 308; *Bourland v. Hildreth*, 26 Id. 183.)

The following authorities are also referred to as bearing upon the different points made for relators. (*Roosevelt v. Goddard*, 52 Barb. 533; *People v. Bennett*, 54 Barb. 480; *McComber v. New York*, 17 Abb. Pr. 35; *Settle v. Van Evrea*, 49 N. Y. 280; *Buckingham v. Davis*, 9 Md. 328; *Manly v. State*, 7 Md. 147; *Ex parte McCollom*, 1 Cowen, 564; *Kendall v. Kingston*, 5 Mass. 532; *Tyler v. People*, 8 Mich. 320; *Tabor v. Cook*, 15 Id. 322.)

*M. A. Murphy, Attorney General*, for Respondent:

I. It was the intention of the constitution that the law should be so framed that the unfortunates should be provided for within the counties where they resided, in order to meet the requirements of that class of unfortunates mentioned in sec. 3 of art. XIII. of our constitution. (Sec. 3749 *et seq.* C. L. Nev., vol. 2.)

II. The words *shall provide*, used in sec. 3 of art. XIII., are mandatory. (Sedgwick on C. & S., 317, note Cons. Pro.; Id. 375, "may and shall.")

III. The act is unconstitutional, because it is in conflict with section 8 of the declaration of rights. (Cooley on Cons. Lim. 339; *In the matter of Janes*, 30 How. Pr. Rep. 446; 65 Me. 120.)

IV. The county commissioners are the creatures of the statutes, and are possessed of no power to deprive a person

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of his liberty; neither can the legislature confer upon a county physician and chairman of the board of county commissioners judicial powers to deprive a person of his liberty without due process of law. (65 Maine, 120.)

V. If there is a doubt in the minds of the judges, the written constitution should have the benefit of the doubt. (Cooley on Cons. Lim. 73; *People v. Lynch*, 51 Cal. 25.)

VI. As to conflict between different sections, the whole instrument to be examined. (Cooley's Cons. Lim. 57-59.)

VII. Section 3 of article XIII. in express terms makes it obligatory upon the counties to support the class therein named within the territorial limits of each county. The presumption is that the people designed that it should be exercised in that mode only. (Cooley's Con. Lim. 78.)

By the Court, BEATTY, C. J.:

This is a petition for a writ of mandamus to compel the respondent, who is state controller, to draw his warrant in favor of the petitioners for the amount of a duly allowed claim on the fund created by an act of the last legislature, approved March 17, 1879, and entitled "an act to establish and maintain a state asylum for the indigent poor and maimed of this State."

The case has been submitted upon demurrer to the petition and upon a stipulation as to the facts which present but one question for decision, and that is as to the constitutionality of the act referred to. If the act is held valid the writ is to issue, if not the proceeding is to be dismissed.

Respondent does not question the correctness of petitioners' proposition that "when an act of the legislature is assailed as unconstitutional the objector assumes the burden of showing either that it is an exercise of authority not legislative in its nature, or that it is inconsistent with some provision of the federal or state constitutions." He admits also that all presumptions are in favor of legislative enactments, and that the act in question must stand unless, as he undertakes to show, it is in plain and palpable conflict with section 3 of article



XIII. of the state constitution, which reads as follows: "Section 3. The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who by reason of age and infirmity or misfortunes may have claim upon the sympathy and aid of society."

The nature of the act under which petitioners claim is very clearly indicated by its title. It creates a state asylum for paupers, and repeals the law under which hitherto the respective counties of the state have been compelled to relieve their own poor. The trustees of the state asylum are required to receive and support any person who is certified by the chairman of the board of county commissioners and the county physician to be a *bona fide* resident of their country, and from the infirmities of age or other sufficient cause, unable to support himself, and without the means of support. (Sec. 7.) This is the substance of the act, and its scope and operation are manifest. It deprives respective counties of the means of providing for their own poor, and transfers all the paupers in the state to one establishment, where they are to be maintained at the charge of the whole people. The repugnance of such provisions to the policy declared in the section of the constitution above quoted is too obvious to require comment, for the meaning of that section, whether read by itself or in connection with other sections which are supposed by counsel for petitioners to control or modify it, is perfectly clear. "Those inhabitants who, by reason of age, etc., may have claim upon the sympathy and aid of society" is merely an euphemism for "paupers," and to "provide for" paupers is to feed and clothe and house them. This is what the people in framing our constitution have said that the respective counties shall do, and this is exactly what the legislature has undertaken to say the state shall and the counties shall not do. This being so, there can be no doubt that the act is void. It is true that the constitution does not expressly inhibit the power which the legislature has assumed to exercise, but an express inhibition is not necessary. The affirmation of a distinct

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policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy. "Every positive direction contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance." (*People v. Draper*, 15 N. Y. 544.) The presumption is always that the positive provisions of a constitution are mandatory and not merely directory (*Cooley's Con. Lim.* 78, 79), and there is nothing to overthrow this presumption with respect to the provisions under discussion. On the contrary it is strongly supported by the consideration that section 3 of article 13 of our constitution simply engrafts upon our fundamental law a policy with respect to pauperism which has prevailed in England and this country for more than three centuries—the policy of local relief for local necessities. With the wisdom of this traditional policy we have nothing to do, and we only refer to its long prevalence as a proof, if proof were needed, that the framers of our constitution knew what they were about in adopting the section in question and meant what they have said.

But counsel for petitioner contend that section 1 of Article 13, controls or modifies the construction and operation of section 3. Section 1 reads as follows: "Institutions for the insane, blind, and deaf and dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be prescribed by law."

The substance of the argument on this point, if we have correctly apprehended it, is as follows: The passage of the act in question is equivalent to a solemn declaration by the legislature that a state asylum for the poor of the state is a benevolent institution which the public good requires; such declaration by the legislature is conclusive upon the

courts, therefore this is an institution which the state is enjoined by section 1 to foster and support, and consequently section 3 must receive some construction which will not defeat the legitimate operation of section 1, to which this act simply gives effect.

It is a mistake, however, to assume that the judgment of the legislature, no matter how deliberately or solemnly expressed, that a state asylum for the poor is an institution required by the public good, is conclusive upon any one, if it is true that the people have declared in the constitution that the public good requires paupers to be supported by their respective counties. And since it is clear that such a declaration has been incorporated into the fundamental law, the whole argument, based upon the conclusiveness of the legislative declaration, falls to the ground. In this view the two sections have a perfectly harmonious operation. The state is enjoined by section 1 to foster and support institutions for the public good. By section 3 it is declared that the public good requires paupers to be supported by their respective counties; the case of paupers is specifically excepted from the rule in relation to other classes of unfortunates.

There is also another view in which the two sections may be perfectly reconciled. Institutions for the insane, deaf and dumb, and blind are required by the public good in a sense wholly different from any in which asylums for paupers can be said to be for the public good. Society looks to no ulterior or contingent advantage from the support of the poor. They are supported for their own good exclusively, and simply because humanity impels us to relieve their necessities. It is different with respect to the insane, the deaf and dumb, and blind. If an insane man is restored to his reason by treatment in an asylum, there is a positive gain to the community; if he is incurable, there is a negative advantage to the public in keeping him under restraint, and so preventing him from doing mischief. The blind and deaf and dumb may be educated and trained in institutions specially adapted for the purpose into useful and

self-supporting citizens—a double advantage to the community, in making them contributors to the general good, instead of leaving them as a burden on others. Institutions founded with these objects are, therefore, in an emphatic sense, for the public good, as contradistinguished from the good of mere objects of charity. The state orphans' home is an instance of this sort of institution. The object in that case is not merely to clothe and feed the orphan children—the wards of the state—but to rescue them from the dangers of neglect, to educate them and make them useful members of society, instead of exposing them to the dangers of falling into the class of depredators and malefactors.

It thus appears that there are two distinct views in which sections 1 and 3 of article 13 are perfectly harmonious; but there is no possible interpretation of the latter which will harmonize with this act.

There is still another argument of counsel to be noticed. They say the legislature undoubtedly had the power to repeal the "act relating to the support of the poor," approved November 29, 1861 (C. L., secs. 3749 to 3759), and they have done so (sec. 11 of this act.). It is the same, therefore, as if there never had been any act prescribing the mode by which the respective counties should provide for their poor, and they ask: "If the act of 1861 had never existed, would not the legislature have had a right under section 1 of article 13 to pass the law of 1879?" We answer unhesitating that they could not. It would be a strange doctrine that the legislature, by neglecting to do what the constitution positively enjoins, could thereby gain the right to do what it impliedly forbids.

We wish to add in this connection that in our opinion the act of 1861 is not repealed. The power of the legislature to repeal a law enacted for the purpose of carrying into effect a provision of the constitution, without at the same time passing some other law to make it effective, is a question that need not be discussed. It is sufficient for the purposes of this case to say that it cannot be presumed the legislature would have repealed the law of 1861 without

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they had thought this act to be a sufficient substitute therefor; and since we are constrained to hold the principal provisions of this act unconstitutional, it follows that the repealing clauses must fall with the rest. (Cooley, Con. Lim. 178.)

The petition for mandamus is dismissed.

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[No. 982.]

THE STATE OF NEVADA, APPELLANT, v. D. H. HASKELL ET AL., RESPONDENTS.

**QUO WARRANTO—TOLL ROAD FRANCHISE—ABANDONMENT—BURDEN OF PROOF.**  
—When the pleadings admit that the parties owning a toll-road franchise have a good title, and the proceeding to have the franchise forfeited is based solely upon a claim of abandonment or forfeiture, the affirmative of the issue and the burden of proof is on the State.

APPEAL from the District Court of the Eight Judicial District, Esmeralda county.

The facts appear in the opinion.

*M. A. Murphy and Wells & Stewart*, for Appellant.

When an information in the nature of *quo warranto* is filed against a party, the *onus* of proof is upon him, not upon the informant. (Angel & Ames on Corp., 734, 749, 751, 756; 15 Johnson, 358.)

*Robert M. Clarke and N. Soederberg*, for Respondent.

The judgment of the lower court is right. The burden of proof was upon the state to establish the forfeiture alleged in the complaint, not upon defendants to prove a negative. C. L. Nev. 392-394; *State v. Brown*, 34 Miss. 688; 2 Doug. Mich. 359; High's Ex. L. Rem. 720. 725.)

By the Court, BEATTY, C. J.:

This is a proceeding by information in the nature of a *quo warranto* instituted by the district attorney of Esmeralda county.  
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## Points decided.

meralda county for the purpose of having a toll-road franchise declared forfeited.

The complaint alleges the grant of the franchise in 1862 and its acceptance and enjoyment until 1869, at which time it is charged the defendants abandoned the road and ceased for a period of eight or nine years to keep it in repair. The answer denies the alleged abandonment, and denies that there was any neglect to repair sufficient to work a forfeiture.

When the case was called for trial the district attorney declined to offer any testimony, and judgment was thereupon entered in favor of the defendants. From the judgment so entered the state appeals. Only one question is involved in the case, and that is as to the burden of proof under the pleadings.

The general rule in cases of this character is that the person claiming the franchise must plead and prove a good title thereto, and that the state is bound to prove nothing; but when, as in this case, it is admitted that the defendant has had a good title, and the only ground of the proceeding is a claim of abandonment or forfeiture, the affirmative of the issue and the burden of proof is on the state.

Proceedings upon *quo warranto* and information in the nature thereof are regulated by statute in this state (C. L., secs. 389 to 415), and it is therein provided (sec. 394) that the issues are to be tried as in other civil cases. This being so, it follows that the state, like any other party relying on a forfeiture or an abandonment, must prove its case.

The judgment of the district court is affirmed.

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[No. 967.]

THE STATE OF NEVADA, RESPONDENT, v. ROBERT  
FRAZER, APPELLANT.

**CRIMINAL LAW—HOMICIDE—JUSTIFICATION.**—Where there is any testimony to support the plea of justifiable homicide, the court has no right to withdraw that question from the jury. A refusal to instruct the jury thereon: *Held*, erroneous.

**ADJUDGMENT—REMARKS OF COURT.**—The court, before charging the jury, said to prisoner's counsel: "That the theory of the defense was based upon the

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proposition that the defendant, at the time, was laboring under an aberration of mind, and therefore not responsible; that this was clearly disproven by the statement of the defendant himself," etc.: *Held*, improper.

APPEAL from the District Court of the Sixth Judicial District, Lincoln County.

The facts are stated in the opinion.

*F. M. Huffaker*, for Appellant.

I. The instructions given by the court were erroneous. (*State v. Duffy*, 6 Nev. 139.)

II. The oral remarks of the court in the presence of the jury were improper. They amounted to an instruction upon the facts, and were in violation of sec. 12, art. 6 of the state constitution. (*People v. Bonds*, 1 Nev. 35; *State v. Harkin*, 7 Nev. 381; *People v. Ah Fong*, 12 Cal. 347.)

*A. B. & W. J. O'Dougherty*, and *Stone & Hiles*, also for Appellant.

*M. A. Murphy*, Attorney-General, for Respondent.

By the Court, LEONARD, J.:

Appellant was indicted for the crime of murder, and convicted of manslaughter. He was sworn as a witness in his own behalf, and testified as follows:

"On the day of the trial with the Floral Springs Water Company, Mr. Donahue (the deceased) gave in false testimony against my wife, and slandered her in court. After going home she took it very bad to heart, and seemed to be very sick. I told her 'not to mind that; the first time I saw Donahue that I would speak to him.' Having occasion to go down town, she asked how long it would be before I would be back. I told her perhaps twenty minutes or a half hour. \* \* \* I went down town. I saw Mr. Newton sitting on a dry goods box in front of Alexander's. I sat down beside him. We got into conversation. \* \* \* I looked up and saw Mr. Donahue coming down the west side of Main street. I walked across the street, and just

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as Donahue got to the south door of Schusterich's saloon, I told him I would like to speak to him. Instead of his coming direct to me he kept on the sidewalk, shoved his hand into his pocket and came around the horses' heads of the team that was standing there in front of Matt. Schusterich's saloon. Says he: 'What do you want?' I asked him 'if he thought it was right to swear false in the court-house and slander a woman;' and I think I said 'making her a laughing-stock through the town.' Says he: 'Do you believe it?' Says I: 'You take time till I tell you the tale out.' Says he: 'Do you believe it?' I said that 'I knew it.' And with the implement that he had in his hand he struck me at that very instant. I could not see, but the head of it seemed to me to be a chisel, or some implement of the kind. I could not positively swear to the shape of it, or whether it was steel or iron; but the very instant he struck at he he said I was a ——— liar. Whether there was anything more said I could not tell, for I thought I had got my death blow right there. I staggered back some eight or ten feet. \* \* \* Think I was down on one knee; would not be positive as to being down on both. The blood was streaming over my face, and as I raised to my feet I saw Donahue in the attitude, as I thought, of coming towards me again. I then drew the pistol, and as I fetched the pistol down he turned with his right side towards me just as I fired at him. At this instant he threw his right hand to his right hip, and the team started off. \* \* \* The next I saw of him I think was on Lacour street, and I fired again. They say I fired four shots, but I could not remember. The reason I could not remember, I presume, was owing to the excitement and the blow together. I followed the man; could not tell how far, and I stopped. Seemed to be a good many men to rustle around me. They asked me if I was shot. I told them I did not think I was shot. I thought that my skull was driven in."

Dr. Lee testified that appellant was wounded over the left eye, the wound having been nearly an inch in length. The skin and flesh were cut through to the bone. The skull was:



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slightly fractured. The fracture was nearly the length of the flesh wound. There was quite an effusion of blood. The effects of the blow and wound were considerable physical prostration and nervous excitement.

It seems from the testimony that four shots were fired; but it was claimed by counsel for appellant that death was caused by the first, and there was testimony tending to show that such was the fact.

There was considerable testimony to the effect that the blow staggered appellant, and that blood flowed profusely from the wound. Witness Hannon testified that Donahue was in a fighting attitude after he had struck appellant, holding his right hand, as stated by the witness, on his right pistol pocket.

With the above testimony before the court and jury, in connection with the plea of "not guilty," it was plainly the duty of the court to submit to the jury, under proper instructions, the question of justification. This the court refused to do, but instructed them as follows: "The defendant, by his own testimony, confesses his guilt under the law. All that you have to do is to determine whether that guilt, under all the facts as testified to, amounts to either murder in the first degree, murder in the second degree, or manslaughter. You have nothing to do with the question as to whether he is innocent or guilty, for you are hereby charged that he has confessed his guilt in one or the other degrees of murder or manslaughter. The only question left open to you is to determine whether the defendant is guilty of manslaughter, or of murder in the second or first degree."

There was some testimony, at least, to support appellants' claim of justifiable homicide, and the withdrawing of that question from the jury and the refusal to instruct them thereon were errors.

It was error also to refuse instructions upon reasonable doubt and the legal presumption of innocence until proof of guilt.

Immediately before charging the jury, addressing itself

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to defendants' counsel in explanation of its reasons for refusing to give certain instructions asked, the court stated orally in the presence of the jury, "That the theory of the defense was based upon the proposition that the defendant, at the time, was laboring under an aberration of mind, and therefore not responsible; that this was clearly disproven by the statement of the defendant himself; that the statement of the defendant showed that he had as clear a recollection of everything that transpired as any other person present; that he had stated distinctly the position of himself and deceased at the time of the firing of the first shot; he had recollection of the deceased passing around the team; crowded deceased against the hydrant, and that he showed a clear recollection of every transaction that transpired up to the fourth shot."

Counsel for the defendant then stated to the court that "the defendant did not claim that he was at all unconscious, or did not have his full faculties throughout the transaction." And the court replied that "if the defendant made no such claim, defendant's own testimony, under the law, amounted to manslaughter, at least, and that he would so instruct the jury."

We had occasion recently to remark upon the impropriety of such or any comments by the trial court in a criminal case (*State v. Tickle*). That the court's first remarks were improper there can be no doubt. They were not called for, and were in effect an oral charge to the jury. Their tendency was, also, to convey to the minds of the jury the idea that appellant's only defense was that he was unconscious at the time of the fatal shot, which, as we have seen, was not the case. To what extent the remarks of appellant's counsel in reply removed the effect of the court's error we shall not stop to inquire, because there was error, and presumably injury, at least. The last remarks of the court to appellant's counsel have nothing to relieve them of their natural effect. They were oral; they withdrew from the jury's consideration appellant's claim of justification, and substituted the court's conclusions in place of the jury's, under proper instructions.

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The case was tried upon a false theory from beginning to end, and the result is that a new trial must be had.

The judgment and order overruling appellant's motion for a new trial are reversed, and the cause remanded. Remittitur forthwith.

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[No. 921.]

**MILES QUILLEN, RESPONDENT, v. PATRICK QUIGLEY ET AL., APPELLANTS.**

**LIABILITY OF SURETIES—WHEN NOT RELEASED.**—The sureties upon an undertaking on appeal are not released by the mere delay of plaintiff in bringing suit. The agreement with the principal to delay the commencement of suit must amount to an estoppel upon the creditor sufficient, in law, to prevent him from beginning a suit before the expiration of the extended time.

**NOTICE—NOTICES BY SURETY.**—Sureties cannot release themselves from liability by simply giving notice to the creditor to enforce his demand against the principal debtor.

**APPEAL** from the District Court of the Seventh Judicial District, Lincoln County.

The facts appear in the opinion.

*A. B. & W. J. O'Dougherty*, for Appellants.

*A. C. Ellis*, for Respondent.

By the Court, **HAWLEY, J.:**

The record in this case, like that in *Irwin v. Samson*, 10 Nev. 282, "contains an abstract of the minutes reciting, in detail, the orders of the court and proceedings during the trial \* \* \* in the apparent order of the trial and proceedings, instead of a statement on appeal." Respondent, upon this ground, moves for an affirmance of the judgment.

In our opinion the judgment roll presents all the points relied upon by appellants.

They contend that the court erred in rendering judgment "on the pleadings," because their answer raised sufficient

issuable facts, if proved, to entitle them to a judgment for costs.

The judgment recites the fact that it is rendered, on motion of plaintiff's attorneys, "upon the pleadings in the case."

We regret that the case has not been argued upon its merits.

This suit was brought against Patrick Quigley, the principal, and John C. Lynch and Frank Gindeof, sureties, upon an undertaking, on appeal in the case of *Quillen v. Quigley*, tried in the justice's court. The plaintiff in that suit obtained judgment in the district court. The answer of the sureties alleges: "That before the commencement of this action, to wit, on or about the month of May, 1876, Miles Quillen, the plaintiff herein, made a special agreement with the defendant and judgment debtor, P. Quigley, by which the said Miles Quillen agreed to satisfy the judgment mentioned and set forth in plaintiff's complaint by receiving from the said P. Quigley the amount of said judgment in monthly installments of \$50 per month until the whole of said judgment should be satisfied; that the said P. Quigley, under and by virtue of said agreement, and in ratification thereof, paid to said plaintiff two installments of \$50 each on the amount of said judgment; that the resources of the said P. Quigley, the said judgment debtor, have not been exhausted; that it has been through the fault and negligence of said plaintiff that the amount of said judgment has not been paid; that these defendants, through their attorneys, have frequently requested the said Miles Quillen, the said plaintiff, to enforce said judgment by levying on the available property of the said P. Quigley, but the said Miles Quillen neglected and refused so to do; that in consequence of the said negligence and default of the said plaintiff in not enforcing said judgment, \* \* \* and in consequence of his having entered into said agreement with the judgment debtor, \* \* \* these defendants hold themselves released from all liability under said bond, as set forth in plaintiff's complaint."

This answer presents two questions: First—Would the

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sureties be released by the agreement for an extension of time? Second—Would they be released by reason of their request to have the plaintiff enforce his judgment against Quigley?

I. The law is well settled that if the plaintiff, in such a case, has done any act, or made any agreement, for a valuable consideration, without the consent of the sureties, express or implied, which tends to their injury, or which absolutely suspends or delays the right to coerce the payment of the amount due on the appeal bond, to the prejudice of the sureties, or which puts the sureties in a worse situation, or increases their risks, or impairs their rights, they are entitled to be released.

It is equally as well settled that mere delay, without fraud, is not sufficient. The agreement must amount to an estoppel upon the creditor-sufficient, in law, to prevent him from beginning a suit before the expiration of the extended time. Although the creditor stipulates and agrees with the principal debtor, without the consent of the sureties, for delay, so long as the agreement is merely voluntary and not founded on a valuable consideration the surety is not released. (*Newell & Pierce v. Hamer*, 4 How. (Miss.) 684; *Coman v. The State*, 4 Blackf. 241; *Bailey v. Adams*, 10 N. H. 162; *Williams v. Covillaud*, 10 Cal. 419; *Farmers' Bank v. Reynolds*, 13 Ohio, 84; *Brinagar's Adm. v. Phillips*, 1 B. Monroe, 288; *Davis v. Graham*, 29 Iowa, 514; *Obern-doff, Trustee, v. Union Bank of Baltimore*, 31 Md. 126; *Hayes v. Wells*, 34 Md. 512.) The agreement set out in the answer belongs to the class last named.

The mere payment of a part of the amount of the judgment in monthly installments is not a binding legal consideration for the extension of time. There is no legal obligation varying the contract which previously existed between the creditor and the principal debtor. The sureties were not deprived of the right of subrogation. The proposed extension of time did not deprive the sureties of any right which existed at the time of the rendition of the judgment.

In *Seawell v. Cohn*, 2 Nev. 308, which was an action against the sureties on an undertaking given for the release

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of an attachment, there was a stipulation in the original action that execution on the judgment should be stayed for sixty days; provided 'the defendant would, within thirty days, "pay to plaintiff the one-half of the amount of said judgment." The court held that this did not release the sureties.

In *Ammons v. Whitehead*, 31 Miss. 99, where the sureties had, as in this case, signed an undertaking on appeal from a justice's court, it was decided that the sureties were not released "by a compromise between the principal and the creditor, made without their assent, by which the creditor recovers judgment against the principal and the sureties, with stay of execution for twelve months."

II. In *Pain v. Packard*, 13 Johns. 174, the Supreme Court of New York, departing from the rule of the common law, decided that when the holder of any security is requested by the surety to proceed without delay and collect the money from the principal, and he neglects to do so, the sureties will be exonerated. This rule, for a time, met with considerable opposition. Cowen, J., in *Herrick v. Borst*, 4 Hill, 656, in alluding to the principles decided in *Pain v. Packard*, said: "What principle such a defense should ever have found to stand upon in any court, it is difficult to see. It introduces a new term into the creditor's contract. It came into this court without precedent (*Pain v. Packard*, 13 Johns. 174), was afterwards repudiated, even by the court of chancery (*King v. Baldwin*, 2 Johns. Ch. Rep. 554), as it always has been, both at law and equity, in England; but was restored on a tie in the court of errors, turned by the casting vote of a layman (*King v. Baldwin*, 17 Johns. 384), Platt, J., and Yates, J., took that occasion to acknowledge they had erred in *Pain v. Packard*, as senator Van Vechten showed most conclusively that the whole court had done." But the doctrine of *Pain v. Packard* was afterward adopted by the court of appeals, and is now the settled law of that State. (*Remsen v. Beekman*, 25 N. Y. 555.)

The same rule prevails in some of the other states.

In several of the states laws have been passed regulating

this subject so as to bring the sureties within the rule of *Pain v. Packard*; but nearly all the decisions in these states declare that the rule did not exist as a part of the common law, and decide that the rule can only be enforced by virtue of the statute (*Carr v. Howard*, 8 Blackf. 190; *Halstead v. Brown*, 17 Ind. 202; *People v. White*, 11 Ills. 348; *Taylor v. Beck*, 13 Id. 376; *Villars v. Palmer*, 67 Id. 204; *Jenkins v. Clarkson*, 7 Ohio, 72; *Freligh v. Ames*, 31 Mo. 253); and then only when the notice is clear, positive, and unconditional to proceed forthwith. A mere request to proceed to collect the debt, or to enforce the judgment—as is alleged in the answer in this case—is not sufficient. (*Baker and Brim, Admr's, v. Kellogg, et al.*, 29 Ohio St. 663; *Conrad v. Foy*, 68 Penn. St. 385.)

An examination of the numerous authorities upon this subject will show that in a majority of the states, where the question is not regulated by statute, the courts have held that the surety cannot release himself from liability by simply giving notice to the creditor to enforce his demand against the principal debtor. (*Sasscer v. Young*, 6 Gill. & J. 243; *Croughton v. Duval*, 3 Call. 61; *Dennis v. Rider*, 2 McLean, 451; *Page v. Webster*, 15 Me. 249; *Leavitt v. Savage*, 16 Me. 72; *Eaton v. Waite*, 66 Me. 221; *Frye v. Barker*, 4 Pick. 382; *Mahurin v. Pearson*, 8 N. H. 539; *Baker v. Marshall*, 16 Vt. 522; *Hickok v. Farmers and Mechanics' Bank*, 35 Vt. 476; *Pintard v. Davis*, 21 N. J. L. 632; *Buckalew v. Smith*, 44 Ala. 638.)

This rule, it seems to us, is sustained upon sound reason. The undertaking of appellants, as sureties, is positive in its terms that Quigley should pay, or cause to be paid, "the amount of any judgment and all costs" that might be rendered against him in the district court. Quillen had a direct remedy against the principal and the sureties. The bond was forfeited as soon as the judgment was rendered, and the defendant Quigley made default in its payment.

The plaintiff had not entered into any contract with the sureties on the appeal bond that he would take prompt measures to collect the judgment. The duty of such action rested with them. The law gave them ample protection.

## Points decided.

They could have paid the judgment at any time, which would have been no more than they had agreed to do, and could thereupon have sued the principal in their own names and proceeded to collect the amount of the judgment without any delay.

We are of opinion that the court did not err in rendering judgment in favor of plaintiff "upon the pleadings in the case."

The judgment of the district court is affirmed

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[No. 929.]

THE STATE OF NEVADA, APPELLANT, v. THE YEL-  
LOW JACKET SILVER MINING COMPANY,  
RESPONDENT.

**TAXES—STATUTE OF LIMITATION—REVENUE LAWS.**—The revenue laws of this state do not except taxes from the operation of the statute of limitations or extend the time for bringing suits for their collection beyond the period allowed by that statute.

**IDEM.**—The statute of limitation applies to suits brought by the state for the collection of delinquent taxes.

**IDEM—CIVIL PRACTICE ACT—DEMURRER.**—The defendant in a suit brought for the collection of delinquent taxes has a right to interpose a demurrer to the complaint upon any of the grounds set forth as a cause of demurrer in the civil practice act.

**IDEM.**—The provisions of the civil practice act, not inconsistent with the revenue laws, are applicable to suits brought for the collection of taxes.

**IDEM—MISJOINDER OF CAUSES OF ACTION.**—Taxes due the state on the proceeds of mines for the different quarters of each year, cannot be united in the same cause of action. Every quarterly or yearly tax constitutes a separate and independent liability. (Beatty, C. J., dissenting.)

**IDEM—DEBTS—IMPLIED CONTRACTS.**—Taxes are not debts in the sense that they are obligations or liabilities arising out of contracts express or implied. They are the enforced proportional contribution of each citizen and of his estate, levied by the authority of the state for the support of the government. They owe their existence to the action of the legislature, and do not depend for their validity or enforcement upon the individual assent of the taxpayer, but operate *in totum*. (Beatty, C. J., dissenting.)

APPEAL from the District Court of the First Judicial District, Storey county.



The facts appear in the opinion.

*Robert M. Clarke*, for Appellant.

I. The action is properly brought in the name of the state. (2 C. L. Nev. 3261, 3231, 3232; *State ex rel. Drake v. Hobart*, 12 Nev. 408, 411; *State v. Yellow J. S. M. Co.*, 5 Nev. 416.)

II. The complaint does not improperly unite several and distinct causes of action. The several demands stated in the complaint constitute but one cause of action, and may be united in one complaint. The civil practice act is not applicable to tax suits (2 C. L. 3160; 1 Id. 1667); or if applicable, it is only in a qualified sense. (2 Id. 3160.) The revenue laws prescribe the form of complaint and define which may be pleaded. (2 Id. 3156; *State v. C. P. R. R. Co.*, 10 Nev. 47, 61.) No defense can be raised by demurrer which is not allowed by sec. 32, Rev. Laws. (10 Nev. 61.) A tax is not one of the demands mentioned or contemplated by the civil practice act, sec. 64. (C. L. 1127; 1 Van Sant. Pl. 199, 200, 679, 680, 682; *People v. Morrill*, 26 Cal. 361; *Wilson v. Castro*, 31 Id. 420, 426; *Schultz v. Winter*, 7 Nev. 130.) The civil practice act does not restrict, but enlarges the cases in which different causes may be united. (Moaks Van. Plead. 750.) The rule to determine whether there be a misjoinder of causes is the rule of practice in equity. If the claims are of similar nature, involving similar principles and results, and may without inconvenience be heard and adjudicated together, they may be joined. (Moaks' Van. Plead. 750, 751, top; Story's Eq. Plead. 271, b.; Id. 530, 531, 532; 5 Ind. 313; 3d Md. Ch. 48; 9 Iowa, 424; 1 Chitty's Plead. 200.)

This action may be fairly likened to the common counts. For work and labor, for goods sold, for distinct penalties, etc. (1 Chitty's Pl. 200, 201; 16 Cal. 333, 336, 337, 345; 23 Id. 184; 4 Tenn. R. 229; 2 Blackf. 36; 3 Hill, 527; 53 N. H. 581; Hill & Denis, 233.) For tortious breach of duty. (11 Johnson, 479.) For damages and penalty against the sheriff. (*Pearkes v. Freer*, 9 Cal. 642.) For the enforcement of several mechanics' liens. (8 Nev. 227,

## Argument for Appellant.

231.) For the enforcement of several tax liens. (13 Iowa, 17.)

Although a tax is not a debt in the ordinary sense of the term, yet it is so far a debt that in the absence of any specific provision, an action of debt or assumpsit will lie for its recovery. (Cooley on Tax, 13, note 1; 1 Gill & Johns, 502; 2 Dutcher, 400, 404; 39 Iowa, 57, 61; 12 B. Monroe, 77, 80, 81; 2 Nevada, 60, 61; 2 Root Conn.; 3 J. J. Marshall; 19 Wallace, 227, 237.)

Several demands for debt may be united in one action. (1 Chitty's Plead. 200, note 2; 13 Johns. R. 462; 3 Blackf. 167, 168; 18 Pick. 231.)

III. The complaint is not ambiguous. (2 Comp. Laws, sec. 3232; Id. sec. 3214; Stats, 1867, p. 160, sec. 99.)

IV. The statute of limitations does not run against the state in an action to collect a tax. The state is not included unless expressly mentioned. (13 Wall. 92; 28 Miss. 763; 18 Johns. R. 228). The liability mentioned in section 16 is not a tax, because were it so, it would have included the state, etc., before the amendment of 1867. It must be a liability of the same character as contracts or obligations. The tax is a lien upon the defendants' mine and can not be discharged unless paid. (2 Comp. Laws, sec. 3159.) The statute of limitations is not a defense allowed in a tax suit. (2 Comp. Laws, sec. 3156; *State v. C. P. R. R. Co.* 10 Nev. 61.) A tax is not a penalty within the meaning of the act of limitations. (16 Cal. 332, 336, 337, 345; 22 Id. 366, 370; 23 Id. 181.)

V. The complaint states a good cause of action. The commissioners had the power to levy fifty cents on the one hundred dollars proceeds. The exception in the act of 1867 is void. (Art. 10 Const. Nevada; 2 Comp. Laws, sec. 3259; Cooley Cons. Lim. 502, 503; 3 Ohio St. Rep. 10, 15, 16; 5 Id. 589, 592; 3 Nev. 179, 180; 9 Wis. 410, 414, 415-423.)

VI. Where part of a statute which is not essential to other parts is unconstitutional, it should be treated as a nullity, leaving the rest of the enactment to stand as valid. (Cooley Cons. Lim. 177, 178; 3 Nev. 180; 8 Id. 342; 22 Cal. 386; 3 Ohio St. 1, 34.)

Argument for Appellant.

*Frank V. Drake*, District Attorney of Storey County, also for Appellant.

I. Without express authority therefor the collection of taxes or revenue could not be enforced. (Cooley on Taxation, 13, 300.)

There is but one kind of action known to the revenue laws for the enforcement of the tax. Further, if we are to hold that either act is exclusive, we must hold the revenue laws to exclude the provisions of the code when inconsistent. (Comp. Laws, sec. 3160.) The practice act applies to *others* not the sovereign. (*Savings Bank v. U. S.* 19 Wall. 227.) Section 64 of the code is essentially an enlarging statute, not restrictive, and under it a variety of actions may be joined, which are not unitable at common law. (*C. P. R. Co. v. Dyer et al.*, 1 Sawyer, 641.)

II. The action of debt lies where a certain sum of money is to be recovered *in numero*, where debt is due by specialty upon an award for a specific sum, and upon a judgment. (3 Bacon's Abr., title "Debt," 83; *Id.* 84; *U. S. v. Lyman*, 1 Mass. C. C. 482; *Meredith v. U. S.*, 13 Peters, 486; *City of Dubuque v. I. C. R. R. Co.*, 39 Iowa 56; *Portland D. Co. v. Trustees*, 12 B. Mon. 77.)

If the sums sued for a matter of record and determined by a record, or are evidenced in the form of a proceeding under a statute, or are determined in the form of a judgment and the distinguishing feature of a fixed sum due, requiring no future valuation, the action in "debt" lies, and it is immaterial as to the manner in which the obligations were incurred. (3 Sneed, Tenn. 145; 1 Dutcher, N. J. 506; 3 McLean, C. C. 150; 2 A. K. Marsh, Ky. 264; 1 Mass. C. C. 243; 1 Bow. "Debt," 3.) By the express terms of the statute the "liability" was created at the moment of the levy of the taxes, and upon the first day of each quarter year, a specific sum, ascertainable by computation, became due to the state from the defendant. (*State v. Esterbrook*, 3 Nev. 173; *State v. W. U. T. Co.* 4 Id. 338.)

If the government does extend its protection and aid to

## Argument for Respondent.

the citizen for his moneys paid in taxation, and as an equivalent, then the constitution is satisfied *but a contract* is created. (Burrongs on Tax. 253, sec. 105.) A compact creates a contract. (Bouvier's Dict. title "Contract;" Cooley on Tax. 14; Vattel, b. 1, ch. 20; *Bank of U. S. v. State*, 12 S. & M. 457; *Rhodes v. O'Farrell*, 2 Nev. 60.)

*Whitman & Wood and Stone & Hiles*, for Respondent.

I. The appeal is from a judgment entered against plaintiff on its own motion, so cannot be sustained. *Imley v. Beard*, 6 Cal. 666; *Evans v. Phillips*, 4 Wheaton, 73; *Vestal v. Burditt*, 6 Blackf. 555; 6 Id. 158; *Sleeper v. Kelly*, 22 Cal. 456; *Paul v. Armstrong*, 1 Nev. 96.

II. The demurrer was properly sustained by the district court.

The action was barred by the statute of limitation, not having been commenced within three years nor four years, save as to the twenty-first cause, and not as to that within two years, and this whether the tax be considered a debt arising out of contract or not. (C. L. 1031, 1034.)

Several causes of action were improperly united, as they did not come within statutory allowance of union. (C. L. 1100 and 1127.) They do not arise out of a contract, express or implied, as taxes are not so based. (Cooley on Taxation, 1; 1 Hilliard on Cont. 5; Hilliard on Tax. 17; Blackwell on Tax Titles, 195, 196; *Phil'a Ass. v. Wood*, 39 Pa. St. 73; Opinion of Judges, 58 Me. 591; *Judd v. Driver*, 1 Kan. 455; *Mitchell v. Williams*, 27 Ind. 62; *Hanson v. Vernon*, 27 Iowa, 28; *Loan Ass. v. Topeka*, 20 Wall. 644; *Clarke v. Nev. & M. Co.*, 6 Nev. 208; *Geren v. Gruber*, 26 La. An. 694; *Union Co. v. Bordelon*, 7 Id. 198; *Pittsburgh v. Commonwealth*, 3 Brews. Eq., Pa. 355; *Delaware v. Commonwealth*, 66 Pa. St. 64; *Trenholm v. Charleston*, 3 Rich. S. C. 347; *Bradley v. McAtee*, 7 Bush, Ky. 667; *Hilbisch v. Catherman*, 64 Pa. St. 154; *Glasgow v. Rowse*, 43 Mo. 479; *City of Carondelet v. Picot*, 38 Id. 125; *Johnson v. Howard*, 41 Vt. 123; *City of Camden v. Allen*, 2 Dutcher, N. J. 398; *Pierce v. City of Boston*, 3 Met. 520; *Whiteaker v. Haley*, 2 Or. 139; *Mechanics' Bank v. Debolt*, 1 O. St. 591; *De Pauw v.*

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Argument for Respondent.

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*New Albany*, 22 Ind. 204; *Lane Co. v. Oregon*, 7 Wall. 80; *Perry v. Washburne*, 20 Cal. 318; *City of Augusta v. North*, 57 Me. 392; *Brown v. Rice*, 51 Cal. 489; *Dyer v. Barstow*, 50 Id. 652.

III. The judgment at bar must stand, if there is any sufficient foundation therefor, even though the district court may have given an erroneous reason for its action. (*Conley v. Chedic*, 6 Nev. 222.)

IV. Legally, the state does not appear, as it could only be represented by the district attorney in case of a delinquent tax; and the attorney-general makes no appearance, as, indeed, he could not properly do, the state having no cause of action. (*State of Nevada v. C. P. R. R. Co.* 10 Nev. 78.)

V. The legislature has provided but one method for the collection of delinquent taxes; that method is by suit, and it has provided certain methods of procedure which we claim must be followed by the state to the exclusion of all other methods.

VI. The practice act is, conjointly with the revenue laws, applicable to suits for the collection of delinquent taxes. The remedy which the sovereign may pursue in the collection of delinquent taxes rests largely, if not altogether, in the discretion of the sovereign. The remedy may be by suit, or by the arrest of the person taxed, or by distress of goods and chattels, or by taking possession of goods and chattels and retaining them until the taxes are paid, or selling them for payment, or by imposing penalties for non-payment, or by forfeiting to the government the property upon or in respect to which the tax is payable, or by the sale of lands, or by making the payment a condition to the exercise of some lawful right.

Where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and is exclusive of any other. It is true, however, that if the right existed at common law, the party may pursue the common law remedy. The statutory one in such cases is regarded as cumulative merely. (*People v. Craycroft*, 2 Cal. 243; *Ward v. Severance*, 7 Id. 126; *Andover and M. Turn-*  
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*pike Co. v. Gould*, 6 Mass. 40; *Dyer v. Barstow*, 50 Cal. 652; *Brown v. Rice*, 51 Id. 489.)

VII. The practice act is exclusive of all common law and equity forms and methods of procedure in suits at law and in equity in the courts of this state. (Pomeroy on Remedies, sections 513, 515; *White v. Joy*, 13 N. Y. 90; *People v. Ryder*, 12 Id. 438, 439; *Hentsch v. Porter*, 10 Cal. 558; *Richards v. Edick*, 17 Barb. 262.)

*C. J. Hillyer*, also for Respondent.

By the Court, LEONARD, J.:

This action was commenced on the fourteenth day of January, 1878, to recover certain taxes (including penalties for non-payment as required by law) upon the proceeds of respondent's mine, alleged to be due and delinquent for twenty-one quarter years, the first quarter commencing July 1, 1867, and the twentieth, July 1, 1872, while the twenty-first quarter commenced October 1, 1875, and ended December 31, 1875.

The complaint contains twenty-one counts, each being called a cause of action, and in each count all the facts required by the statutory form of complaint in tax suits are alleged. It is also alleged that a part of each of the twenty-one quarters' taxes has been paid by defendant, the Yellow Jacket Silver Mining Company, but that it has neglected and refused to pay the balance of the same, and that, in the aggregate, there is due from defendants to plaintiff on account of, and by reason of, the several levies of taxes, and of the several delinquencies and penalties, the full sum of fifty-nine thousand seven hundred and sixty-nine dollars and forty-one cents, in United States gold coin.

Judgment is asked against the Yellow Jacket Silver Mining Company for the amount claimed, and separate judgment against its mine described for the same sum, and that a decree be entered adjudging said taxes and penalties for the several quarters stated, to be liens upon the said mine or mining claim.

The defendant, the Yellow Jacket Silver Mining Com-

pany, is a corporation organized and existing under and by virtue of the laws of this state, and has been such corporation since the first day of January, 1865; and its mine, described in the complaint and made a defendant therein, the proceeds of which it is alleged were taxed and assessed, is situate in Gold Hill mining district, Storey county, Nevada. It appears also from the transcript, and it was so stated at the oral argument, that similar actions were brought to recover back taxes, etc., against the Savage Mining Company, the Belcher Silver Mining Company, the Consolidated Virginia Mining Company, the Hale and Norcross Silver Mining Company, the Crown Point Gold and Silver Mining Company, the Ophir Silver Mining Company, the Kentuck Mining Company, the Chollar-Potosi Mining Company, and the Sierra Nevada Mining Company together with the mining claim of each. A part or all of the defendants last named are foreign corporations, but the mining claim of each is situate in Storey county, Nevada.

To the complaint filed in each case, a demurrer was interposed, similar, as we understand, to the one filed in this case, and they were each and all sustained by the court. The state refused to amend, and judgments were entered for the respective defendants. Both parties desire the decision in this case to cover all those mentioned above; that is to say: We are asked to decide whether or not the demurrer herein was properly sustained, and to have the decision embrace so many of the grounds of demurrer stated as may be necessary in order that our conclusions may be decisive of the other cases mentioned, as well as this.

Among others, defendants demurred upon the following grounds:

1. That each, every, and all the causes of action stated in the complaint, were barred by the statute of limitations of this state.
2. That several causes of action had been improperly united in the complaint.
3. That the complaint did not state facts sufficient to constitute a cause of action.

If we mistake not, the other grounds of demurrer need not be stated or considered.

And first, the Yellow Jacket Silver Mining Company being a domestic corporation, and its mine described in the complaint being situate in this state, are all or any of the causes of action stated in the complaint barred by the statute of limitations?

I. During the whole period stated in the complaint, taxes on the proceeds of mines became delinquent as follows: For quarters commencing January 1st and ending March 31st, on the fourth Monday in June following; for quarters commencing April 1st and ending June 30th, on the fourth Monday in September following; for quarters commencing July 1st and ending September 30th, on the fourth Monday in December following; for quarters commencing October 1st and ending December 31st, on the fourth Monday in March following. (C. L. 3221.) Within three days after the fourth Monday in June, September, December, and March of each year, it became the county auditor's duty to deliver the delinquent list, then in his hands, to the district attorney, whose duty it was, immediately to commence action, in the name of the state, against the person, firm, incorporated company, or association so delinquent, and against the mines or mining claims from which the gold and silver-bearing ores, quartz or minerals were extracted and assessed, so delinquent. (C. L. 3230, 3231.) The result, therefore, is, that all the taxes alleged to be due in this case, except those stated in the twenty-first cause of action, were delinquent on or before the fourth Monday in December, 1872, and that a cause of action accrued as to each quarter's taxes within three days at least, after the same became delinquent; that the amount alleged to be due in the twenty-first cause of action (twenty-four dollars and twenty-three cents) became delinquent on the fourth Monday in March, 1876.

The statutes of this state provide as follows: "Civil actions can only be commenced within the periods prescribed in this act, after the cause of action shall have accrued, except where a different limitation is prescribed



by statute." (C. L. 1016.) \* \* \* "Actions other than those for the recovery of real property can only be commenced as follows: Within three years—First, an action upon a liability created by statute other than a penalty or forfeiture. \* \* \* Within two years—First, an action upon a contract, obligation or liability not founded upon an instrument of writing. \* \* \* Fifth, an action upon a statute for a forfeiture or penalty to the state." (C. L. 1031.) "An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." (C. L. 1033.)

"The limitations prescribed in this act shall apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties." (C. L. 1034.)

In our opinion, under the provisions of the statutes quoted, all the causes of action contained in the complaint in this case, with the exception of the last, are barred. Nor is it necessary to decide that they are included within any of the subdivisions of section 1031, in order to be driven to such conclusion. If they are not embraced within that section, they certainly must be covered by sections 1033 and 1034.

That the common law maxim, "*nullum tempus occurrit regi*," does not apply to, and has not been in force in, this state since the adoption of section 1034 in 1867, is too plain for argument. That the legislature had the power to include the state within the provisions of the statute of limitations is not questioned. In *The United States v. Hoar*, 2 Mason, C. C. R. 312, Mr. Justice Story says: "It may be laid down as a safe proposition that no statute of limitations has been held to apply to actions brought by the crown, unless there has been an express provision including it."

"Limitations are created by, and derive their authority from, statute." (*People v. Gilbert*, 18 Johns. 227.)

In *The People v. The Supervisors of the County of Columbia*, 10 Wend. 365, the court says: "By the revised statutes (2 R. S. 295-97, sec. 18-28) the same limitations of actions apply to the people of the state as to individuals.

\* \* \* If the state neglects to prosecute for the period which protects individual claims, it loses the demand in the same manner as individuals do.”

“Our statute of limitations embraces all characters of actions, both legal and equitable.” (*White v. Sheldon*, 4 Nev. 288.) And it may be added, that it embraces every civil action, both legal and equitable, whether brought by an individual or the state; and if the cause of action is not particularly specified elsewhere in the statute, it is embraced in section 1033, and the action must be commenced within four years after the cause of action accrued. Such is the plain reading of the statute and the evident intention of the legislature. In many other states besides this the state is limited, the same as individuals. So it is in New York, Massachusetts, and California.

It is urged by counsel for plaintiff that the statute has not run against any or all of the causes of action stated because the revenue laws provide that a lien shall attach upon the mine, “which shall not be satisfied or removed until all taxes are paid, or the title to the mine has absolutely vested in a purchaser under a sale for the taxes levied on the proceeds thereof.” (C. L. 3156, 3250.)

The revenue law of 1861, as well as that of 1865, created a lien upon the real property of the person assessed, to secure payment of the taxes due from such person. During that period, and until 1867, the statute of limitations did not run against actions for delinquent taxes, because, until the last-mentioned date, the state was not, by express provision, included by that statute. But in 1867, when the statute creating and continuing the lien was in force, the legislature declared that the statute of limitations should apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties. That statute must apply to tax suits unless they are excluded from its operations by some other statute. The only ones claimed to have that effect are those mentioned, creating and continuing the lien, passed both before and after section 1034. (See C. L. 3250; statute 1867, 164; statute 1871, 89; statute 1873, 96.)

The question presented then, is this: "Do the several statutes just mentioned, either except taxes from the operation of the statute of limitations, or extend the time for bringing suits for their collection beyond the period allowed by that statute? They are substantially as follows: "Every tax levied under the authority or provisions of this act, on the proceeds of mines, is hereby made a lien on the mines or mining claims from which ores or minerals bearing gold and silver, or either, or any other valuable metal, is extracted for reduction, which liens shall attach on the first days of January, April, July and October of each year, for the quarter-year commencing on those days respectively; and shall not be satisfied or removed until the taxes, as provided in this act, on the proceeds of mines, are all paid, or the title to said mines or mining claims has absolutely vested in a purchaser, under a sale for the taxes levied on the proceeds of such mines or mining claims." (C. L. 3250.)

All that can be claimed under the statute quoted is, that the lien created continues indefinitely, or until the tax is paid, or the property is sold under tax sale. Does that fact establish what is claimed, that the remedy to enforce collection by suit is not barred?

The revenue laws have given two remedies to enforce by action the collection of delinquent taxes, one against the person and the other against the property, and neither depends upon the other for its existence or efficiency. (*O'Grady v. Barnhisel*, 23 Cal. 294.)

A personal judgment may be given in a proper case, and also a separate judgment against the property. Upon such judgments executions may issue as in other civil cases. A lien is also created, the effect of which is to subject the property to the payment of the tax, although it may have passed into other hands subsequent to the date of the lien. But in order to obtain a judgment against the personal defendant, or against the property, or to enforce the lien, an action like the one we have in hand, must be brought; that is the remedy provided by statute if the taxes are not voluntarily paid. It is the only remedy permitted except the summary one mentioned in section 3222.

The lien cannot be enforced, the property can not be sold, without the aid of the remedy provided—that is, by suit; and if that is barred, the remedy is lost, although the right may remain, as in other cases. The creation of a lien upon the mine certainly could not prevent the operation of the statute as to the other defendant, the Yellow Jacket Silver Mining Company. A lien is only security, whether it be given by statute, judgment, mortgage or pledge. A mortgage may be given to secure the payment of an account. The statute would run against the latter in three years and the former in six. The mortgagee has two remedies, one upon the debt and the other upon the mortgage. If he postpones suit until after the statute has run against the debt, he may still foreclose his mortgage within the six years, but he can have no personal judgment against the mortgagor for any deficiency. So, in this case, should it be admitted that plaintiff can sustain an action to enforce the lien created by statute, still it has lost its personal remedy. We could not arrive at any other conclusion without doing violence to a plain expression of the legislative will. But has not plaintiff lost its remedy as to the property also? Appellant says no; because the statute provides that the lien shall continue until the tax is paid. Suppose it does. It is common learning, that a lien may continue after the remedy for its enforcement is lost. A mortgage debt is not destroyed or extinguished by the statute of limitations. The remedy only is taken away. (*McCormick v. Brown*, 36 Cal. 180; *Sichel v. Carrillo*, 42 Id. 493.)

“The statute does not destroy the right, but only bars the remedy. Hence, if the claimant has any means of enforcing his claim, other than by action or suit, the statute can not be set up to prevent his recovering by such means.” (Darby and Bosanquet on Stat. Lim. 10.)

“An action of assumpsit by a pawnee, to recover a simple contract debt, is not the more protected from the operation of the statute because accompanied with property pledged as collateral security; for it is not, on that account, less subject to the mischief against which the statute was intend-

ed to guard. But though it be clear in such case that the remedy to enforce the debt may be barred, yet the lien upon the property pledged will remain." (Angell on Lim. sec. 73; see, also, *Henry v. The Confidence Company*, 1 Nev. 621.)

It is plain to our minds that the creation and continuation of a lien did not extend the time for bringing tax suits, beyond the period allowed by the statute of limitations, nor did it exempt taxes from the operation of the statute, either as to the corporation defendant or the property. Had the statute created the lien without providing for its continuance until the tax should be paid, the result would have been the same—the lien would have continued when once created until payment, or until the repeal of the statute creating it.

The Massachusetts tax act of 1824 provided as follows: "Whenever a tax shall be assessed on any real estate liable to taxation, said tax shall be a lien on said estate," etc. It did not, in terms, provide for a continuance of the lien, but the court said in *Hayden v. Foster*, 13 Pick. 495, "Nor do we entertain a doubt that such lien continues until the tax is paid."

This, then, is our case upon the question under discussion. A statutory lien is created, which still exists, but which cannot be enforced, nor can judgment be obtained against either of the defendants, without this or a similar action, which is barred by the statute.

Counsel for appellant also claim, that the statute of limitations is not a defense allowed in tax suits, and that no defense can be raised by demurrer, which is not permissible by answer under section 3156.

We said, a few days ago, in the case of *The State ex rel. Lake v. The Board of County Commissioners of Washoe County*, that "the concluding sentence of that section (3156), 'and no other answer shall be permitted,' must be understood with this qualification: that it does not exclude the direct denial of any allegation of the complaint, necessary to be proved, in order to entitle the state to recover."

No more does it prohibit raising the issue of law, that

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admitting the facts stated, plaintiff cannot maintain its action. If the plaintiff does not state a cause of action in its complaint, or if it states facts which, if not waived, are a bar to the action, the defendant may protect himself by proper pleading, as in other cases. Indeed, it is difficult to perceive why the defendant may not demur for any of the reasons stated in the civil practice act. As will be seen further on, the civil practice act is made applicable to tax suits, so far as it is consistent with the revenue law, and there is nothing in the law last named inconsistent with the practice act in relation to demurrers, unless it be section 3156.

It is evident that that section does not refer to demurrers. Its opening sentence is: "The defendant may answer, which answer shall be verified." It refers only to a pleading which contains denials or averments of facts constituting a defense to the matters of fact alleged in the complaint. Who can say there is not the same necessity for interposing a demurrer in a tax suit as any other? If the complaint does not state facts sufficient to constitute a cause of action, there is nothing to try. If it is ambiguous, unintelligible or uncertain, it should be made plain. If the court has no jurisdiction of the person of the defendant, or of the subject of the action, it cannot proceed with the case. If it appears upon the face of the complaint that the action is barred, no cause of action is stated, if the defendant interposes the proper plea. Before the defendant can be required to answer in a tax suit, or any other, a valid, subsisting cause of action must be alleged against him. Besides, the law making the statute of limitations applicable in actions brought by the state, the same as in actions by private parties, was passed two years subsequent to section 3156 of the compiled laws, and is, consequently, the controlling statute, so far as this defense is concerned. The demurrer to the twenty causes of action first stated was properly sustained as to both defendants, for the reason that they were barred by the statute of limitations. The twenty-first cause of action was not barred, but the court below had no original jurisdiction, and this court has no

appellate jurisdiction, over a case involving the amount therein claimed.

II. Have several causes of action been improperly united in the complaint?

Although this question was argued with signal ability by counsel on both sides, still we find it full of difficulties. It will be our endeavor to so construe the different statutes touching this question, that our conclusion will harmonize with reason and the majority of adjudicated cases.

As we have seen, the revenue law makes it the duty of the district attorney to bring suit immediately after receiving the delinquent list of each quarter; and the only provision made by that law in relation to the complaint, or what it may or shall contain, is found in sections 3232 and 3160, C. L.

The first section mentioned prescribes the form that may be used for one quarter's taxes only, and neither that section nor any other, in terms, provides or intimates that more than one quarter's taxes may be enforced in the same action. In other words, the revenue law is silent upon the question, with the exception of section 3160.

That section provides as follows: "An act to regulate proceedings in civil cases in the courts of justice in the state of Nevada, approved November 29, 1861, and the several amendments thereto, or amendments which may hereafter be made thereto, or laws passed under the government of the state of Nevada, so far as the same are not inconsistent with the provisions of this act, are hereby made applicable to the proceedings under this act."

It is plain that the only test as to whether any portion of the civil practice act of 1861 was made applicable to proceedings in tax suits, brought under the revenue law, is whether or not such portion was *inconsistent* with the provisions of the revenue law. If any section of the former act is consistent with all the provisions of the latter, it must be considered and followed with the same particularity as though it was included in the body of the revenue law. It is common for legislatures to refer to other statutes, as was done in this case, and by such reference only, to desig-

nate the powers given under the latter act. When that is done without limitation, the statute referred to is to be considered as incorporated in the one making the reference. (*Turner v. Wilton et al.*, 36 Ill. 393.) If the operation of the statute referred to is limited by the act making the reference, then the former is considered as incorporated in the latter, with the limitations mentioned. The legislature must have had some object in view in making all consistent provisions of the practice act applicable to the revenue law. In 1861, a revenue law was passed and approved, November 29th. In its principal features it was similar to the revenue law of 1865. The revenue law of 1861 and the practice act of 1861 were both approved on the same day, and the latter was made applicable to the former, so far as it was consistent.

The legislature knew that no provision had been made in the revenue law as to many necessary points or matters of pleading and practice. They knew, also, that it was not desirable to adopt a new system for the collection of delinquent taxes, except so far as circumstances rendered such change necessary. The legislature, therefore, with the best of reasons, made the practice act the controlling law in tax suits as much as it was in other civil cases, except when inconsistent with the provisions of the revenue law. We have no doubt that the legislature intended to make the civil practice act of 1861 applicable as stated; nor have we any doubt that the civil practice act of 1869, now in force, is applicable to the same extent. Such would probably have been the effect had the practice act of 1861 only, been referred to and made applicable to the revenue law of 1865. (*Kugler's Appeal*, 55 Pa. St. 125; *McKnight v. Crinnion*, 22 Mo. 560.)

But the revenue law now in force (C. L. 3160), not only made the civil practice act of 1861, then in force, applicable, but also its several amendments, or amendments which might thereafter be made thereto, or laws passed under the government of the state of Nevada, so far as consistent. The apparent intention was to make the civil practice act



in force at the time a tax suit should be brought, applicable, unless inconsistent with the revenue law.

Nothing need be said in addition to what is expressed in the first portion of this opinion, in relation to defendant's right to demur upon the ground of misjoinder of causes of action. There is nothing in the revenue law against it, directly or indirectly, and the civil practice act permits it. Besides, every conceivable reason favors such a proceeding in tax suits as well as in others. The fortieth section of the practice act is not inconsistent with the revenue law, and in tax suits any ground of demurrer therein stated may be urged. The same conclusion must follow in relation to section 64. It is not inconsistent with any of the provisions of the revenue law. That section provides that "the plaintiff may unite several causes of action in the same complaint, when they all arise out of: First—Contracts, express or implied; \* \* \* But the causes of action so united shall all belong to only one of these classes, and shall affect all the parties to the action, and not require different places of trial, and shall be separately stated."

If the different quarters' taxes are separate and distinct causes of action, and if it shall be found that no other causes of action can be united in one complaint, than those permitted by section 64, it is not contended that those united in the complaint in this case can be so joined, unless they are embraced in the first subdivision quoted—that is, unless a tax upon the proceeds of mines is a debt or liability arising out of an express or implied contract.

The question, then, that now presents itself is this: Although section 64 is applicable to tax suits, can any other causes of action be united, except those specified therein? Does the express permission to unite those stated in that section prohibit the union of others not mentioned therein, which, under the old equity practice, could have been joined in the same complaint? Is our code "the only source of authority from which rules of pleading may be drawn, and have its methods so completely supplanted those which preceded it that the latter can no longer be appealed to as possessing of themselves any force and authority?"

The practice act now in force is entitled, "An act to regulate proceedings in civil cases in the courts of justice of this state, and to repeal all other acts in relation thereto."

Section 1 declares that "there shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs."

Section 37 provides that "all the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this act."

By section 38 it is provided that "the only pleadings on the part of the plaintiff shall be the complaint or demurrer to the defendant's answer; and the only pleadings on the part of the defendant shall be the demurrer or the answer."

It seems to us that sections 37 and 38, when construed together, plainly mean this and nothing more: That the complaint, answer and demurrer are sufficient, when they square with the rules prescribed by the civil practice act, and not otherwise. We think, also, that the provision in section 37, that "the rules by which the sufficiency of pleadings shall be determined shall be those prescribed in this act," exclude the consideration of other rules. It is said that "a statute containing a mere affirmative provision, without any negative, expressed or implied, does not alter any common law rule existing in regard to its subject matter before the statute." (Sedgwick on the Construction of Stat. and Const. Law, 29.) But there is, in section 37, a plainly implied negative. (7 Iowa, 276; 36 Conn. 375; 20 Ark. 420.) Let us test the conclusion at which we have arrived by some provisions of the practice act.

Section 39 declares what, in general terms, the complaint shall contain, whether legal or equitable relief, or both, are claimed. Section 40 provides within what time and upon what grounds the defendant may demur to the complaint. Seven grounds of demurrer are stated. No one would argue that a demurrer can be interposed in this state for any other reason than those stated. Even Mr. Moak, in his *Van Santvoord's Pleadings*, says on page 750:

"The first of these, that is, the misjoinder of claims or causes of action between the same parties, is specifically provided for in the seven several subdivisions of section 167 of the code as amended. And here the remark made in *Manchester v. Storrs* (3 How. Pr. 410), in respect to a demurrer for the misjoinder of several causes of action, may be repeated; that 'we must forget all rules respecting demurrers, and regard a demurrer now as a pleading created, with its character and office defined by the code. No demurrer will lie except to a complaint, nor for any other causes except the six grounds specified in section 122, now 144.'" And yet he holds that causes of action not mentioned in the practice act may be united, if they are such as might have been joined under the former equity practice.

We do not perceive why a different rule should obtain in relation to demurrers from that concerning joinder of different causes of action. The language of the code is the same in both cases. "The defendant may demur," etc. (Sec. 40.) "The plaintiff may unite several causes of action in the same complaint, when they arise out of," etc. (Sec. 64.) If the conclusion arrived at by the author is based upon the fact that "there are remedies, well known to our jurisprudence, which still exist, and which can not be comprised in either of the subdivisions of section 167" (corresponding with section 64), as seems to be the case, then why not be consistent, and arrive at the same conclusion in relation to demurrers? It is well known that the code does not specify all the grounds of demurrer that were known and permitted before the code.

In *White v. Joy*, 13 N. Y. 89, the court said: "Departure in pleading is defined to be, when a party quits or departs from the cause or defense which he has first made, and has recourse to another. \* \* \* Prior to the code, a demurrer would lie for a departure in pleading; but is a demurrer authorized by the code for such fault in pleading? \* \* \* It is proper to remark, that since the code, parties must find their authority for pleading in the code, and if the authority is not found there for any pleading put in, and it is not a case where a demurrer is authorized, the

remedy is by motion to strike out. It is an irregularity to put in pleadings not authorized by the code. All the cases in which a demurrer may be interposed are clearly specified." Without quoting, we refer especially in this connection to *Dyer v. Barstow*, 50 Cal. 562, and *Brown v. Rice*, 51 Cal. 489.

So, examining the statute outside of pleadings, who would say that an injunction, certiorari or mandamus can be granted, except for the reasons stated in the practice act; or that a new trial can be had except upon grounds therein stated? Who would think of taking an appeal except in the cases prescribed in title nine? And is any other act or omission a contempt, save those mentioned in section 460?

We shall make two brief quotations in addition to the foregoing, and close this branch of the case: "There is no intermingling of a former practice where the provisions of the code are specific. The whole plan of prosecuting appeals and reserving questions is contained in their (New York) code, and there only. All the former machinery, cumbrous and elaborate as it was, far more so than our own, is entirely superseded by the code. Any legal gentleman in that state, who should adhere to the old practice, setting it up against the new, would only make himself ridiculous. So in this state. Wherever the code has made affirmative provisions, the former practice is obsolete. The only thing which looks to keeping alive the old practice, is that one provision already alluded to, of very doubtful constitutional validity, which provides for omitted cases. Everything else has fallen before the express and detailed provisions of the code. This is the last expressed will of the legislature, and on the plainest principles of statutory construction, as well as in express terms, it abrogates everything in the former practice, and all enactments inconsistent with it." (*Jolly v. Terre Haute Drawbridge Co.*, 9 Ind. 427.)

We quote also from Mr. Pomeroy's excellent work on "Remedies and Remedial Rights," p. 545. He says: "Before entering upon the matter thus outlined, a preliminary question presents itself, upon the answer to which much of the succeeding discussion must turn. The question involves the true relations between the doctrines and rules of plead-

ing enacted by the codes and those which existed previously, as parts of the common law and the equity jurisprudence, and may be stated as follows: Are the doctrines and rules contained in the statute to be regarded as the sole guides in pleading under the reformed procedure? or are the ancient methods still controlling, except when inconsistent with some express provisions of the later legislation?" And after stating the views of different courts, etc., he concludes as follows: "During the earlier periods of the present system, there was an evident disposition on the part of some judges and courts to adopt the former of these two views, and to hold that the old methods, rules and requisites of the common law and of equity are still applicable in substance, when not inconsistent with the provisions of the statute; or, in other words, that they had been supplanted only so far as such inconsistency extends. The second theory has, however, been generally, if not universally, adopted, as the true interpretation to put upon the language of the codes, and as the starting point in the work of constructing a system of practical rules for pleading. The proposition, as stated in the foregoing paragraph, has been expressly announced in well-considered judgments; in the vast majority of instances, however, it has rather been assumed and impliedly contained in the decision of the court, yet none the less passed upon and affirmed. It may now, I think, be regarded as the established doctrine, that the code in each of the states is the only source of authority from which rules of pleading may be drawn; that its methods have completely supplanted those which preceded it, so that the latter can no longer be appealed to as possessing of themselves any force and authority."

In our opinion it is wisdom to preserve the plain, simple methods and rules of the code, in pleading and practice; and if section 64, or any other, does not, in terms, embrace all that is desirable, then let us appeal to the legislature for aid, rather than to judicial legislation. It is proper to refer briefly to certain authorities to which our attention has been called in this connection.

*Bowers v. Keesecher*, 9 Iowa, 424, and *Byington v. Woods*, Nev. Vol. XIV.—16.

13 Id. 20, were decided under statutes justifying the conclusions of the court, but by reason of the great difference between those statutes and ours they throw no light upon this case. (See Laws of Iowa, revision of 1860, and 13 Id. 20.)

*People v. Seymour*, 16 Cal. 340, was brought under a special statute legalizing the assessments of taxes in the city and county of Sacramento for the years 1858 and 1859, and authorizing their collection.

*People v. Todd*, was a similar action, brought to recover taxes for 1858, 1859 and 1860, under a similar statute.

It is not necessary to decide whether by those statutes it was the evident intention of the legislature to permit taxes against the same person and the same property for the different years, to be collected in the same suit, because the question here presented was not in any manner raised or suggested in either of those cases. So, in any event, they are not authority in this case upon the question of misjoinder of causes of action.

*Deyo v. Rood*, 3 Hill, 528, was decided in 1842, before the adoption of the code, and the decision was placed expressly upon the common-law doctrine allowing several penalties to be recovered in the same suit. The same is true of *City of Brooklyn v. Cleves, Hill & Denio*, 233, and *Church v. Mumford*, 11 Johns. 479.

*Kempton v. Savings Institution*, 53 N. H. 583, was brought under a penal statute which provided that "if any person upon any contract receives interest at a higher rate than six per cent. he shall forfeit three times the sum so received in excess of said six per cent. to the person who will sue therefor." The question before the court was whether that statute authorized a separate suit for every separate reception of usurious interest on the same contract. And the statute having been penal, and hence its operation and effect could not be extended by implication, and the court being of the opinion that the statute did not, in terms, authorize a separate suit for each breach any more than that the whole must be included in one suit, it was deemed the best policy to resolve the doubt according to the well-

established doctrine, that "the law does not favor or encourage a multiplicity of suits."

*Pearkes v. Freer*, 9 Cal. 642, was an action against a sheriff to recover damages sustained by reason of his failure to execute and return process, with the addition of two hundred dollars imposed by law as a penalty for such neglect. The statute provided that for such failure the sheriff should "be liable in an action to the party aggrieved for the sum of two hundred dollars, and for all damages sustained by him." A demurrer was interposed to the complaint on the ground that two distinct causes of action had been improperly united. The court said: "It is not the policy of the law to promote multiplicity of actions, and by no rule of construction of which we have any knowledge can we arrive at the conclusion that the legislature intended that two suits were necessary to enable a party to avail himself of the remedy given by this statute."

The fact is, that although there were two kinds of relief, there was but one cause of action. (*Pomeroy's Remedies*, 486, *et seq.*)

We are also referred to *Skyrme v. Occidental Co.* (8 Nev. 231), an action to enforce several mechanics' liens. The court in that case said: "The plaintiff need not have brought suit to foreclose any but his own lien, and then, by pursuing the provisions of the statute, would have had the right to exhibit proofs as to the others. \* \* \* But by bringing suit upon all the liens (doing more than was necessary) he did not, in our judgment, lose the right to have the assigned liens enforced." (See, also, *Hunter & Co. v. Truckee Lodge*, decided at the last January term, and *Ivers v. Elliott*, 6 Nev. 290.)

But it is argued by counsel for appellant:

1. That there is in fact but one cause of action stated in the complaint, although the different quarters' taxes and penalties are set out as distinct causes.

2. That if there are as many separate and distinct causes of action as there are delinquencies stated in the complaint, still a tax is in the nature of a debt, and those al-

leged to be due in this case can all be recovered in one action.

If the complaint contains but a single cause of action, whatever else it may contain, we are of the opinion that the defendants cannot successfully demur on the ground that several causes of action have been improperly united. (*Hillman v. Hillman*, 14 How. Pr. 459.)

In *Mayer v. Van Collen* (28 Barb. 231), a cause of action is defined to be "the right which a party has to institute and carry through a proceeding for the enforcement or protection of a right, the redress or prevention of a wrong." "The complaint states the facts showing this right. The unity of the right to be enforced, or of the wrong to be redressed, constitutes the unity of the action." (*Id.*) Mr. Pomeroy says: "Every action is based upon some primary right by the plaintiff, and upon a duty resting upon the defendant corresponding to such right. By means of a wrongful act or omission of the defendant, this primary right and this duty are invaded and broken; and there immediately arises from the breach a new remedial right of the plaintiff and a new remedial duty of the defendant. Finally, such remedial right and duty are consummated and satisfied by the remedy which is obtained through means of the action and which is its object. \* \* \* \* \*The cause of action, therefore, must always consist of two factors: 1. The plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate, person, character, property or contract. 2. The delict, or wrongful act or omission of the defendant by which the primary right and duty have been violated. Every action, when analyzed, will be found to contain these two separate and distinct elements, and, in combination, they constitute the cause of action." (Sec. 519.)

The two combined elements in this case, then, were (1) the state's right to a quarterly payment of taxes alleged to be due, and the defendant's duty to pay the same at the times provided by law; and (2) the omission to pay when required. The combined elements necessary to constitute



a cause of action existed as to each quarter's taxes as soon as the auditor handed over to the district attorney the delinquent list for such quarter. At that time, then, the state had a cause of action, and the right to bring it. If the statute of limitations had not barred an action for any part of the taxes alleged to be due, and if the state had obtained judgment in an action brought to recover the amount claimed to be due for the last quarter only, would such judgment be a bar to an action or actions for the recovery of amounts alleged to be due for the preceding quarters? If such judgment for a part would bar an action for any or all taxes claimed for previous quarters, then only one cause of action is stated in the complaint. On the contrary, if such judgment would not be a bar, then there are twenty-one causes of action stated in the complaint.

"The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. \* \* \*

But it is entire claims only which cannot be divided within this rule—those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trespasses have been committed, may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of action

might be united in a single suit; the right of the party in whose favor they exist, to separate suits, is not affected by that circumstance, except in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions. \* \* \* The true distinction between demands or rights of action, which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one, and only one, cause of action. The case of a contract containing several stipulations to be performed at different times is no exception. Although an action may be maintained upon each stipulation as it is broken, before the time of performance of the others, the ground of action is the stipulation, which is in the nature of a several contract. Where there is an account for goods sold, or labor performed; where money has been lent to, or paid for, the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will, in each case, depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and usually, in case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period or at the pleasure of one or both parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, a single or entire demand or cause of action."

(*Secor v. Sturgis*, 16 N. Y. 554–558, and cases there cited.) We know of no plainer condensed statement of the law upon the subject in hand than the above. (See *Staples v. Goodrich*, 21 Barb. 317; *The Erie & New York City R. R. v. Patrick*, 2 Keyes, 256; *Secor v. Sturgis*, 2 Abb. Pr. 70; *Cashman v. Bean*, 2 Hilt. 341; *Reformed Protestant Dutch Church v. Brown*, 54 Barb. 199; *Boyre v. Christy*, 47 Mo. 72.)

It is true that one law is the sole authority for the different acts required in tax matters. That law creates liabilities, but it also requires the performance of certain acts in a specific way before payment can be enforced. A valid assessment is an indispensable basis for the support of a tax. On real and personal property an annual levy is made by the law for state purposes, and by the county commissioners for county purposes. The methods are different, but the result, in both cases, is a yearly levy, and each levy is separate from that of any other year. So it is as to assessments. Each is and must be an assessment of one year only. (*People v. Hastings*, 29 Cal. 452.) Separate tax lists, tax rolls and delinquent lists are required and kept for each year. Each lien created is a lien for that year's taxes, and suits can be, and under the law should be, brought independently of suits for the taxes of other years.

There is no provision allowing delinquent taxes of one year to be added, or attached, to those of another year. Any errors in one year's assessment, levy, or other act required, does not affect the collection for any other year. Each year a lien attaches upon the real property assessed, for the tax levied upon the personal property of the owner of such real estate, but only for that year. Each delinquent list, or a copy thereof, certified by the county auditor, showing unpaid taxes against any person or property, is *prima facie* evidence in any court to prove the assessment, property assessed, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. Hence different evidence is necessary to support an action for each year's taxes.

"Where the act complained of is indivisible, a plaintiff

cannot separate it and bring one action for one part and another for another; and the test by which to determine whether causes of action are the same is to inquire whether the same evidence will be necessary to support them." (*Crips v. Talvande*, 4 McCord (S. C.), 20.)

What has been said in relation to real and personal property is entirely applicable to the proceeds of mines, with this difference: In the first instance, as well as in the second, the levy is made yearly, but after the levy, the different acts in relation to proceeds of mines are required to be done quarterly. It must be admitted that if taxes upon the proceeds of mines for different quarters constitute but one single cause of action, then those upon real and personal property, for different years, must fall under the same rule. After a careful examination of the revenue law, it seems to us that if the taxes delinquent for several different years in the one case, and for different quarters in the other, constitute but one cause of action, then it is difficult to find those that are separate and independent. If A. should purchase goods of B., having a settlement monthly for the goods purchased during the month preceding, and at the end of a year B. should bring suit, he could unite the several amounts found due on settlement, because all arose out of contract, but each would have to be separately stated, because of being a cause of action by itself, in consequence of a settlement and separation from the rest of the account. Here the law settles and fixes the amount due for each quarter and does not allow it to become mingled with, or dependent upon, the taxes or proceedings of any other quarter. Every quarterly or yearly tax is an enforced contribution for the support of the state, and from its very nature must be a separate and independent liability. We now come to a consideration of the question whether a tax is a debt, or in the nature of a debt, and whether those due for different quarters can be collected in the same action. A conclusion in this case that a tax is in the nature of a debt could not help appellant, if it does not arise out of a contract, express or implied; and it may be conceded that, before the code, the action of debt was a proper remedy

for the collection of a tax, in case any action was allowed, and that several demands for debt could have been united.

"By the common law an action of debt is the general remedy for the recovery of all sums certain, whether the legal liability arise out of contract or be created by statute." (*United States v. Lyman*, 1 Mason C. C. R. 498.) That was an action of debt to recover certain duties. It was held to be a proper remedy, not because the amount claimed was due under a contract, but because, under the law, it was for a certain, definite sum for which the defendant was liable. Bouvier says: "Debt lies for a sum of money certain, due by the defendant to the plaintiff, whether it has been rendered certain by contract between the parties or by judgment or by statute." (3 Bouv. Inst. 627; see Bliss on Code Plead. sec. 243; *Meredith v. United States*, 13 Peters, 486, and *Portland D. D. Co. v. Trustees*, 12 B. Mon. 77.) It will be seen by reference to the authorities, however, that this class of cases does not strengthen appellant's case. Although they decide that, under the common law and the old practice, the action of debt was a proper remedy for the collection of a tax or duty, in the absence of a special statute, still they do not decide that such an action was proper because a tax or duty is a debt arising out of a contract, express or implied, and that is the condition of unity under section 64.

In comparison with the number holding an opposite doctrine, there are very few authorities which declare a tax an obligation or debt based upon or arising out of an implied contract. (See *Dugan v. Baltimore*, 1 Gill and J. 499; *The City of Dubuque v. The Ill. Cent. R. R. Co.*, 39 Iowa, 60; *Mayor v. McKee*, 2 Yerg. 167; 3 Bl. Com. 158.)

Opinion by Beatty, J., 2 Nev. 61, with dissenting opinion by Brosnan, J., Lewis, C. J., not participating in the decision. (See repub. vols. 1, 2, Nev. R. 588.)

In the first of the above cases no reasons are given in support of the doctrine stated. In the second, Bouv. Dict., tit. Contract, Chitty's Contracts, 2, and 3 Bl. Com. 158, are cited. Cole, J., dissents expressly.

And in relation to the reasoning of Mr. Blackstone, Jus-

Opinion of Beatty, C. J., concurring and dissenting.

tice Story, in 1 Mason, 288, says that "it is very refined and ingenious in theory, but it never has to its full extent been admitted in practice, as the foundation of legal remedies." The case in 2 Yerg. declares upon the authority of Blackstone, that by becoming a member of society a person tacitly promises to pay any debt or tax legally imposed, and for non-payment is liable to a suit upon such implied promise. We do not subscribe to the doctrine of the above authorities. It was a convenient fiction in the beginning, and can never arise to the dignity of reality. The authorities are overwhelming in favor of the conclusion that taxes are not debts in the sense that they are obligations or liabilities arising out of contracts express or implied, and in the true and usual sense, are not debts at all; but that they are "the enforced proportional contribution of each citizen and of his estate, levied by the authority of the state for the support of government, and for all public needs; that they owe their existence to the action of the legislative power, and do not depend for their validity or enforcement upon the individual assent of the taxpayer, but operate *in invitum*." (Cooley on Tax, 13; Bliss on Code Plead. 128; *Johnson v. Howard*, 41 Vt. 125; 26 Id. 436; *City of Augusta v. North*, 57 Me. 394; *Geren v. Gruber*, 26 La. An. 697; *Loan Association v. Topeka*, 20 Wall. 664; *Pierce v. City of Boston*, 3 Met. 520; *Lane Co. v. Oregon*, 7 Wall. 78; *Perry v. Washburn* (wherein the court explains *People v. Seymour*, 16 Cal. 340); *Hanson v. Vernon*, 27 Iowa, 46; *Bradley v. McAtee*, 7 Bush, Ky. 673; *The City of Camden v. Allen*, 2 Dutcher, 398; *City of Carondelet v. Picot*, 38 Mo. 130; *Trenholm v. Charleston*, 3 Rich. S. C. 349; *Whiteaker v. Haley*, 2 Oregon, 139; *De Pauw v. City of New Albany*, 22 Ind. 206; 58 Me. 591.)

We deem it unnecessary to notice other points raised by counsel.

The judgment is affirmed, each party to pay its own costs on appeal.

BEATTY, C. J., concurring and dissenting:

I concur in the judgment on the ground that the action was barred by the statute of limitations.

I dissent from that part of the opinion of the court in which it is held that there was in this case a misjoinder of causes of action. If the principle of the decision upon that point affected only suits for taxes the matter would, perhaps, not be of sufficient consequence to justify any extended statement of the grounds of my dissent, for as long as the plain injunctions of the statute are obeyed there ought never to be more than one claim for delinquent taxes pending against the same person; and consequently it can not be presumed that the privilege of uniting two or more such claims in one action will ever hereafter be of any practical importance. But it will be seen from the reasoning of the court, and the authorities cited to sustain its conclusions, that the decision rests upon a principle that will include a great many other causes of action besides delinquent taxes, and that if it is consistently adhered to, the beneficent rule of the statute will be very greatly restricted in its operation. For in effect it is held that there is no implied contract to pay taxes *because, and only because, the obligation is imposed by statute, and does not depend for its validity upon the individual assent of the taxpayer*; because, in short, it is an obligation operating *in invitum*. Now, if this is a good reason for holding that there is no implied promise to pay a tax, it must equally follow that there is no implied promise to discharge any common law or statutory obligation which operates *in invitum*, and the result is that no two demands of that character can hereafter be united in the same action. This I regard as an extremely pernicious consequence, and therefore I shall endeavor to show that the doctrine from which it flows, although true to a certain extent, has no application to the construction of section 64 of the practice act. For this purpose I shall rely to a great extent upon the cases and writers whose authority is invoked by the court. In the first place, however, I wish to call attention to a principle of legal construction, which seems to have been to some extent overlooked: The office of interpretation is to determine the sense in which words have been used. The same word does not always mean the same thing. Not only are words employed in different

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senses in different statutes, but the instances are not rare in which a word has been held to mean one thing in one part and another thing in another part of the same statute. What is true of other words of ambiguous import is empirically true of the word *contract*—a word that has been used by law-writers of the highest reputation and authority sometimes in a very enlarged, and at others in a much more restricted, sense. In order to determine its meaning in any particular statute in which it may be found, it will always be necessary to look to its context, to the subject-matter, and to the spirit and object of the law. To hold that, because in construing one statute it has been interpreted in its ordinary and more restricted sense, it must therefore be taken in the same sense in every other statute, is simply to ignore one of the most familiar rules of legal construction. Yet this, in my opinion, is the mistake into which the court has fallen.

No one will deny that it has been frequently held, and correctly held, that a tax is not a debt or obligation *ex contractu* in the ordinary sense of those terms, or within the meaning of such statutes as the legal tender act, and the statutes of limitations, set-off, etc., of some of the states. The question here, however, is not as to the ordinary sense of the word *contract*, standing by itself in an ordinary statute, but as to its technical sense, as a term of art, when combined in a technical phrase, in a statute relating exclusively to technical matters, and therefore necessarily the work of professional hands.

The civil practice act permits the joinder of causes of action arising out of contracts, express or implied. What did the lawyers who framed the code of practice mean by the expression "causes of action arising out of contracts, express or implied?" Can it be doubted that they intended it to embrace all those causes of action which at common law were held to arise out of implied contracts? I at least entertain no doubt, and the authorities cited by the court (Bliss and Pomeroy) admit that the language of the act is to be taken in its broadest technical sense. This conclusion, moreover, is forfeited by the fact that every considera-



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tion of policy and convenience, as well as the whole spirit and object of the statute, favor such a construction.

The practice act is a remedial law. It was designed to simplify legal proceedings; to expedite them and render them less costly and burdensome to litigants. Many of its rules are borrowed from the practice in equity, and, in construing its provisions, courts have generally professed to be guided by the liberal and enlightened principles of equity, with a view to the promotion of justice, the discouragement of oppression and the prevention of needless expense and delay. For all these reasons, I not only feel authorized, I feel constrained, to give the largest and most liberal possible construction to the provision in question. For it can not be denied that the rule of equity and of sound policy is against the unnecessary multiplication of suits. When a number of demands of similar nature, involving similar principles and results, capable of being heard together without inconvenience, and open to the same defense, can all be embraced in the same judgment, they ought to be united in the same action, not only for the sake of the litigants, but also for the sake of the public. This is the doctrine of equity (Story's Eq. Pl., secs. 530-1-2), and this is the spirit of section 64 of the practice act, as is shown by the restrictive clause near the end, which prohibits the joinder of actions, unless they "all belong to only one of these classes and shall affect all the parties to the action, and not require different places of trial." This express limitation upon the right of uniting separate causes of action in the same suit proves that it was the intention of the framers of the law that, subject to its own positive restrictions, it should be largely and liberally construed. *Exceptio probat regulam.*

It is not denied—indeed, it is tacitly conceded, both in the argument of counsel and in the opinion of the court—that it would be better if the law allowed the joinder of the several causes of action set out in this complaint. The court decides, only because it feels compelled to decide, that a delinquent tax is not a "cause of action arising out of an implied contract." To this conclusion it is forced by

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what it deems the overwhelming weight of authority. I might feel similarly constrained if I found the long list of cases cited by the court to be strictly in point, and found nothing more on the other side than the two or three cases referred to in its opinion. But I think I may safely affirm that whoever will take the trouble to make a critical examination of the authorities relied on will find that a large number of them have a very remote, and some of them no bearing whatever on the question at issue. There are, however, quite a number of them, following the case of *Pierce v. Boston* (3 Met. 521), which hold that an obligation operating *in invitum* is not a contract *in the ordinary sense of the word* and therefore (on the principle that words are presumed to be used in their ordinary sense unless there is something in the context or spirit and object of the law to prove the contrary) that taxes are not embraced by the words "contract" and "debt," as used in the legal tender act and in certain statutes of limitation, set-off, etc. I do not question the correctness of these decisions. They are, in fact, entirely consistent with the principle of interpretation which I invoke; for in every single instance in which a tax has been held not to be a debt or obligation *ex contractu*, the whole spirit and object and policy, and sometimes the express words, of the statute in question were opposed to an enlarged and liberal interpretation of the words. The fact, therefore, that an obligation imposed by law and operating *in invitum* is not a contract in the ordinary sense of the word was a perfectly valid ground for those decisions. But can it thence be inferred that such obligations were not held to be implied contracts at common law, and that they are not embraced in the provisions of section 64 of the practice act? This question is answered in the negative by the very authorities relied on by the court.

Bliss on Code Pleading, section 128, is cited. In that section the author is treating the identical question under consideration, and this is his language: "The permission is to unite actions upon contracts, express or implied. It is said that an implied agreement is but an obligation, created by law, warranted by justice, but not by the assent—and

often against the assent—of those to be charged. So far as this is so, such obligations have no affinity with contracts and can not upon principle be classed with them. To call such an obligation a contract was always a fiction." This is the passage cited, and certainly it does show that the doctrine of implied contracts was always, to a great extent, based upon a legal fiction. But what if that legal fiction has been recognized and adopted by the statute as a means of definition, and as the basis of substantial rights? In that case it seems to me that, at least for the purpose of construing the statute, the "convenient fiction" so cavalierly treated in the opinion of the court does "rise to the dignity of reality." Now, what does Mr. Bliss say on this subject? I quote from the same section (128), a little lower down: "There were cases (at common law) in which assumpsit would lie where ~~no~~ promise, as a fact, could be implied; where the allegation of a promise was a naked fiction; where there was an obligation merely, and where, logically—if any logical deduction had governed the common law plead-ers which did not spring from a fictitious premise—debt, or case, or trespass, should have been the form of action. I refer to legal obligations in respect to those through whom the debt accrued, and to obligations arising from injuries. Thus one might lay a promise from the husband or father to pay for necessities furnished to a wife or child, although furnished against his express command, and also lay a promise to pay for goods wrongfully converted by the defendant, although under a claim of ownership. *As the code expressly refers to implied contracts, these as well as those where the agreement is understood, will probably continue to be treated as agreements, and thus one of the most marked fictions of the common law pleading is perpetuated.*" From the last sentence in the above quotation (which I have italicized), it clearly appears that this author, although disposed to find fault with the "common law fiction" of implied contracts, is nevertheless convinced that within the meaning and for the purposes of section 64 of the practice act that fiction has been "*perpetuated.*" What rank Mr. Bliss is to take as an authority on code pleading is not yet deter-

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Opinion of Beatty, C. J., concurring and dissenting.

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mined, and I have only been induced to quote his opinion at so much length because he is included in the list of authorities deemed "overwhelming" by the court. I have shown, I think, conclusively that upon the point at issue he ranges himself distinctly against the opinion of the court. So also does another text writer who is quoted at great length and highly commended by the court in connection with another branch of the case. (See Pomeroy's Remedies and Remedial Rights sections 492, 493, and cases cited.)

Upon the opinion of these two writers, in the absence of any authority to the contrary, I am willing to rest the correctness of my conclusions, that the provisions of section 64 of the practice act embraces all causes of action arising out of implied contracts, in the widest sense of that expression as used by common law pleaders.

It remains only to be seen whether the obligation of the tax-payer was one of those upon which a promise was implied at common law. That it was, has been held, not only in the cases referred to by the court, but in other cases to which I shall call attention, and the contrary has never, to my knowledge, been decided in any case. It has been frequently decided, and such is probably the settled law, that where the statute provides another remedy a suit for taxes can not be maintained; but it has never been denied that, in the absence of any other remedy, *debt or assumpsit* would lie for the collection of delinquent taxes. None of the cases cited in the opinion of the court are opposed to this statement. The utmost extent to which they go is, I repeat, that a tax is not a debt or obligation *ex contractu*, in the ordinary sense of those terms, and therefore that taxes are not debts or contracts within the meaning of certain statutes whose spirit and object do not embrace them. I have not the slightest fault to find with this doctrine. I only object to its application to a case which depends upon a different principle; for it is constantly to be borne in mind that the *reason, and the only reason*, why in those cases it was held that a tax was not a debt, was that it is an obligation imposed by statute and operating *in invitum*. But I have shown that, in the opinion of Mr. Bliss and Mr.

Pomeroy at least, section 64 of the practice act embraces obligations of that precise description. I shall endeavor, further, to show from numerous decided cases that at common law a promise to pay was always implied where the law, whether common or statute law, or the judgment of a court, imposed an obligation to pay.

Three cases (1 Gill and J. 499; 39 Iowa, 60 and 2 Yerg. 167) are referred to by the court as holding that from the obligation to pay a tax a promise to pay will be implied. We are left to infer that these are the only cases that sustain the doctrine, and an attempt is made to disparage their authority by pointing to the fact that they cite only Blackstone and Chitty, Jr., and that they assign no reasons for the doctrine stated. It is a mistake, however, to suppose that there are no other decisions to the same effect, and it is equally a mistake, in my opinion, to suppose that there is any real conflict between these decisions and the long list of cases cited in support of the conclusions of the court. If there were any such conflict it might be very pertinently remarked that even Blackstone and Chitty are better than no authority at all; and while it is true that they alone are cited in support of the doctrine stated in the three cases referred to, it is equally true that no decision and no writer is cited in support of the doctrine of *Pierce v. Boston*, and the other cases in which it has been followed. But, in truth, there seems to have been very little need of citing authority in support of either set of decisions, one of which rests upon the admitted fact that the word "contract," in its ordinary sense, does not include involuntary obligations, and the other upon the well-understood maxim of the common law that, for the sake of affording a remedy, the law will always imply a promise from any legal obligation to pay. This principle is plainly stated in the case of *The Mayor of Baltimore v. Howard*, 6 Harris and Johns. 394, in which it was held that the action of assumpsit would lie for a delinquent tax. And in its practical form, I am not aware that the rule has ever been seriously questioned, although the explanation of its origin, or the ground upon which it rests, as given by Blackstone (3 Com. 158), has been un-

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favorably criticised. It makes no difference, however, what the origin of the maxim was; it concerns us only to ascertain its meaning and proper application. When we know what causes of action were held to arise out of contract before the code, we shall know what causes of action can be joined under the provisions of section 64.

What is said by Blackstone in relation to implied contracts, in the passage referred to, is as follows: "Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound, and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence or assessed by the interpretation of the law. For it is a part of the original contract entered into by all mankind who partake of the benefit of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge," etc.

This is the doctrine, if not the exact passage, commented upon by Mr. Justice Story in the language quoted by the court from the decision in *Bullard v. Bell*, 1 Mason, 288. By reference to that case it will be seen that Judge Story expressly admits that a "mere legal liability, created by statute," "may furnish the foundation or consideration of a contract, express or implied," although it "is not of itself a contract." All that he denies is so much of Mr. Blackstone's reasoning as holds that it is a contract in itself. He does not deny that the cause of action upon such an obligation is, in a technical sense, a cause of action arising out of contract. Moreover, the only reason given by Judge Story for dissenting from the doctrine as stated by Blackstone is an utterly inconclusive reason. He says: "If it were universally true, then *indebitatus assumpsit* would lie to recover a fine on a criminal sentence or a penalty or forfeiture upon a penal statute, which certainly can not be pretended." With all proper deference to the opinion of Judge Story

(who, by the way, has been more than once repudiated by this court), I think a sufficient reason can be assigned why a fine or penalty or forfeiture was not recoverable in assumpsit without the slightest reference to the universality of the principle stated by Blackstone. The action of assumpsit, as is well known, lay only upon *parol* or *simple* contracts; it was not the remedy allowed for the recovery of any sum *due by specialty*. Therefore, when a *sum certain* was due by statute the action of debt only would lie, for the statute was deemed for that purpose a *specialty*. This precise point is decided by Judge Story himself in the case under consideration, and in fact the point upon which the decision turns is that a *sum certain* due by statute is a *sum due by specialty*. (1 Mason, 289.) The action of *debt* was as much an action *ex contractu* as the action of assumpsit; the only difference was that *debt* was in some respects a more extensive remedy than assumpsit. It would lie upon some contracts (*specialties*, including penal statutes), which would not support assumpsit. (1 Chitty's Pl. 121.) It is therefore a complete *non sequitur* to argue that because the action of assumpsit would not lie to recover a statutory penalty there was no implied contract to pay it. The fallacy of such a conclusion is demonstrated more completely by the fact that assumpsit would always lie to recover money due upon a statutory obligation in those cases where the statute could not be treated as a *specialty* (1 Chitty's Pl. 119); that is to say, in all cases where the amount to be recovered was unliquidated. For it is obvious that there is no principle upon which a promise to pay an uncertain amount can be implied which will not equally sustain the implication of a promise to pay a sum that is ascertained.

A great authority on common-law pleading has said "that all actions of debt whatsoever are founded upon a contract raised either in fact or by construction of law." This was an admission made against himself in arguing the case of *Hodsden v. Harridge* (2 Saunders, 66) by Mr. (afterwards Chief Justice) Saunders. Considering his high reputation as a lawyer, and the authority of his reports upon questions of pleading, such an admission, re-

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Opinion of Beatty, C. J., concurring and dissenting.

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ported by himself after his retirement from the bench, is, in my opinion, entitled to quite as much weight as a *dictum* of Judge Story.

But even admitting it to be true, for the sake of the argument, that it is only where the action of assumpsit will lie that a promise to pay is implied, "it is the general rule that, for money accruing, due under the provisions of a statute, the action of assumpsit may be supported unless some other remedy is expressly given." (See *Hillsborough County v. Londonderry*, 43 N. H. 453, and the long lists of cases therein cited; see also *Bath v. Freeport*, 5 Mass. 325, and *Watson v. Cambridge*, 15 Id. 286.)

These were cases in which counties and towns were sued in assumpsit upon their statutory obligation to support paupers. In a case above cited (*Mayor of Baltimore v. Howard*, 6 Harris and Johns. 383) assumpsit was held to be the proper form of action for the recovery of a delinquent tax. In the case of *Rann v. Green* (Cowper, 474) Lord Mansfield held that the law raised an assumpsit upon the order of commissioners fixing the amount of titles under a private act of parliament. That was an action for assumpsit for a sum *liquidated* by the order of the commissioners; in other words, it was a suit for a tax assessed upon the defendant by authority of law. In *Peck v. Wood* (5 Term R. 130) the defendant was sued in assumpsit upon his statutory obligation to contribute to the expense of a party wall, and the action was maintained. We have then, besides Blackstone and Chitty, jun., the authority of Chief Justices Saunders, Mansfield and Kenyon of the king's bench, and the supreme courts of Massachusetts, Vermont, New Hampshire, Maryland, Tennessee and Iowa for the proposition that the law raises an implied promise upon statutory obligations, and of Mr. Bliss and Mr. Pomeroy that such promises are embraced by section 64 of the code. On the other side there is nothing except the case of *Pierce v. Boston*, and like cases, in which it has been held that an obligation, imposed by statute and operating *in invitum*, is not a



contract in the ordinary sense of the term. In my opinion there is no conflict between the two classes of decisions, and I am confirmed in this view by the fact that, in the same State (Massachusetts) in which a tax has been held not to be a contract within the meaning of the statute of set-off, because it is an obligation operating *in invitum*, it has also been held that assumpsit will lie upon the statutory obligation of a town to support its paupers, and none has suggested that the two decisions are in conflict.

In conclusion, I think I may fairly claim to have proved that section 64 of the code was intended to embrace all cases in which a contract was implied prior to its enactment, and that a contract was implied upon all statutory obligations to pay money. That a tax is a statutory obligation has not only been decided, but it cannot be denied. Indeed, it is something more than a statutory obligation. The people, acting in their primary capacity, have put into the constitution a distinct acknowledgment of the inherent duty of every citizen to contribute to the support of the government in proportion to his means, and they have expressly delegated to the legislature the power to levy uniform taxes. The legislature, therefore, does not impose the duty. It is a duty recognized as existing antecedent to any legislation—a duty not created, but merely regulated by law. No possible distinction can be drawn between the duty to pay taxes and the statutory duty to support paupers, or the common-law duty to support wife and children, to pay tithes, or compensate the owner of goods wrongfully converted. As has been said by the most recent American writer on the law of taxation (Burroughs, 254), "a citizen enjoys the benefit of government, his person and his property are protected, and the expenses of the government are to be paid; will not the law in like manner raise an implied promise that the citizen shall pay his proportion of the expense? And when it is ascertained in the mode prescribed by law what amount he should pay, should there not be considered an implied promise that he will

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Opinion of the Court—Leonard, J.

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pay the amount? Taxes are a political necessity. If the law raises a promise to pay, that one of its citizens may not obtain the services or goods of another without compensation, surely it will raise it that the state may exist."

Upon these grounds I dissent from the conclusion that there was a misjoinder of causes of action.

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[No. 822.]

S. BUCKLEY, APPELLANT v. ARMENIA BUCKLEY,  
ADMINISTRATRIX, ETC., RESPONDENT.

CROSS-EXAMINATION OF WITNESS.—The testimony of a witness upon cross-examination should be confined to matters testified to upon his examination in chief.

PETITION for rehearing.

This case is reported in 12 Nev. 424.

*Lewis & Deal, W. Webster & W. L. Knox*, for Appellant.

*W. Cain*, for Respondent.

Response to petition for rehearing.

By the Court, LEONARD, J.:

After a careful re-examination of this case, we are satisfied that appellant is entitled to a new trial, and particularly on account of one error in the court below, to wit: In allowing witness Short, on cross-examination by respondent, to testify that H. A. Buckley told him that he (Henry) had traded his sheep in California for his father's sheep in this state. It was in no sense proper cross-examination, and it was certainly injurious to appellant's case.

And although we are unable to *perceive* how the error in permitting Irwin J. Buckley to answer on cross-examination as to the value of the sheep left behind at the "boneyard" was *injurious*, still it was error.

The petition for a modification of the judgment, and an affirmance as modified, must be and is denied.

[No. 841.]

## MICHAEL HARRISON, RESPONDENT, v. WILLIAM H. LOCKWOOD, APPELLANT.

STATEMENT MUST BE FILED IN TIME.—A statement on motion for new trial which was not filed within the time allowed by law should, on motion, be stricken out. (*Williams v. Rice*, 13 Nev. 235, affirmed.)

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

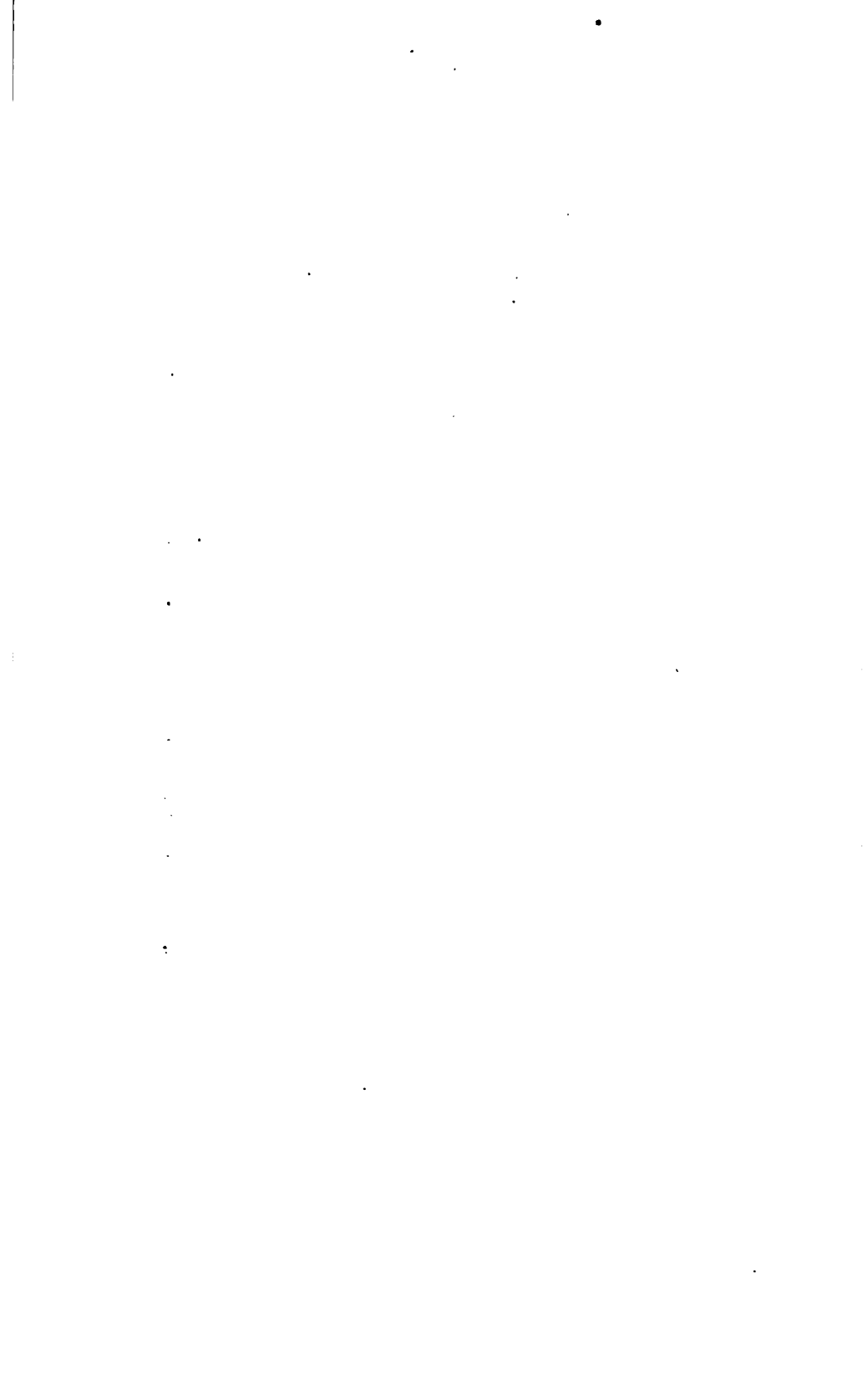
The facts are stated in the opinion.

*John T. Baker*, for Appellant.

*C. J. Lansing and D. E. Bailly*, for Respondent.

By the Court, LEONARD J.:

This was an action upon a promissory note, and James Reilley, Thomas Reilley, and William H. Lockwood, partners, under the firm name of Reilley & Lockwood, were made defendants. Judgment was rendered against Thomas Reilley and Lockwood on the eighteenth of July, 1878, for one thousand six hundred and twenty-five dollars and fifty-seven cents, besides interest and costs. On the twenty-fifth of July, 1878, appellant alone filed a notice of motion for a new trial, and on August 31, 1878, he filed a statement on motion for a new trial. The motion was denied August 31, 1878. Defendant Lockwood alone appeals from the judgment only. There is no statement on appeal, and the statement on motion for a new trial was filed long after the time allowed by law therefor, and long subsequent to the time given for filing a statement on appeal. Respondent moves to strike out the statement on motion for a new trial, and on the authority of *Williams v. Rice et al.*, 13 Nev. 235, the motion must prevail. There is then nothing left for us to consider but the judgment roll. In that no error appears and none is claimed. The judgment of the court below is affirmed.



REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,

JULY TERM, 1879.

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[No. 898.]

**E. S. DAVIS, RECEIVER OF THE FIRST NATIONAL  
BANK, APPELLANT, v. LEWIS COOK ET AL., RE-  
SPONDENTS.**

**PARTNERSHIP—PROMISSORY NOTES—PRESUMPTION.**—Where the notes are given in the firm name the legal presumption is, that they were executed for a partnership purpose, and the burden of proof is upon defendants to establish the contrary.

**IDEM—POSSESSION OF PERSONAL PROPERTY—VERITY OF DEED—INSTRUCTION.**—The following instruction, viz: "Possession of personal property is *prima facie* evidence of ownership, and a deed on its face imports verity, and no subsequent change of possession shows, or tends to show, that a party in possession first was not the owner at that time:" *Held*, erroneous.

**REAL ESTATE—PURCHASE OF BY ONE PARTNER.**—The purchase of real estate may or may not be within the scope of the partnership business.

**IDEM—SCOPE OF PARTNERSHIP BUSINESS.**—Lewis, John A. and Isaac Cook were co-partners engaged in the business of general merchandising, under the firm name of "Cook Bros." Lewis was the resident partner. John A. and Isaac were non-residents. Lewis Cook purchased a stone storehouse and a lot of stationery, in his individual name, and in payment therefor gave the notes, sued upon in this action, in the firm name: *Held*, in reviewing all the testimony, that Lewis Cook in making this purchase acted within the scope of the partnership business, and that the knowledge of such purchase was not sufficient to put the plaintiff upon inquiry as to the consent of the other partners.

**ASSUMPTION OF FACTS NOT PROVEN.**—A question which assumes a fact not proven in the case ought not to be asked.

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Statement of Facts.

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APPEAL from the District Court of the Ninth Judicial District, Elko County.

The question referred to in the fifth assignment mentioned in the opinion as immaterial, propounded to John A. Cook, was as follows: Question—"Prior to July, 1869, did you ever have any knowledge or ever consent to the establishment of any business at Hamilton, by Cook Bros., or Lewis Cook, in the firm name?"

The question propounded to J. Barnett, and referred to in the opinion as the ninth assignment, was as follows: Question—"At the time John A. Cook settled Cook Bros., indebtedness with the First National Bank, at Hamilton, Nevada, who had the immediate control and supervision of that business for E. S. Davis, Receiver of the First National Bank?"

The following are the instructions referred to in the opinion of the court.

Instruction number seven asked by the plaintiff and refused:

"The plaintiff asks the court to instruct the jury, that Harker at the time these notes were given had the right to presume that the business of Cook Bros., at Hamilton, had been established, if at all, by the firm, and that unless he knew that it had not been, or had notice sufficient to put him upon inquiry that it had not been so established, then the right of the plaintiff to recover is not affected by the question as to whether Lewis Cook opened business in Hamilton with or without the consent of his partners."

The ninth instruction asked by plaintiff and refused:

"The jury are instructed that if they believe from the evidence that Lewis Cook opened a store in Hamilton, Nevada, under the firm name of Cook Bros., and that the other members of the firm were apprised of the fact, and never objected thereto, then in contemplation of law this was an adoption and ratification by John A. and Isaac Cook, and they cannot now be heard to say that such business was carried on without their consent or authority."

The second instruction asked by defendant and given by

the court reads as follows: "You are instructed that if the transaction which was the consideration of the notes sued upon was outside of the business of the firm of Cook Bros., then the bank was not entitled to actual notice that the transaction was in the name of and for the individual benefit of Lewis Cook."

The other facts are set out at length in the opinion.

*Kenney & Rand*, for Appellant.

I. The court erred in overruling the objections to the question propounded John A. Cook, mentioned in the fifth assignment. The testimony was irrelevant.

The law presumes that when one member of a mercantile firm gives the notes of the firm, he is acting for the firm, and within the scope of the partnership business. (1 Parsons on Notes and Bills, 123, 128; Story on Prom. Notes, sec. 92; 18 Am. Rep. 192; 11 Mich. 525.)

Not having pleaded the want of authority they should not have been permitted to prove it. (10 Cal. 331; 39 Id. 532; 29 Barb. 170; 1 Greenl. on Ev., sec. 448.)

The presumption of law being admitted, so far as this case is concerned, he had the authority. (1 Parsons on N. & B. 123; 11 Nev. 200; 5 Cowen, 688.)

There was no offer to prove that the bank had any knowledge of the want of authority, and the law presumes that he had such authority. When a party offers to prove a fact, which standing by itself is irrelevant, and it is objected to as irrelevant, the party offering such proof should undertake to show such facts as would make it relevant, otherwise the proof should be rejected. (12 Cal. 426; 1 Greenl. on Ev., sec. 51.)

II. There was no evidence to identify the deed offered in evidence with the property purchased in the transaction in which these notes were given, and none that the bank had any knowledge that the deed was made to Lewis Cook alone. The record of the deed was not notice to the bank. (6 Cal. 720; 20 Id. 515.)

III. The receiver's powers were of a restricted and limited character. He could not admit away the rights of the

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Argument for Appellant.

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creditors. (Morse on Banking, 516, sec. 50; General Banking Laws of the United States, approved June 3, 1864; Paley on Agency, 174-75-76, and notes thereto; Story on Agency, secs. 13 and 14; 26 Wend. 485.)

IV. There was a material fact assumed in the ninth assignment of which there was no proof, and no offers to prove. It was an attempt to controvert by evidence facts admitted in the answers. (1 Greenl. on Ev. 434; 10 Md. 76; 1 Whart. on Ev. 504; 20 Ill. 170; 27 Cal. 418.)

Davis could not ratify the acts of McCornick in attempting to defraud the creditors of the bank, and even if he could, he should have had something more than an opportunity of knowing what was done. He should have had actual notice of what was done.

The fourteenth assignment was clearly error. Hilp had been examined in chief as to the same subject-matter, and the plaintiff had a right to cross-examine him in relation to everything to which he had been examined in chief. (1 Wharton on Ev. 530; 7 Nev. 385.)

V. Plaintiff had a right to show that the merchandise, which was a part of the consideration for which these notes were executed, was appropriated and used by the firm of Cook Bros., with the knowledge and consent of the other members of the firm, and also to show a ratification of the purchase of the goods. (12 Pick. 430; 31 Mich. 373.)

The plaintiff had a right to show that the building, which was a part of the consideration for which the notes were given, was used by the firm for partnership purposes with the knowledge and consent of John A. and Isaac Cook. (Pars. on Partner. 376-77-78-79; 1 Pars. on N. & B. 124; 14 Wendell, 133; 1 Sumner, 183.)

VI. The court erred in refusing the seventh instruction asked by plaintiff. Lewis Cook told Harker that the firm had opened business in Hamilton, and the partnership is admitted. (Pars. on Part. 20, 180-197; note top 209; 2 Pars. on N. & B. 481; Story on Part. sec. 108-109; 6 Allen, 317.)

The court erred in refusing the ninth instruction asked by the plaintiff. There was ample evidence to sustain the in-



## Argument for Respondents.

struction or to entitle the jury to pass upon it. (Story on Agency, secs. 253, 256, 258.)

VII. The court erred in giving the first instruction asked by defendant. It ignores the fact that it was just as necessary that the bank should have notice or sufficient reason to suppose to put it upon inquiry, that Lewis Cook was acting outside of the business of the copartnership as that he should be so acting. (1 Pars. on N. & B. top 128, 132, 133; 16 Wend. 505; 11 Johns. 544; 2 Pa. 160; 5 Blackf. 210; 20 How. U. S. Sup. Ct. 343.)

A *bona fide* holder of commercial paper is the person who owns the paper and has taken it in good faith for a valuable consideration.

He may be the payee, the indorsee or the bearer. (Story on Prom. Notes, secs. 195, 196; Pars. on N. & B. 253, 254.)

When errors are committed the law presumes injury. (39 Cal. 609; 42 Id. 402.)

VIII. The deed from Ivers to Lewis Cook is only *prima facie* evidence that the bank had any knowledge that it was given to Lewis Cook individually. (Pars. on Part. 376-77-79; note to 378; 5 Metcalf, 582; 9 Cal. 639; 9 Nev. 134, 1 Sumner, 182.)

IX. The acts of Lewis Cook were but the reasonable acts of the managing partner of a mercantile firm in this state. (Story on Part. note to top p. 244; Pars. on N. & B. 123; 12 Pick. 545; 44 N. Y. 514; 44 Id. 680; 9 Wall, 546; 20 How. 343; 6 Allen, 317; 17 Wend. 47; 5 Id. 223.)

*A. M. Hillhouse*, for Respondents.

I. The fact that the notes were given in lieu of indebtedness of Brachman & Ivers to the bank, shows that the transaction was simply that of a partner *assuming* an indebtedness of others for his firm.

This was not within the power of a partner.

U. S. Digest, N. S., vol. 9, p. 841, secs. 530-1-2-3, and authorities there cited.

II. Harker, the president of the bank, knew Lewis Cook was purchasing real estate and an entire stock of books, stationery, etc., both of which were outside of the business

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of "general merchandise." (6 Moak's notes Eng. Rep. 292; 43 Cal.)

III. A third party dealing with a partner must—when he knows the character of the transaction—know at his peril whether the business is within the legitimate scope of partnership business. (8 Ves. 540; 4 Johns. 266; 6 Id. 38; 19 Id. 156.)

A partner cannot establish a new firm on new business. (20 Ind. 110; 7 Barb. 150; 18 Wend. 477; 14 Id. 141; 3 Id. 415; 10 Id. 461.)

The business in which a partnership note is given must be within the scope of the partnership. 12 Gray, 453; 13 Id. 467; Story on Part. 132, 133; Collyer on Part. p. 188, sec. 139, p. 475.*et seq.*; Story on Ag., secs. 125, 137; 1 Am. Rep. 440; 8 Id. 576; 9 U. S. Dig. 439, 493.)

IV. Plaintiff stood in chief upon original authority and anticipated defendants' case. Defendants only controverted that. No proof of ratification was proper in rebuttal. (4 Gray's Mass. 215; 2 Id. 282; 6 Id. 507.)

There can be no ratification without full knowledge of all the material facts in relation to the act sought to be enforced. (3 Johns. Ch. 188; Storey's Agency, sec. 239, p. 298; *Adams Express Co. v. Trego*, 35 Md. 47; 12 Allen Mass. 493; 5 Nev. 224.)

V. Under all the evidence in the case the verdict and judgment are so manifestly correct that, even if there were some errors, the order and judgment appealed from should be affirmed. (See Graham and Waterman on New Trials, vol. 3, pp. 817, 864–868, and authorities there cited.)

By the Court, LEONARD, J.:

There have been several trials, and one appeal, of this case, before the present one. (9 Nev. 134.) At the last trial defendants recovered judgment for their costs. Plaintiff's motion for a new trial was denied, and this appeal is taken from the order overruling that motion. The notes sued on were dated at Hamilton, Nevada—the first, June 23, 1869, the second, June 30, 1869, and were signed "Cook Bros." Defendant Lewis Cook was not served with summons,

and in no manner appears or answers. John A. and Isaac appear and answer for themselves alone.

If is alleged in the complaint, and is not denied in the answer, that the three defendants, at the time the notes were made, were partners doing business under the firm-name and style of "Cook Bros."

It is also alleged that on the days above stated, defendants, for value, made and delivered said notes to the First National Bank of Nevada; that no part of the same has been paid, and that plaintiff, as the duly appointed and authorized receiver of said bank, is the lawful holder and owner thereof. Defendants John A. and Isaac do not allege want of authority in Lewis to execute the notes in the name of the firm as he did; nor is there any denial that the bank gave a valuable consideration therefor. There is no denial that the defendants executed them in the firm name, except by an allegation that they were given for the individual indebtedness of Lewis, for goods and real estate purchased by him of Bruckman & Ivers and W. D. Ivers, for his individual use and benefit, and not for the firm, with knowledge of such facts on the part of the bank, through its officers and agents, who colluded and conspired with Lewis to defraud the other defendants, and that the firm received no part of the consideration of the notes. Defendants John A. and Isaac also allege that at the time of the purchase of said property of Bruckman & Ivers and W. D. Ivers, the latter were indebted to the bank to the extent of the notes in question, and that in part payment of the purchase money Lewis assumed their indebtedness to the bank, and the bank took Lewis therefor; that afterwards, at the date of the notes, with intent to defraud the defendants answering, and with knowledge of the facts stated, the bank made out, and Lewis signed, the notes set out in the complaint, as the notes of Cook Bros., when in truth the firm had no interest whatever in the consideration of said notes, as the bank well knew. They further allege settlement and payment by them of all notes and accounts due from the firm to the bank before the commencement of this action; that in the month of —, 1870, Lewis paid the notes

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set out in the complaint to W. S. McCornick, deputy receiver, who, well knowing the facts before stated, and with intent to defraud the defendants answering, as deputy receiver, took back said notes from Lewis, and for the bank claimed and claims to hold the same against Cook Bros.

The evidence shows that Cook Bros. commenced business in Austin in 1864; that Lewis was admitted into the firm as a partner in July, 1866, from which time until May, 1870, the firm carried on the business of general merchandising; that John A. and Isaac were generally absent from the state, and Lewis was the resident managing partner. The First National Bank of Nevada was established in Austin in 1864 or 1865, and subsequently, but before the dates of the notes in question, a branch bank was established in Hamilton. Some time about June 22, 1869, Lewis purchased of W. D. Ivers, above named, a town lot in Hamilton, with a two-story stone storehouse thereon; also, another lot, with building thereon, used as a lodging-house; also, a lot with stone saloon thereon, used as a brewery. The deed conveying the real property was executed in the name of Lewis Cook alone, and the consideration named in the deed was five thousand dollars. At the same time, and probably as a part of the same transaction, he purchased of Bruckman & Ivers a stock of goods consisting of stationery. It does not appear what the exact purchase price of the whole property was, except to the extent of the indebtedness of Bruckman & Ivers, the amount of the larger note (five thousand and eighty-seven dollars and forty-seven cents), and the indebtedness of W. D. Ivers, the amount of the smaller note (one thousand five hundred dollars), for the satisfaction and payment of which the notes in suit were given. The only evidence showing the nature of the transaction, so far as the bank is concerned, outside of the notes themselves, is the testimony of J. W. Harker, who testified as follows:

"I wrote those notes. They were signed by Cook Bros., and delivered to the bank at the time they bear date. I did not know Lewis Cook individually in the matter. The transaction was this: The bank held the notes and overdrafts

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of Bruckman & Ivers, and a note of W. D. Ivers, indorsed by Withington. The notes and overdrafts of Bruckman & Ivers were the amount of the larger note, and the note of Ivers was the amount of the smaller note sued on in this action. In June, 1869, I went to Hamilton to try to settle the matter up. I met Lewis Cook at Hamilton. He told me that Cook Bros. had started business in Hamilton. He made arrangements with, and bought of, Bruckman & Ivers and W. D. Ivers, a stone store-house and a lot of merchandise, for Cook Bros., and in payment of this property gave the notes sued on in this action, to the bank, and the bank gave up and canceled the notes and overdrafts of Bruckman & Ivers, and the note of W. D. Ivers. The consideration for the notes to Cook Bros. was the stone storehouse and a lot of merchandise that they received from Bruckman & Ivers."

On cross-examination he said: "Cook Bros. had a lot of goods in Hamilton, and more on the way from Austin, when these notes were given. \* \* \* Cook Bros. did business with the bank constantly, almost every day. They drew overdrafts and gave notes. Lewis Cook was in Hamilton, off and on, about two months. I think Cook Bros. were about starting business in Hamilton in April, 1869, I will swear that I think they were. The two notes were a part of the same transaction. They were negotiated at the same time. Bruckman & Ivers and W. D. Ivers were the parties whose notes were given up. I knew that Bruckman & Ivers were selling real estate. Cook Bros. commenced doing business with the bank in 1866, and did business with the bank almost every day, up to the time these notes were given. The business Cook Bros. did with the bank was to borrow money on notes and overdrafts. The bank extended to them the same accommodations it did to other merchants in good standing. The notes were signed by Lewis Cook for Cook Bros. I knew that they were rich, and I was satisfied. I conducted the entire transaction on the part of the bank. W. D. Ivers did not tell me he had sold the property to Lewis Cook. He told me that he had made arrangements with him to settle with the bank, but

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I understood that the trade was made for Cook Bros. I never knew that there was any real estate sold in this transaction except the stone store."

On re-direct examination he stated that "all the time Cook Bros. had been dealing with the bank, Lewis Cook was the managing partner in the firm of Cook Bros. in this state, and transacted all the business of the firm with the bank. He gave the notes of the firm a great many times, and they had always been paid by the firm; and up to the time of the execution and delivery of the notes sued on in this action Cook Bros. paid all the liabilities to the bank incurred by Lewis Cook in the name of the firm."

In rebuttal, the same witness testified that prior to the delivery of these notes he did not know that the real estate was deeded to Lewis Cook.

There is no evidence in the case showing, or tending to show, that Lewis purchased the property mentioned for his own use and benefit, and not for the firm, except that the deed conveying the real estate was taken in the name of Lewis alone, as above stated, and that he took possession of the personal property.

There is no proof that Harker knew or had reason to think the property was purchased for the use and benefit of Lewis and not for the firm, or that the firm did not receive the consideration given for the notes, unless it be true that the purchase of the store and the goods was so entirely outside of the scope of the partnership business of the firm that he was thereby bound in law to know the fact that Lewis had authority from his partners before receiving the notes, and, failing to do so, that the law holds him and the bank guilty with Lewis of constructive fraud.

There is no testimony tending to show actual fraud on the part of Harker, nor is such fraud claimed by counsel for defendants. Nor is there any proof that, as between the partners themselves, Lewis did in fact exceed his authority in purchasing the property; or that Harker knew, or had any notice, that the deed was taken in the name of Lewis; or that the goods were stored in his name, either before or after the delivery of the notes, if such was the case.

Ballenberg testified that in the last part of June, 1869, certain goods, principally stationery, were stored in Ottenheimer's warehouse in Hamilton, in the name of Lewis Cook, as the books showed. He was not sure whether they were withdrawn by Lewis or by Cook Bros. It was not shown that the stationery so stored was that which was bought of Bruckman & Ivers, but we shall treat it as the same, and consequently that Lewis took possession of the goods.

What Harker did know, or had reason to know, in relation to the transaction between Lewis and Bruckman & Ivers and W. D. Ivers, at the time he received the notes, and, as he states, after Lewis had told him that Cook Bros. had started business in Hamilton, is that Lewis had bought the stone store and merchandise—the stationery—for Cook Bros. So far as is shown, that was the limit of his information.

Plaintiff offered to prove, as we shall see, what became of the goods, and by whom the store was occupied after its purchase, but such proof was rejected.

Counsel for defendants states his theory of this case as follows: "Upon these pleadings, what issues are made? We urged that these notes were given for Lewis Cook's individual indebtedness. To prove that, we show all the real estate to have been taken in his name, and the personal property in his possession. We claim, also, a fraud upon the part of Lewis Cook and the bank, upon John A. and Isaac Cook. To prove this we show, and the plaintiff also proved, that this transaction was outside of the legitimate business of Cook Bros., and that the bank had actual knowledge. Next, Lewis Cook, as a partner, being only the agent of the firm, within the legitimate scope of the firm's business, that, as in all other cases of agency, the person dealing with such agent must, at his peril, know his authority; that taking firm notes from one partner in a transaction outside of the partnership business is a fraud upon the other partner." Briefly stated, then, the position of counsel for defendants is this: Lewis gave the firm notes, as he had the authority to do, if the transaction—the purchase—was within the scope of the partnership business. But, says

counsel, in this case, the transaction must be considered as having been made for the individual use and benefit of Lewis, and not for the firm, because the deed was taken in his name, and the personal property was taken possession of by him; and the bank having had notice of the above facts (for the reason that the purchase was outside of the scope of the partnership business, of which fact the bank had actual knowledge), therefore, the taking of the firm notes was a fraud upon the other partners, and the bank was, constructively, a party to the fraud, and plaintiff can not recover.

We shall examine these two propositions in the order stated.

This case must be considered as though it had been admitted that Lewis commenced business for the firm, in Hamilton, by and with the previous consent of the other partners. If the latter had not consented to the opening of their house, at the time the notes were given, they certainly did consent within a few days thereafter. So far as the record shows, and from their own testimony, after July 1, 1869, and after they knew that Lewis had commenced business in the firm name, their acts were a constant acknowledgment and proclaiming to the world that Cook Bros. had opened a store in Hamilton. Nor does it matter if, at the dates of the notes, the store had not been actually opened. It is true that, in a proceeding outside of the scope of the business, John A. and Isaac cannot be held to have ratified the unauthorized acts of Lewis, without proof that they knew all the material facts at the time; but here the material fact was that the business which had been carried on by the firm in Austin, and was afterwards conducted in Hamilton in the firm name, had been established by Lewis at the last-named place, or was about to be established, at the time the notes were given. That fact they know as early as July first and by ratifying the establishment of their business, the firm thereby became liable for all acts of Lewis properly within the scope of the business so established. (*Burnley v. Rice*, 18 Tex. 495.) The case is the same as though Lewis had gone to Hamilton by and



with the knowledge and consent of his partners, with power to open a store and carry on their business at that place. "Such adoptive authority relates back to the time of the original transaction, and is deemed, in law, the same to all purposes as if it had been given before." *The London Savings Fund Society v. The Hagerstown Savings Bank*, 38 Pa. St. 503.)

The notes having been given in the firm name, the legal presumption is, that they were executed for a partnership purpose, and that the firm is bound by them, and the burden of proof is upon defendants to establish the contrary. (1 Pars. Notes and Bills, 128; *Carrier v. Cameron*, 31 Mich. 377;  *Gansevoort v. Williams*, 14 Wend 138; *Whitaker v. Brown*, 16 Wend, 511; *National Union Bank etc. v. Landon*, 66 Barb. 190; *Burgess v. Northern Bank of Kentucky*, 4 Bush, 600; *Hamilton v. Summers*, 12 B. Mon. Law and Eq. 11.)

When it appears upon the face of a bill or note that it is given in discharge of a separate debt, or in a transaction unconnected with the partnership business, or if it is admitted by the holder that such was the nature of the transaction and he knew it at the time it was taken, then in order to recover against the firm he must show facts other than that it is partnership paper. He must then show the consent of the other partners. But in other cases the burden is upon the defendant to remove the presumption above stated, as well as the additional fact that the holder knew the money was borrowed for the individual use of the partner borrowing, or in a transaction unconnected with the business of the partnership. (*Whitaker v. Brown*, *supra*, 511; *Gansevoort v. Williams*, *supra*, 138.)

It is said by counsel for defendants, however, that the evidence of both parties removes these presumptions, inasmuch as it shows that the purchase was not within the scope of the partnership, and that Harker had knowledge of that fact; that the burden was therefore upon plaintiff to prove the consent of John A. and Isaac, which he has failed to do. For the purposes of the argument, we shall concede, without deciding the question, that Harker was bound to know that the purchase was without the scope of the business of

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the firm, if so it was; and for the same purpose, without deciding it, that plaintiff's rights are the same as they would have been if the bank had sold the store and goods to Lewis and taken the notes in question therefor, the latter having had authority to commence and carry on the business of general merchandise in Hamilton. We shall not consider the fact that Lewis purchased any real estate besides the store, because there is no proof that Harker knew or had reason to think that the balance described in the deed was included in the purchase. (*Knapp v. McBride*, 7 Ala. N. S. 26, 27, 28, and the two cases last cited.)

Do the facts, then, that the deed to the store was taken in the name of Lewis Cook, and the possession of the goods taken by him after purchase, prove *per se* that the purchase was made for his use and benefit alone, and not for the firm, and consequently that the firm notes were executed for his separate indebtedness? Whether Lewis made the purchase on his own account or for the firm; whether the property was appropriated to the use of Lewis or to the firm, and whether Harker or the bank had knowledge that the transaction was for the benefit of Lewis alone, were undoubtedly questions for the jury to consider. (*Woodward v. Winship*, 12 Pick. 433; *Goodman v. Simonds*, 20 How. U. S. 343; *Lea v. Guice*, 13 Smedes and M. 671; *Judson v. Gibbons*, 5 Wend. 224.) But it was necessary that they should decide such questions, like all others, under proper instructions and upon proper evidence; and it may be added that it was a matter of no consequence to prove that the purchase was made by Lewis for his use and benefit, without further proof that Harker or the bank had knowledge of that fact, or circumstances sufficient to put the bank upon inquiry. Several assignments of error may be considered in this connection.

The jury were instructed as follows at the request of the defendants: "Possession of personal property is *prima facie* evidence of ownership, and a deed on its face imports verity, and no subsequent change of possession shows, or tends to show, that a party in possession first was not the

owner at that time;" and the court refused to permit plaintiff to prove that about the time the notes were given, Cook Bros. opened a store in Hamilton, in the stone building bought of Ivers, which was a part of the consideration of the notes, and continued to transact business in said building under the firm name until May, 1870; that the stationery purchased of Bruckman & Ivers went into the firm's stock of general merchandise when they opened their said store; that they there dealt in stationery; all of which was done with the knowledge and consent of the defendants John A. and Isaac; and that for a large portion of the time John A. was present, assisting Lewis in conducting and controlling the business of the firm. It is claimed by counsel for defendants, that the instruction above quoted is sound law in this case, and therefore that the rejected evidence was immaterial; also, that it was not legitimate rebuttal. We think counsel is in error. At the trial plaintiff first introduced the notes in evidence, which established a *prima facie* case against defendants, and in addition proved by Harker what the consideration was, what Lewis told witness about Cook Bros. having commenced business in Hamilton, and that the giving of the notes was a transaction of the firm, so far as he was concerned, and not an individual affair of Lewis. On cross-examination witness stated that Ivers did not tell him that he had sold the property to Lewis, but did tell him that he had made arrangements with Lewis to settle with the bank, and that witness understood the trade was made for Cook Bros. When plaintiff rested, defendants introduced the deed from Ivers to Lewis, and evidence tending to show that Lewis took possession of the personal property purchased, and that he stored it in his own name, for the purpose of proving that the property was sold to Lewis and not to the firm. Plaintiff then endeavored in rebuttal to prove the facts above stated, which were rejected. In opening his case, plaintiff did not show that the purchase was made by Lewis for his individual use and benefit. All that was said by Harker touching that point was stated in cross-examination, and that was merely the understanding of

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the witness. He testified to no fact upon which his understanding was based, tending to show that such was the nature of the purchase. The deed, unexplained, did tend to show what defendants claimed for it, and plaintiff had the right to prove facts in rebuttal of the ostensible object and effect of the deed. He had a right to show that although the deed was taken in the name of Lewis, still he held the legal title for the firm, and took possession of the personal property for the firm, just as in proper cases it may be shown that a deed, absolute upon its face, was, and is, in fact, a mortgage. But counsel says: "The title to all the real estate was shown to have been in the name of Lewis, and the possession of the goods in him. Apply the rule of law in this instruction, quoted above, and what became of the goods or who occupied these premises becomes entirely immaterial."

The court evidently took the same view.

Under the facts and pleadings of this case the instruction in question was not law. Let it be borne in mind that one of the principal issues made was, that Lewis bought the property for his individual use and benefit and not for the firm. If that fact had been admitted by the plaintiff, the instruction would have been correct. But we must remember that plaintiff contended that the purchase was made for the firm.

It is said in *Pars. on Merc. Law*, 180: "If goods are bought by one partner, and they are immediately used as the property of the firm, there would be a presumption that they were bought by him as a partner and for the firm." (See also *Lindley on Partnership*, 268.) Here the offered proof would have brought the case fully within the doctrine laid down above. It was a circumstance for the jury to consider in deciding one of the main questions made by defendants, and in deciding that, they should have been permitted to say why Lewis put the goods purchased with the general merchandise of the firm, and sold them as a part of the firm stock, if such were the facts, with the knowledge and consent of his partners. The jury should have said whether or not such acts on the part of all the

partners were consistent with the idea that Lewis purchased the goods for himself, and that the firm so regarded the purchase. (See *Bracken v. March*, 4 Mo. 76; Lindley on Part. 268.)

What has been said in relation to the goods is equally true of the store. If that was used for the business of the firm from July, 1869, until May, 1870, with the knowledge and consent of all the members of the firm, that fact, too, was a matter for the consideration of the jury. They might have considered it a circumstance of great significance, particularly in the absence of any evidence that the firm paid Lewis rent for its use, and that the goods and store were not treated as firm property at the time of dissolution. (*Reynolds v. Swain*, 7 La. (N. S.) 127; *Dewey v. Dewey*, 35 Vt. 556.)

If Lewis had paid out the firm's money for the property instead of giving its notes, taken possession of the goods and received the deed in his own name, I presume, in a contest between his creditors and the creditors of the firm, it would not have been claimed that an appropriation of the property to the use and benefit of the firm was not an important fact to be considered by the jury in determining for whom the purchase was made. The rejected evidence was equally important in this case.

Besides, if Lewis had authority to purchase the goods and thereby bind the firm, and did purchase them for the partnership, possession by him was possession by all. And if the purchase of the store was within the scope of the partnership business, and was in fact purchased for the firm and appropriated to its uses, it was a matter of no moment that the deed was taken in the name of Lewis alone. (Pars. on Part. 364 *et seq.*; *Hunt v. Benson*, 2 Humph. 460; *Hoxie v. Carr*, 1 Sumner, 180; *Dyer v. Clark*, 5 Met. 581; *Moderwell v. Mullison*, 21 Pa. St. 259; *Hogle v. Lowe*, 12 Nev. 295.)

The court erred in giving the instruction just considered, and in rejecting the offered evidence.

But it is urged that the purchase of both the store and the goods was beyond the scope of the partnership busi-

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ness, and, consequently, that Lewis had no implied authority to bind his partners thereby; that knowledge of such purchase was sufficient to put Harker upon inquiry as to the actual authority of Lewis, and that failing to prove authority outside and beyond the fact that, as partner, he made the purchase and gave the partnership notes in payment, plaintiff cannot recover. The most important questions in the case are here presented: Are the undisputed facts legally sufficient to sustain the position of counsel and support the verdict in this respect? In the consideration of these questions, we must again keep in mind, first, that the business of the partnership was general merchandising; and, second, that even though it be true that Lewis had not the implied authority or the express consent of his partners to open business in Hamilton, still by their subsequent conduct, after they knew he had done so, they ratified the acts of Lewis in so doing, and in relation to the questions under discussion, the case stands the same as though the latter had commenced business there, by and with the previous consent of his partners.

The purchase of real property may or may not be within the scope of partnership business. If it is, one partner can buy it, if the purchase be made actually or ostensibly for the partnership, and thereby bind the firm—the vendor acting in good faith—just as he can purchase personal property under similar circumstances. No rule of law prohibits a partner from purchasing either, if such purchase is fairly within the scope of the business. Each gives the other, when the partnership is formed, an implied authority to enter into any contract within the scope of the business. If a partnership is formed for the sole purpose of dealing in lands, either may purchase them for the firm, and thereby bind his partners; but he would have no right, by reason of the partnership relation, to buy personal property, unless it be for the proper management, and in aid, of the partnership business.

If the business of a partnership is buying and slaughtering cattle, the managing partner can not, in consequence of the partnership alone, bind the firm by the purchase of a

store, a saloon or a theater, for speculative purposes; but he can buy either for the firm, if he makes the purchase for a slaughter-house, and the vendor acts in good faith, believing from representations of the purchasing partner that it is bought for the business of the firm.

Two men in Carson form a partnership for the purpose of keeping a hotel in Eureka. They agree that each may give the notes of the firm, draw bills of exchange and checks, if he deems proper, in all matters within the scope of the partnership business, thus giving one another the same power that defendant had without such agreement. One goes there as the managing partner. He finds a building that is a fit place for the business. He can hire at a high rent, or purchase at a low figure, and he buys instead of hiring. He can not run the hotel without supplies, and therefore buys them at a neighboring store. He then goes to one bank and tells the cashier that the firm has bought the hotel and intends to keep it; that they wish to borrow a stated sum of money to be used in payment. The money is loaned on six months' time, and the firm note given. He then goes to another bank and informs the cashier that he wishes to borrow money to pay for supplies bought for the firm. That money is loaned on the same time, and the firm note given. Can it be said that the purchase of the house for a hotel was outside of the scope of the partnership business, while buying supplies was within it, and that knowledge of the purchase by the first cashier would defeat an action upon the note received by him, while upon the second the firm is bound?

In my opinion the buying of supplies was not more within the scope of the business than the purchase of the hotel. Both were required, and both appertained to hotel-keeping only.

Two men as partners established a stage line between Carson and Bodie. One, the active, managing partner, buys stock, grain, coaches and hay. For those articles he can undoubtedly bind the firm, whether he makes judicious bargains or not. But it is necessary to purchase, build or hire barns. In one place he builds, in another hires, in

another buys on credit. All those acts are entirely within the scope of the partnership, and one as much as the others. In the case last supposed, if both partners had been present, they might have concluded to accomplish the same end by different means; where one built, both might have deemed it expedient to hire, but had they done so, the acts of both would not have been more within the scope of the partnership than was the act of one. Any act which would have been within the scope of the business, if both had acted in concert, is equally so if it is done by one. In this case, if all the defendants had been present, and had purchased the store for speculative purposes, it would have been outside of the business of general merchandising. So it would have been had Lewis bought it for that purpose. So it was if he did purchase it for that purpose; and had Harker known that such was the object of the purchase, instead of having good reason to think—if his own testimony is true—that the firm had started business in Hamilton, and needed the store for their legitimate purpose, a different case would have been presented.

*Brook v. Washington*, 8 Grattan, 250, is an interesting case in this connection.

Perdue, Nichols, Brooke and Jewell entered into partnership for carrying on the business of iron-making in Jefferson county, and accordingly carried it on for about two years. Perdue and Nichols resided in the county, and were the ostensible partners, while Brooke and Jewell were non-residents of the state. The firm name was "Perdue, Nichols & Company." The respondent, Washington, sold and conveyed to Perdue and Nichols eight hundred and forty-three acres of land in Jefferson county, for six thousand two hundred dollars, of which one thousand one hundred dollars were paid at the time, and for the balance they gave their bonds and a deed of trust on the land, to secure payment. The cash payment was made by the check of Perdue, Nichols & Co., and entries were made on their books crediting Washington in account with the firm for six thousand two hundred dollars, the purchase money of the land, and debiting him with one thousand one hundred dollars, the cash payment.



During the operations of the partnership for some eighteen months after the purchase, five thousand cords of wood were cut from the land and used in the firm business. Rents for a portion of the land were received by the firm and entered on their books. It was not generally known that Brooke and Jewell were partners, nor did Washington know it at the time of the sale of the land. Brooke had access to the books, but it did not appear that he examined any account but his own. The firm became insolvent, and Washington brought suit and endeavored to charge the balance due upon the individual partners, the land having become comparatively valueless by reason of the destruction of timber and trees thereon. Brooke alone filed an answer and placed his defense principally upon the ground that the purchase was not made on account, or upon the credit, of the firm, or by his authority, and was not within the scope of the partnership.

We quote briefly from the court's opinion: "The purchase was within the scope of the partnership, for the operations of the furnace could not be carried on without fuel; and the best mode of obtaining it was to purchase land in the neighborhood, well covered with wood, as was the land of Washington. All the partners are therefore bound for the purchase money on the authority of the cases before cited." (See, also, *Weaver v. Tapscott*, 9 Leigh, 424; *Burnley v. Rice*, 18 Tex. 494.)

In Schouler's Pers. Prop. the author says, on page 225: "It was formerly deemed that partners could not, as such, own real estate, nor, indeed, transact business in lands at all. But the law in this respect has changed with the wants of trade. Not only does a partnership find real estate suitable for the purposes of investment, but lands and buildings are frequently desired for stores, warehouses and factories in connection with the partnership pursuits. \* \* \* The American rule, as now established, is that real estate purchased and held as partnership property is so treated in equity and subjected to all the partnership incidents." (See *Lacy v. Hall*, 37 Pa. St. 360; *Erwin's Appeal*, 39 Pa. St. 537.) And admitting that Harker was bound to know

that the purchase was within the partnership business, then, as regards the goods, it must appear that the purchase of stationery was within the scope of the business of general merchandising. He was not bound to know that defendants had never, in fact, dealt in stationery. If buying and selling stationery was within the scope of the partnership as much as dealing in provisions, groceries and clothing, then Lewis had power to purchase it and bind the firm by his act. Had defendants' business been dealing in hardware only, either could have bound the partnership in the purchase of any article that could be considered as legitimately belonging to that line of trade. They may have never dealt in stoves, yet stoves are hardware, and the seller need not have stopped to inquire whether or not the firm had ever dealt in them before. So it is in this case, if buying and selling stationery is within the scope of general merchandising. There is no kind of business that permits within its legitimate scope a more extended dealing than the one under consideration. Why it does not, or should not, include stationery, if that article is in demand at the place of business, as well as groceries, clothing, dry goods, etc., counsel for defendants has not informed us, and the books certainly do not so teach. (See Bouv. Dict., tit. "Merchandise." *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story's R. 51.)

If Lewis had bought stationery in San Francisco under the same circumstances, we hardly think defendants would have claimed that he acted beyond the scope of the partnership. If the partnership had been formed for the purpose of carrying general merchandise from the railroad to Hamilton, in an action to recover the value of stationery lost or destroyed, we venture the opinion that the defendants would not have urged, in defense, the proposition so persistently argued here, that stationery cannot properly be classed with general merchandise. In his work on Part. page 201 (6th ed.), Mr. Story says: "If persons are engaged in the mere business of tallow chandlers, as partners, a purchase of a cargo of flour, or of pepper, or of coffee, or of other things, by one partner, wholly beside the business of the

firm, would not bind the other partners. But if the articles were such as might be applied or called for in the ordinary course of their business, the purchase of such articles would bind the firm, even though they were unnecessary at the time, or were bought contrary to the private stipulations between the partners, or were not designed to be used in the partnership at all, if the vendor were not acquainted with the facts." (See also *Livingston v. Roosevelt*, opinion of Kent, Ch. J., 1 Am. Lead. Cas. 427; *Winship v. Bank U. S.*, 5 Pet. 560; Bateman on Commercial Law, 587, 595, 596, 601; Collier on Part. 484; Smith's Merc. Law, 76; Gow on Part. 53, 56, 61, 68; *Bond v. Gibson*, 1 Camp. 184; *Freeman v. Carpenter*, 17 Wisc. 137; *Walden v. Sherburne*, 15 Johns. 422; *Woodward v. Winship*, 12 Pick. 433; *Chemung Canal Bank v. Bradner*, 44 N. Y. 688; *Beckham v. Drake*, 9 M. & W. 92, *et seq.*)

None of the authorities cited by counsel for defendants are opposed to our conclusions. Our opinion is, that under the undisputed facts, Lewis acted within the scope of the partnership business in purchasing the stationery and the store, and that the knowledge of such purchase was not sufficient to put Harker upon inquiry as to the consent of the other partners.

A few additional assignments of error will be noticed briefly: If we are correct in the conclusion before stated in relation to the effect of the acts of John A. and Isaac, subsequent to July 1, 1869, the question embodied in the fifth assignment was at least immaterial, and the objection should have been sustained.

The question referred to in the ninth assignment assumed as a fact, that John A. had settled the indebtedness of Cook Bros., when there was no proof of the same. That might have influenced the jury, and it should not have been asked in that form. (*Boyd v. McCann*, 10 Md. 118.)

Plaintiff should have been permitted to ask witness Hilp, on cross-examination, when Cook Bros. commenced business in Hamilton. He had, in chief, testified directly upon that point.

Nothing additional need be said concerning instructions.

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seven and nine, asked by plaintiff, or instruction two, given at request of defendants.

The order overruling plaintiff's motion for a new trial is reversed.

HAWLEY, J., having been of counsel at a former trial of this cause, did not participate in the foregoing decision.

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[No. 966.]

THE STATE OF NEVADA, RESPONDENT, v. EDWARD  
MALIM, APPELLANT.

**INDICTMENT—COUNTS SETTING OUT OFFENSE IN DIFFERENT FORMS.**—If an offense is set forth in different counts, it must be done in such a way as to show clearly upon the face of the indictment that the matters and things set forth in the different counts are descriptive of one and the same transaction.

**IDEM—EMBEZZLEMENT.**—An indictment for embezzlement contained two counts, each identical as to the time, place, names of persons and description of property: *Held*, that the indictment charged but one offense.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

*Lindsay & Dickson*, for Appellant.

The demurrer ought to have been sustained. The indictment charges two distinct offenses. The statute is imperative that the indictment shall charge but one offense. (1 Comp. Laws, 1862; see, also, *Id.* 1858, 1860; 1 Wharton C. L. 414, *et seq.*; *The People v. Thompson*, 28 Cal. 217; *People v. Shotwell*, 27 *Id.* 400.)

*M. A. Murphy*, Attorney-General, for Respondent.

By the Court, HAWLEY, J.:

Appellant was indicted, tried and convicted of the crime of embezzlement.

The indictment contains two counts. Leaving out the heading and conclusion, the respective counts read as follows:

1. "Edward Malim is accused by the grand jury of the

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county of Storey, by this indictment, of the crime of embezzlement, committed as follows, to wit: That the said Edward Malim, on or about the seventh day of July, A. D. 1877, and before the finding of this indictment at the county of Storey, state of Nevada, was employed and hired in the capacity of clerk to L. P. Drexler and George H. Dana, and as such clerk, was instructed to receive, by his said employers, large sums of moneys, certificates of mining stocks and other articles of great value, and being so employed and intrusted as aforesaid, the said Edward Malim, by virtue of such employment, then and there did receive and take into his possession, and was by his said employers intrusted with one hundred gold pieces, coins of the United States, of the denomination of twenty dollars each, the property of said L. P. Drexler and George H. Dana; four hundred silver pieces, coins of the United States, of the denomination of fifty cents each, the property of said L. P. Drexler and George H. Dana, and a large number of gold notes, of the currency of the United States, of the aggregate value of one hundred and twenty dollars, the property of the said L. P. Drexler and George H. Dana, and that the said Edward Malim, on the day and year last aforesaid, while so intrusted with and in possession of said described moneys and property did withdraw himself from his employers aforesaid and go away with the said money with the intent to steal the same and defraud his said employers thereof, and without their consent, contrary to the trust or confidence in him reposed by his said employers."

2. "That the said Edward Malim on or about the seventh day of July, A. D. 1877, at the county of Storey, state of Nevada, was a hired clerk and in the service or employment of L. P. Drexler and George H. Dana, and that the said Edward Malim, being so in the service of his said employers, did then and there feloniously embezzle and convert to his own use, with the intent and purpose to steal the same, one hundred gold pieces, coins of the United States, of the denomination of twenty dollars each, four hundred silver pieces, coins of the United States, of the denomination of fifty cents each, and a large number of gold notes of the

currency of the United States, of the aggregate value of one hundred and twenty dollars; all of said moneys then and there being the property of his said employers, L. P. Drexler and George H. Dana."

A demurrer was interposed to this indictment on the ground that it charges two offenses. It is claimed by appellant that this demurrer ought to have been sustained because the words "said" or "aforesaid" are not used in the second count with reference to the time when the offense was alleged to have been committed and to the description of the property alleged to have been embezzled, and because these or other equivalent words were not so used it is argued that this court has no right to presume that the second count relates to the same offense as that charged in the first count.

To sustain this position we are referred to *The People v. Shotwell*, 27 Cal. 400; *The People v. Thompson*, 28 Id. 217.

The statute of this state, like that of California, declares that: "The indictment shall charge but one offense; but it may set forth that offense in different forms under different counts." (1 Comp. Laws, 1862.)

In *The People v. Shotwell*, the defendant was indicted for forgery. In the second count, the check was set out in the identical language of the check described in the first count; but it was distinguished from it by being described as the "last mentioned" check. The court, therefore, very properly said that it was not possible, "from the face of the indictment, to say that the same check was intended to be described in both counts; and though the copies are alike, *verbatim et literatim*, it is not to be presumed that each is a copy of only one and the same original instrument." Certainly not, because such a presumption would be contrary to the plain meaning and intent of the words, "last mentioned" check, as used in the second count.

It does not, however, follow from any reasoning of the court that if the words "last mentioned" had not been used the court would have decided that the indictment charged two offenses.

If one offense is set forth in different counts, it must al-

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ways be done, as stated in *The People v. Thompson*, in such a way "as to show clearly upon the face of the indictment that the matters and things set forth in the different counts are descriptive of one and the same transaction," and "the use of the words 'said' or 'aforesaid,' or other equivalent expressions in the second count of an indictment," may often be found "indispensable in order to fix the identity of the offense therein stated with that contained in the first count." It would doubtless be better pleading to always use them. (*People v. Ah Sam*, 41 Cal. 648.) It would never do any harm and might often do good. It would in every case prevent the question here presented from being raised, and inasmuch as the age of technicalities will never pass away, the pleader ought in every instance to use every precaution to make his pleading clear, plain and perfect. In *The People v. Thompson*, no words were used in the indictment to show "that the Crescent City Hotel, of the second count, is the Crescent City Hotel of the first, except that the names of the hotel and its proprietor are the same in both." The court decided that the identity of the names of the houses and their proprietors is *prima facie* evidence of the identity of the two houses, and that they are, in fact, one and the same house.

Now, applying that principle to the case in hand, does it not necessarily follow that the identity of the time, place, names of persons and description of property is *prima facie* evidence, at least, that they are the same? What principle of law exists that would authorize this court to indulge in the presumption that the two counts actually charge two different offenses, when the fact appears affirmatively upon the face of the indictment that the language of each count is identical as to the time, place, persons and property, and no words are used in either count tending in the slightest degree to show that more than one offense is intended to be charged? If we were to hold that the indictment charged two offenses, would it not be substituting a violent presumption for an apparent fact? It is true a case might be imagined where a defendant at different times "on or about" the same

day, at the same place, and from the same person, might embezzle the same amount and character of money. Such an event is possible. But is it true that because such an event might happen, a court must presume that it did in this case? It was within the wide range of possibilities that the defendant Thompson, in 28 California, actually broke into the Crescent City Hotel at two different times on the same day, and that at one time he intended, as charged in the first count, to steal the goods of John McRaith; and at the other time, as charged in the second count, to steal the goods of John McGrath.

It was admitted upon the oral argument that it would be proper in indictments for robbery, in different counts, to charge the property as belonging to different persons. Now, unless such indictments appropriately used the words "said" or "aforesaid" in describing the money or other property, why might it not there, as well as here, be claimed that the indictment charges two offenses?

In *The State v. Chapman*, the indictment charged the robbery in two counts, the only difference being "that in one the money is charged as being the property of Wells, Fargo & Co., and in the other it is laid in the messenger having at the time special custody thereof."

The objection that the indictment charged more than one offense was summarily disposed of, and the district attorney was commended for the excellent manner in which the indictment was framed. (6 Nev. 325.)

The counts in that indictment were not in any manner connected by the words "said" or "aforesaid," or other equivalent words.

Is it not evident from the general framework, language and structure of the indictment in the present case, that the same offense was intended to be and is charged in each count? If so, that is all the law requires. (*State v. Rust*, 35 N. H. 441.)

Is it not apparent upon the face of the indictment to "a person of common understanding" (1 C. C. L. 1867) that the different counts, charging the same offense in different



## Points decided.

ways, were inserted for the purpose of meeting the evidence as it might turn out upon the trial, and be admissible under the provisions of section 74 of the act concerning crimes and punishments? (1 C. L. 2380.) We think it is.

Whenever such facts appear, courts invariably sustain the indictment, no matter in what form the objection may be made or whether the law allows more than one offense or not to be charged in the indictment. (*State v. Nelson*, 11 Nev. 339; *Engleman v. The State*, 2 Ind. 91; *Joy v. The State*, 14 Id. 144; *State v. McPherson*, 9 Iowa, 56; *People v. McKinney*, 10 Mich. 95; *State v. Canterbury*, 28 N. H. 227; *State v. Lincoln*, 49 Id. 464; *Mayo v. State*, 30 Ala. 33; *U. S. v. Dickinson*, 2 McLean, 327; *State v. Hood*, 51 Me. 364; *Hampton v. State*, 8 Humph. 71; *Cash v. State*, 10 Id. 113; *Reg v. Trueman*, 8 C. & P. 727.)

We are of opinion that the court did not err in overruling the demurrer.

The judgment of the district court is affirmed.

[No. 388.]

TRUCKEE LODGE, No. 14, I. O. O. F., APPELLANT, v.  
BENJAMIN WOOD ET AL., RESPONDENTS.

**STATEMENT—OBJECTIONS TO WHEN WAIVED.**—When counsel appear and orally argue a case upon its merits and afterwards, by leave of the court, file a brief and therein rely upon objections to the statement: *Held*, that the oral argument upon the merits amounted to a waiver of the objections to the statement. (Hawley, J., dissenting.)

**CONTRACT—ADMISSIBILITY OF EVIDENCE—MECHANICS' LIENS—NOMINAL DAMAGES—COSTS.**—Plaintiff brings suit and claims damages against W. & R. for breach of contract in building Odd Fellows' Hall. The contract provided that plaintiff should not be held accountable for any labor or materials furnished in said building. Plaintiff offered to prove that W. & R. had incurred indebtedness to sub-contractors and others, who had filed liens upon the building and brought suits to foreclose the same. The court refused this evidence: *Held*, 1. That plaintiff, it not being shown that it had paid anything upon said liens, was only entitled to recover nominal damages for this breach of the contract; 2. That if the plaintiff should have been allowed to prove the existence of the liens for the purpose of showing nominal damages, the error in excluding the proof is not ground for a new trial, when such damages do not entitle plaintiff to recover costs.

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Statement of Facts.

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**IDEM—COUNTER-CLAIM.**—W. & R., in their answer, as a counter-claim, allege a balance due upon the original contract, and a balance due for extra work: *Held*, That the refusal of the court to permit plaintiff to introduce proof of the existence and amount of the liens, was error: that such facts were admissible for the purpose of defeating the contractors' counter-claim to the extent of the full amount of valid liens for labor and materials furnished to the contractors.

**IDEM—VALUE OF WHOLE BUILDING.**—Against plaintiff's objection, the court allowed defendant to ask a witness: What is the reasonable value of the whole material and work done in the erection of that building as it now stands? *Held*, error to allow defendants to prove the value of any thing not done by W. & R., and then only as to extra work and materials.

**IDEM.**—The court refused to allow plaintiff to prove the difference between the value of the building as completed, and as agreed to be completed: *Held*, not error.

**IDEM—ALTERATIONS—EXTRA WORK—WAIVER OF AGREEMENT.**—The contract provided for changes in the plans, and that extra pay therefor should be either mutually agreed upon or referred to arbitrators before any changes were allowed to be made. The price for extra work had not been agreed upon or settled as the contract required: *Held*, in reviewing the testimony, that the fact that the contractors were willing to agree upon the price of changes; that they urged plaintiff to fix the same, and that plaintiff refused but continued to order changes, amounted to a waiver of the clause inserted in the contract for plaintiff's benefit.

**IDEM—RIGHTS OF SURETIES.**—*Held*, that the failure of plaintiff to make the weekly payments as specified in the contract released the sureties upon the contractor's bond.

**IDEM.**—*Held*, that the failure to retain money, in excess of \$10,800, until the completion of the contract, as agreed upon, released the sureties.

**IDEM.**—*Held*, that if plaintiff permitted and requested changes to be made without previously agreeing upon the price of the same as specified, it was such a material change in the contract as would release the sureties.

**JUDGMENT CORRECT—ERRONEOUS INSTRUCTIONS.**—A judgment will not be reversed for any error in the instructions when it is apparent that the verdict would have been the same with correct instructions, and when the court below could not have refused to grant a new trial had the verdict been for the opposite party.

**LIABILITY OF SURETIES CANNOT BE CHANGED WITHOUT THEIR CONSENT.**—The liability of a surety cannot be changed without his consent, even though such change is advantageous to him.

APPEAL from the District Court of the Second Judicial District, Washoe County.

At the request of the sureties the court gave the following instructions, which are referred to in the opinions.

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Statement of Facts.

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8. "The defendants, C. A. Bragg, A. C. Bragg, L. I. Crockett, and J. C. Hagerman are sureties, and their contract with the plaintiff is to be construed strictly; their liability is not to be extended beyond the terms of their contract; to the extent and in the manner, and under the circumstances pointed out in their obligation, they are bound, and no further. It is not sufficient that they may sustain no injury by a change in the contract, or that it may even be for their benefit. They have a right to stand upon the very terms of their contract, and, if they do not assent to any variations of it, and a variation is made, it is fatal."

9. "Under the contract the building committee were required to pay the contractors the sum of nine hundred dollars on August 26, 1876, and a similar sum on each Saturday thereafter for eleven successive weeks. You are instructed that any failure or neglect to pay any of said sums, or the full amount thereof, on the dates agreed upon, or about such dates, not agreed to or acquiesced in by the sureties, releases them, and, if you find the facts so to be, you must find against the plaintiff so far as the sureties are concerned."

10. "Under the contract the plaintiff's building committee agreed to retain from the contractors any balance that should be due them under their contract after the payment of ten thousand eight hundred dollars, until their job was completed. You are instructed that if you find the committee did pay the contractors more than said sums before their job was completed, and without the consent or agreement of the sureties, the contract of suretyship is violated, and the plaintiff cannot recover against them."

11. "Under the contract alterations or changes may be made upon request of the building committee, provided the extra price or deduction in price for the same is mutually, or by arbitration, agreed upon before such change is made. You are instructed that if you find that any charges were made without such agreement as to price being made, the sureties are exonerated."

12. "You are further instructed that the provision in the

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Argument for Appellant.

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contract does not mean any change that might be requested by the building committee, but only refers to changes and alterations made in conformity with the contract and the general plan of the building. Therefore, if you find that any change was made by the committee and contractors, not in conformity with the contract and general plan of the building, without the consent of the sureties, and that such change was material and imposed additional burdens on the contractors, the sureties are exonerated from liability on their bond. And if the change was a material departure from the plans and specifications, it makes no difference whether it was favorable to the contractor or not.'

13. "The sureties are not bound by any parol agreement that the plans referred to in the contract and their bond should be considered reduced in scale, made subsequent to their undertaking, unless such agreement was assented to by them. Therefore, if you find that such an agreement was made, and that by the same the plan of the building was materially changed, and that the building was built in accordance with such parol agreement without the consent of the sureties, you will find for them."

*Robert M. Clarke, for Appellant.*

I. It was a breach of the builder's contract to suffer liens for labor and materials to attach, and the amount of their liens was the measure of damages for the breach.

II. The defendants, Wood and Richards, had no action upon the contract for the recovery of any unpaid balance until they had fully satisfied the liens for the labor and materials.

III. In an action upon a contract to recover for failure to complete a building at the time specified, and for omitting to do certain specified work, it is error to permit the defendant, for the purpose of reducing plaintiff's demand or defeating recovery, to show the value of the work done and material furnished. The contract itself furnishes the only just measure. (61 Mo. 270; 17 N. Y. 175.)

IV. The contract in this case provided for alterations and extra work, and specified that all extra pay should be fixed

## Argument for Respondent.

in advance by mutual agreement or arbitration. In view of this provision it was error to permit the defendant to prove extras not requested and agreed upon as specified in the contract. (24 Wend. 448; 17 N. Y. 175, 176.)

V. The changes shown to have been made in the plans and details of construction of the building are not alterations of the contract in the sense of the term. (50 Cal. 419; 24 Vt. 440; 27 Id. 125, 673.)

VI. The court erred in the instructions which it gave to the jury. As to the sureties the case was tried upon a total misapprehension of the law. It is not the law that any variation from the written contract releases the sureties. On the contrary, no variation, however material, could so operate if made without the sanction of plaintiff, and no alteration in the plans or details of construction, however material, could operate to release the sureties if made pursuant to the contract. And no alteration in the mere details could operate to release the sureties unless prejudicial to them.

*N. Soederberg*, also for Appellant.

*Thomas E. Haydon*, for Respondent Wood.

I. No notice of motion for new trial was ever filed or served upon the defendants Wood or Richards. The motion for new trial cannot be considered. (*Killip v. Empire Co.* 2 Nev. 34; *Wright v. Snowball*, 45 Cal. 654; *State v. First National Bank*, 4 Nev. 358.) The statement, in so far as defendants Wood and Richards are concerned, has never been authenticated in the manner required by law. (*White v. White*, 6 Nev. 20; *Lockwood v. Marsh*, 3 Id. 188; *McCausland v. Lamb*, 7 Id. 238; *Irwin v. Samson*, 10 Id. 282.)

II. Any action by plaintiff to recover damages on account of the liens filed against the building is premature. The defendants did not covenant that no liens should be filed. Prospective damages cannot be recovered. (6 Nev. 203.) Damages can only be estimated by the actual injury a party has received. (2 Green on Ev. sec. 265.)

III. The findings of the court below are conclusive

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Opinion of the Court—Leonard, J.

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upon the facts. There is a substantial conflict of evidence. The statement does not purport to contain all the testimony given at the trial. (4 Nev. 156, 304; 5 Id. 281, 415; 6 Id. 203, 215; 8 Id. 41, 118, 126; 9 Id. 152.)

IV. The evidence shows that the contractors were unable to obtain a settlement of the changes and alterations directed by the architect. The owners of the building could do it, for it was for their benefit. (*Blethen v. Blake*, 44 Cal. 117; *McFadden v. O'Donald*, 18 Id. 160.)

V. Where a special contract for work is proven, but the contract is deviated from, testimony may be admitted as to the value of the services rendered. (*De Boom v. Priestly*, 1 Cal. 206; *Reynolds v. Jourdan*, 6 Id. 108; 7 Id. 161; *O'Connor v. Dingley*, 26 Id. 20; *Whiting v. Heslip*, 4 Id. 327; 4 Id. 274; 4 Id. 335.)

*Boardman & Varian*, for Respondents Bragg *et al.*, sureties.

There were several material departures from the contract. The alterations in the building were not made as provided for in the contract. Plaintiff agreed with the contractors to disregard the provisions of the written agreements.

Having undertaken to protect itself by controlling the contractors in the matter of payments, in utter disregard of the undertaking with the sureties, it can not now resort to the bond which it repudiated during the progress of the work. (*Miller v. Stewart*, 9 Wheat. 704; *Quillen v. Arnold*, 12 Nev. 234; *Bragg v. Shain*, 49 Cal. 134; *U. S. v. Howell*, 4 Wash. C. C. 620-623; *Grant v. Smith*, 46 N. Y. 98; *Zimmerman v. Judah*, 13 Ind. 286; *Finney v. Conlen et al.*, Ill. Sup. Ct. Legal News, Feb. 23, 1878, No. 488, p. 182.)

By the Court, LEONARD, J.:

This is an action for damages for alleged breaches of contract. Respondents, Wood & Richards, were contractors and builders. They entered into a written contract to build for appellant an Odd Fellows' Hall and building in Reno, and to secure a faithful performance of the same, executed and delivered to appellant an undertaking in the penal sum

of ten thousand dollars. Wood and Richards were principals and the other respondents sureties. In its complaint appellant alleges failure to perform according to the contract, plan and specifications, and demands judgment therefor in the sum of five thousand two hundred and thirty-four dollars and twenty-one cents. The principals and sureties answered separately. They deny all alleged breaches of the contract on the part of Wood & Richards, and aver full performance thereof. Wood & Richards allege that there is a balance of two thousand four hundred and nine dollars and eighteen cents due upon the original contract, and the further sum of four thousand seven hundred and forty-four dollars for extra labor performed and materials furnished at the request of appellant, for which sums they demand judgment. The sureties allege that there is due Wood & Richards, upon the original contract and for extra work and materials, the sum of six thousand two hundred and ninety-four dollars. Other parts of the pleadings will be referred to as we proceed in the examination of questions presented for consideration. At the trial, respondents, Wood & Richards, obtained judgment against appellant for one thousand and ten dollars and thirty cents, and the sureties were released. This appeal is from an order overruling appellant's motion for a new trial, and from the judgment. Objections have been made to the transcript, all but one of which could be waived, and that has been removed by amendment. Counsel for Wood & Richards argued the case upon its merits without intimating that there were any faults in the transcript, and not until months thereafter were any objections made thereto. We shall consider the case upon its merits, believing the objections now made have been waived.

I. The contract above referred to provides that the appellant shall not in any manner be answerable or accountable for any of the materials or other things used or employed in finishing said building. In its complaint appellant alleges, "That in partial performance of the said contract, the said Benjamin Wood and E. S. Richards incurred indebtedness to sundry persons for work and labor performed

and materials furnished, to be used, and which were used, in constructing said building, in the sum of four thousand seven hundred and ninety-three dollars and thirteen cents gold coin of the United States, which said indebtedness became, and is, a lien against plaintiff's said building and premises, and for the payment of which plaintiff and its said building and premises are liable, wherefore plaintiff has been greatly injured and damaged in the sum of four thousand seven hundred and ninety-three dollars and thirteen cents, etc." To maintain its claim for damage on account of the liens mentioned, appellant offered to prove, by the records of the county recorder of Washoe county, that Wood & Richards had incurred said indebtedness to the persons named in said records; that the materials and labor therein mentioned had been furnished at the request of said contractors and used in and about the construction of said building, and that the contractors had failed and refused to pay the same or any part thereof; that the same were then valid and subsisting liens upon the building in question; that plaintiff was liable to pay the same, and that suits had been commenced to foreclose them. Counsel for respondents objected to such proof, for various reasons stated, and it was rejected.

In rebuttal, appellant offered to prove the same facts for the purpose of defeating the claim of Wood and Richards for extra work, etc., upon the building. This proof was also excluded by the court, and its action in excluding the offered proof to support appellant's claim for damages on account of said liens; also, to defeat recovery by Wood and Richards upon the counter claims set up by them in their answer, is assigned as error.

It is first claimed by counsel for appellant, that the proof offered should have been admitted for the purpose of showing damage resulting from a breach of the contract, and that the amount of the liens is the measure of such damage. If it be conceded that the contractors broke their contract by permitting liens to be filed, etc., still the admitted fact remains, that there was no offer to prove that appellant had paid any sum for their satisfaction, or had otherwise been



damaged by reason of their existence. Such being the case, appellant was entitled to recover, at the most, nominal damages only, on account of the breach complained of.

Had actual damages been allowed against defendants on account of the liens, the contractors might have been compelled to pay twice for the same thing. The lien-holders might have dismissed their foreclosure suits and brought an action against the contractors. A judgment for damages in this case, in favor of appellant for the full amount of the liens, would not bar such an action. The lienholders are not parties, and would not have been bound by any judgment in this case. Hence, as before stated, had appellant recovered actual damages on account of the liens, the lienholders might thereafter have dismissed their foreclosure suits, waived their liens, brought action against the contractors, and recovered judgment to the extent of the amount due, regardless of the fact that theretofore judgment in this case had been rendered against them for the same claims. (*Prescott v. Trueman*, 4 Mass. 627; *Wyman v. Ballard*, 12 Id. 305; *Tufts v. Adams*, 8 Pick. 547; *Harlow v. Thomas*, 15 Id. 68; *Sedgwick on Dam.* 44, *et seq.*) And if, technically, appellant should have been permitted to prove the existence of the liens for the purpose of showing nominal damage, that error is not ground for a new trial, in cases where, under statutes like ours, such damages do not entitle the plaintiff to recover costs. (*Jennings v. Loring*, 5 Ind. 250; *Sedgwick on Dam.* 54.)

The refusal of the court to permit appellant, in rebuttal, to introduce proof of the existence of the liens, and that suits were then pending to foreclose the same, was error. Section 10 of the lien law (Stat. 1875, page 123) is as follows: "The contractor shall be entitled to recover upon a lien filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties, for work done and material furnished as aforesaid; and in all cases where a lien shall be filed under this chapter, for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such

action the owner may withhold from the contractor the amount of money for which such lien is filed, and in case of judgment against the owner or his property upon the lien, the said owner shall be entitled to deduct from the amount due or to become due by him to the contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was, originally, the party liable."

Under that section, it is too plain for argument that appellant should have been permitted to make proof of the facts stated, for the purpose of defeating respondents' counter claims, to the extent of the full amount of valid liens for work done and materials furnished to the contractors, Wood & Richards. If appellant had the right to withhold from the contractors the amount of money for which the liens were filed, during the pendency of the foreclosure suits, certainly the contractors could not recover judgment for any portion of the money so withheld.

II. Against appellant's objection, respondents were permitted to ask Wood this question: "What is the reasonable value of the whole material and work done in the erection of that building, as it now stands?" The witness answered: "Twenty-seven thousand dollars." It will be noticed that the question included the value of all the materials furnished and labor performed in the construction of the building. It embraced within its scope not only the value of the labor and materials used in performing the extra work, but also the value of the materials and labor furnished and performed under the special contract between the contractors and appellant. Nor is that all. It embraced the value of all that was done by Ferguson & O'Hara, who did the mason work under a separate contract.

In their answers, as we have seen, respondents allege that a certain sum is due Wood & Richards for work done under the written contract, and an additional sum for extra

work, of the value stated. For the work done under the special contract, Wood & Richards' damages must be measured by that agreement. It was error to allow respondents to prove the value of anything not done by Wood & Richards, and then only as to extra work and materials. (*Railway Company v. Vosburgh*, 45 Ill. 313; *Sedgwick on Dam.* 235 *et seq.*)

III. The court did not err in refusing to permit appellant to prove the difference between the value of the building as completed and as agreed to be completed. It is alleged in the complaint that Wood & Richards have failed to finish the building according to contract, and that the labor and materials necessary to so finish it will cost the appellant, and be reasonably worth, nine hundred and twenty dollars in United States gold coin. There is no allegation or claim contained in the pleadings that would have justified the court in permitting appellant to make the proof stated.

IV. The contract in question provided as follows: "All alterations or changes in the plans during the course of construction of said building which may be requested by the parties of the first part (appellant), shall be made by the parties of the second part (Wood & Richards); but all extra pay or deductions in price for work, by reason of such change, shall be, either mutually or by reference to arbitrators, agreed upon and settled by the parties hereto, before said change is allowed to be made."

In view of these provisions of the contract, and of the fact that the price for extra work had not been agreed upon or settled as the contract required, counsel for appellant objected to questions propounded to respondent Wood, as to the cost of extras, "because it is sought to prove by this witness, that changes were made which are not shown to have been requested by the committee, and the price of which was not agreed upon by the parties or submitted to arbitrators." To meet that objection, Wood then testified that a great number of changes had to be made, and that they were all made by order of appellant, but no proof was made that the prices for extras or changes were agreed upon.

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The court then admitted the evidence objected to, and appellant accepted. Subsequently, during the examination of the same witness, he testified that the prices of changes had not been fixed, with one exception. He stated, however, as the reason why they were not fixed, that he asked Mr. Bowker, one of appellant's committee, to give him a paper as to the prices, etc.; that he received such paper, but that the prices were not carried out; that Bowker wanted him to go to Sturgeon, the architect, for the reason, as stated, that he (Bowker) could not get the committee together; that if witness wanted it done he would have to go to Sturgeon. Witness also stated that the reason why the prices were not inserted in the paper referred to, was because they had not been agreed upon; that he said to Bowker: "Let us agree to it;" that Bowker told him that he could not get the committee together. On cross-examination witness testified: "We could not get anything from them" (meaning the committee); "they would not agree. Mr. Sturgeon would serve me with an order that I had to do that. I delayed the floor over two weeks before I would lay it." Witness stated also that he asked that the question of price be submitted to arbitrators.

Counsel for appellant still urges the same objection made in the court below. In view of all the facts, we shall not review the argument of counsel—that no proof of the price or value of extras or changes was admissible, without showing also that such price was agreed upon or awarded by arbitrators. In our opinion, the general legal principle invoked by counsel is not applicable to this case. If it be true, that at the time the evidence objected to was admitted, it was inadmissible, for the reason that no preliminary proof had then been made of the efforts of Wood to have the prices fixed, and of the failure of the committee to act when requested so to do; still, such proof was subsequently made by the same witness, and the error, if such it was, was cured. In *United States v. Robeson*, 9 Peters, 326, the court say: "It appears that the agent of the government expressly stipulated to pay the money under the contract on the certificate of Colonel Arbuckle or the officer com-

manding the party. And for any additional services to those provided for in the contract, payment was to be made at the same rate, upon producing duplicate specified certificates of the commanding officer. It does not appear that any excuse was offered why these certificates were not procured; and the question is, whether the claimant, at his option, can establish his claim by other evidence. The contract is a law between the parties in this respect; as they expressly agreed that the amount of the service shall be established by the certificates of the commanding officer, can it be established in any other manner, without showing the impracticability of obtaining the certificates? Is not this part of the contract as obligatory as any other part of it; and if so, is not the obtaining of the certificate a condition precedent to the payment of the money? Where parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He can not compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so. And as this was not done by the defendant in the district court, no evidence to prove the service, other than the certificates, should have been admitted by the court. Had the defendant proved that application had been made to the commanding officer for the proper certificates, and that he refused to give them, it would have been proper to receive other evidence to establish the claim." In *Smith v. Brady*, 17 N. Y. 174, the defendant agreed to pay the plaintiff a certain sum as the work progressed, and the balance, when all the work should be completed and certified by the architects to that effect. In construing the contract, the court say: "The parties have seen fit to make the production of such a certificate a condition precedent to the payment. The plaintiff is as much bound by this part of his contract as any other. \* \* \* Had it been shown by the plaintiff that he had made application to the architects

for the requisite certificate, and that they had obstinately and unreasonably refused to certify, it might have been proper, perhaps, for the plaintiff to establish his right to recover by other evidence." (See, also, *Herrick v. Belknap's estate et al.* 27 Vt. 681.)

The case of *White v. S. R. and S. Q. R. R. Co.*, 50 Cal. 417, is inapplicable to this case.

There, the plaintiff, on the verbal order of the engineer, performed extra work not embraced in his contract, of the value of three thousand nine hundred and twenty-three dollars and four cents, and for which the engineer refused to give him a certificate when a settlement was made. The written contract provided that the engineer should have full liberty to make alterations in, additions to, or deductions from, any of the works referred to therein; and that such alterations, etc., should be valued and estimated according to the schedule of prices filled up by the contractor and agreed to by the engineer. But it also provided that "no deviation from any of the provisions of this contract, specification or drawings will be permitted, unless with the sanction in writing of the engineer; nor will any claim of extra work be allowed under any pretense, unless a written order for the same by the engineer can be produced."

Under such a contract the court held that plaintiff could not recover for extra work without producing a written order signed by the engineer. By his contract he had made it impossible for him to make proof by any other means. He had agreed that he should not be allowed for any extra work he might perform, unless he could produce a written order signed by the engineer. In this case respondents Wood and Richards agreed to make such alterations and changes as might be requested by appellant's committee, and that all extra pay or deductions in price for work, by reason of such change, should be agreed upon and settled by the parties mutually, or by reference to arbitrators, before such change should be allowed to be made. There was no agreement, as there was in the case last referred to, which precluded all kinds of proof save one, regardless of whether it was appellant's fault or the contractors' that the

price was not fixed. It is a general rule of law, and a just one, that a party cannot insist on a condition precedent when he himself has defeated a strict performance. The proof of respondents shows that the contractors were willing and anxious to agree upon the price of changes; that they urged the committee to fix the same; that the latter failed to do so after request, but continued to order changes without fixing the extra pay. Such action on their part was a waiver of a clause inserted for appellant's benefit (*McFadden v. O'Donnell*, 18 Cal. 164; *Blethen v. Blake*, 44 Id. 120), and it was a mode of defeating strict performance by the contractors, which prevented appellant from insisting upon the objection made.

V. By the contract, in consideration of the covenants and agreements being strictly performed and kept by the contractors, Wood & Richards, as specified therein, appellant agreed to pay the contractors a certain sum of money in the following manner, to wit: "Nine hundred dollars on Saturday, August 26, 1876, and nine hundred dollars on each Saturday thereafter, for eleven successive weeks the balance when the job is completed." In their answer, respondents, the sureties, allege that the parties of the first part to said contract utterly failed and neglected to pay said sums of money as stated, and at the times stated and agreed. They further allege, by amendment to their answer, that "it was provided by the contract, that all extra pay or deductions in price should be, mutually or by reference to arbitrators, agreed upon and settled before such change should be allowed to be made; that notwithstanding such provision, and without the permission, knowledge or consent of the said defendants, or either of them, the parties to the contract aforesaid made a large number of material changes in the plan and the work of construction, and changed the entire plan of said building, and introduced new and expensive additions, as detailed in the plans and specifications at the time of the execution of the undertaking by said defendants, and utterly failed and neglected to have the extra pay or deductions in price thereof either mutually, or by arbitration, or in any manner, agreed upon prior to the making of such

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alterations, or to have the same agreed upon at any time; that by reason of the changes and alterations aforesaid, and of the failure to have the price for the same settled as aforesaid, the contract with them was violated and their obligation released." Respondents, the sureties, testified that they were never advised of, or acquiesced in, or consented to, any of the changes, testified to as material, from the original plan and specifications; that they knew nothing of the failure of the building committee to pay each installment to the contractors as it fell due, nor authorized the committee not to pay the same; and that they did not consent to the building committee overpaying the contractors more than ten thousand eight hundred dollars specified in the contract, before the completion of the building. Moreover, the burden of proving ratification or waiver was upon appellant, and the record contains no proof of either.

The appellant did not claim to have paid the contractors weekly, as it agreed to do. The first payment of nine hundred dollars was due August 9, 1876, and the last, November 11, 1876, making in all ten thousand eight hundred dollars, to be paid as before stated, and the balance when the building was completed. Whereas it appears from appellant's own evidence, by the testimony of Mr. Kinkead, who paid the money to the contractors, and of Mr. Bowker, one of appellant's committee, that only six thousand nine hundred dollars had been paid on the eleventh of November; that afterwards, at irregular intervals, other sums were paid until February 21, 1877, when the last payment was made, at which date the total amount paid was eleven thousand seven hundred and ninety dollars and eighty-two cents, being nine hundred and ninety dollars and eight-two cents in excess of the amount appellant agreed to pay before the completion of the contract, and which it agreed not to pay until the contract was completed; that before the eleventh of November, as well as after, in many instances the payments were not made when they were due; that the reason why payments were not made according to the terms of the contract, was because Wood & Richards did not appear to



be doing anything, and under such circumstances appellant was unwilling to advance money. It does not appear, definitely, when the building was completed, but it was certainly subsequent to February 21, 1877, the date of the last payment. In the complaint it is alleged that it was incomplete at the time the action was commenced, March 12, 1877. Mr. Bowker testified that the upper story was first occupied about April 1st. In fact, appellant claimed damage from November 15, 1876, until April 1, 1877, for failure to complete the upper story at the time stated in the contract. Besides, the specifications called for eight quite elaborate secretaries. Mr. Wood testified that they were not shipped from San Francisco until about the middle of March, 1877, and were put up in the building after that date; that he held possession of the upper story until after the secretaries were put in place.

In our opinion, there are two facts shown by all the evidence of both parties, and concerning which there was at the trial no dispute, which are fatal to appellant's claim against respondents, the sureties, to wit:

1. That the weekly payments of nine hundred dollars each were not paid as agreed.

2. That the amount due in excess of ten thousand eight hundred dollars was not all retained until the completion of the contract.

Failure to do both was a substantial violation of the contract on the part of appellant.

And if appellant requested and permitted changes to be made without previously agreeing upon the price of the same, or referring it to arbitrators, that, too, was a violation which was material. If we are correct in our conclusions, it is unnecessary to examine the instructions given at the request of the sureties. A judgment will not be reversed when it is apparent that the verdict would have been the same with correct instructions, and when the court below could not have refused to grant a new trial had the verdict been for the opposite party. The eighth, ninth, tenth, and eleventh instructions are correct, and they cover the principles upon which we base our decision.

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Opinion of Beatty, C. J., concurring and dissenting.

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The law is too well settled to require argument or authorities in its support, that the liability of a surety can not be changed without his consent, even though such change is advantageous to him. The following authorities sustain the principle state, and are applicable to the present case: *Quillan v. Arnold*, 12 Nev. 238; *Bragg v. Shain*, 49 Cal. 134; *Miller v. Stewart*, 9 Wheat. 704; *United States v. Howell*, 4 Wash. (C. C. R.) 620; *Calvert v. London Dock Co.* 2 Keen, 639; *Burge on Suretyship*, 46, 53, 115, 118.

For the errors before mentioned affecting appellant's rights as regards respondents, Wood & Richards, the judgment as to them is reversed and the cause remanded. As to respondents, the sureties, judgment is affirmed.

HAWLEY, J., concurring and dissenting.

I concur in the judgment of affirmance as to the sureties.

As to the respondents, Wood & Richards, there is no settled or agreed statement on motion for a new trial, and hence nothing properly before us but the judgment roll. (*Lockwood v. Marsh*, 3 Nev. 138; *White v. White*, 6 Id. 20.)

In my opinion the objection to the statement is not one that is required, under rule 8, to be "noted in writing and filed at least one day before the argument," and although the objection was not made in the oral argument, it is made in the written brief that was filed within the time given by the court. This, it seems to me, is not a waiver of the objection.

As no error appears in the judgment roll, I think that, under the previous rulings of this court, the judgment of the district court ought to be affirmed.

BEATTY, C. J., concurring and dissenting.

I concur in the opinion of Justice Leonard that counsel for respondents, Wood & Richards, by arguing this appeal on its merits, waived the objections which they afterwards made to the transcript, and I concur in his opinion that as to them the judgment should be reversed. But I think the judgment as to the sureties ought also to be reversed. The instructions given to the jury, at their request, were, in my

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opinion, erroneous, and as the statement does not purport to contain all the evidence, it cannot be said to establish any fact so conclusively in favor of the sureties as to render the error in the instruction immaterial.

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[No. 990.]

**EX PARTE PHILLIPP DEIDESHEIMER.****RIGHTS OF STOCKHOLDERS—DUTY OF SUPERINTENDENT—STATUTE CONSTRUED.**

—In construing the provisions of the act to protect the rights of stockholders in the mines of this state (Stat. 1877, 80; Stat. 1879, 57): *Held*, that the superintendent cannot be held guilty of a misdemeanor for refusing to permit the qualified stockholders to examine the mine.

**IDEM—PENAL STATUTE.**—Penal laws should be plainly written, so that every one may know with certainty what acts or omissions constitute the crime.

**HABEAS CORPUS.** The facts appear in the opinion.

*B. C. Whitman and C. J. Hillyer*, for Petitioner.

*Stone & Hiles, Seeley & Woodburn, and M. A. Murphy*, Attorney-General for the State.

By the Court, LEONARD, J.:

The petitioner, Phillipp Deidesheimer, is brought before me in chambers on *habeas corpus*, with a return showing he was arrested and is detained under a warrant of arrest issued by Thomas Moses, justice of the peace of Township No. 1, in Storey county, by James Jewell, constable of said township. There is no dispute as to the facts, which are as follows:

On the twenty-eighth day of July, 1879, the petitioner was the duly qualified and acting superintendent of the Hale and Norcross Mining Company, a foreign corporation incorporated for the purpose of working upon and mining in the Comstock lode, in Storey county, and on that day A. B. Thompson, who, as owner and agent, was possessed of one-fifth of one per cent. of the original capital stock of

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said corporation, applied to said justice, under and in accordance with the provisions of section 1 of the statute hereafter noticed, found on page 57, statutes of 1879, for an order to examine the shafts, adits and hoisting works of the mine of said corporation. Thereupon the justice delivered to Thompson an order directed to petitioner as superintendent, commanding him "to admit Thompson into said mine and permit him to examine fully all parts of the shafts, adits, borings, drifts, stopes, winzes, hoisting apparatus and every and all properties and appurtenances belonging to said mining company." Thereafter, on said day, Thompson presented the order to petitioner at the mine of the company, and demanded to be admitted. Petitioner then and there refused to comply with the order, or any part thereof. At the time of the application and refusal just mentioned, there was posted in a conspicuous place at the mine, a notice, of which the following is a copy:

"VIRGINIA, NEVADA—NOTICE! In compliance with the provisions of the act of the legislature of the State of Nevada, touching the examination of mines, etc., Monday is named as the day of the week in which authorized stockholders may be admitted under the provisions of said act.

"PHILIPP DEIDESHEIMER, Supt."

It is admitted that petitioner complied with the law in relation to posting notice.

A complaint upon oath was thereupon laid before the justice, charging petitioner with the crime of refusing him, the said Thompson, admittance to the underground works and mine of the Hale and Norcross Mining Company, upon the Comstock lode, in Storey county, Nevada, contrary to the provisions of an act of the legislature of the state of Nevada, entitled "An act to amend an act, entitled 'An act to protect the rights of owners of stock shares and other interests in the mineral and metal-yielding mines of this state.' Approved February 21, 1877." A warrant of arrest was issued and placed in the hands of the constable, who arrested petitioner, and he is now detained under said writ.

The warrant is conceded to be in due form; but it is alleged in the petition, and claimed by counsel for petitioner, that such warrant was and is without authority of law.

It is said by counsel for the state, that if petitioner is discharged, the order therefor must be based upon some one or more of the grounds set out in section 20 of the *habeas corpus* act (Stat. 1862, p. 100); that he must bring his case within either or both of subdivisions fourth and sixth of such section, which provide that the petitioner may be discharged. \* \* \* "Fourth—When the process, though proper in form, has been issued in a case not allowed by law." \* \* \* "Sixth—Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law."

As I view the case, it may be decided by asking and answering the question submitted by counsel for the state as the main one in controversy, to wit: "Was this warrant issued in a case allowed by law, or is the process authorized by any provision of law?"

The original statute, entitled "An act to protect the rights of owners of stock shares and other interests in the mineral and metal-yielding mines of this state," was passed and approved in 1877. (Stat. 1877, p. 80.)

In 1879, section 1 of the statute just referred to was amended, but section 5 was not amended or re-enacted.

It is urged by counsel for petitioner, that section 5 of the statute of 1877 only attaches to a violation of the provisions or conditions of section 1 of that act, and that it does not attach or apply to a violation of the provisions or conditions of section 1, as amended in 1879. In my opinion section 1 as amended, and section 5 in the original act, must be construed together, as though the former had been incorporated in the prior act at the time of its adoption. (*Holbrook v. Nicholl*, 36 Ill. 161; *McKibben v. Lester*, 9 Ohio St. 627; *Sedgwick on the Construction Stat. Law*, 68.)

For the purposes of this case, section 1 of the statute of 1879, and section 5 of the statute of 1877, may be epitomized as follows:

"Section 1. Any person being the *bona fide* owner of one-fifth of one per cent. of the original capital stock of any

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Crime. (Bish. on Stat. Crimes, sec. 193; Beccaria on Crimes, 22, 45; *The Schooner Enterprise*, 1 Paine, 33.)

Beccaria says: "I do not know of any exception to this general axiom, that every member of the society should know when he is a criminal and when innocent." (45.)

"There is nothing more dangerous than the common axiom, the spirit of the laws is to be considered. To adopt it is to give way to the torrent of opinions. This may seem a paradox to vulgar minds, which are more strongly affected by the smallest disorder before their eyes, than by the most pernicious, though remote, consequences produced by one false principle adopted by a nation. Our knowledge is in proportion to the number of our ideas. The more complex these are, the greater is the variety of positions in which they may be considered. Every man hath his own particular point of view, and at different times sees the same objects in very different lights. The spirit of the laws will then be the result of the good or bad logic of the judge; and this will depend on his good or bad digestion; on the violence of his passions; on the rank and condition of the accused; or on his connection with the judge; and on all those circumstances which change the appearance of objects in the fluctuating mind of man. Hence we see the fate of a delinquent changed many times in passing through the different courts of judicature, and his life and liberty victims to the false ideas or ill humor of the judge, who mistakes the vague result of his own confused reasoning for the just interpretation of the laws. We see the same crimes punished in a different manner at different times in the same tribunals; the consequence of not having consulted the constant and invariable voice of the laws, but the erring instability of arbitrary interpretation." (22.)

In the case of the schooner *Enterprise*, Mr. Justice Livingston used the following language: "The act, and particularly that part of it under which a forfeiture is claimed, is highly penal, and must therefore be construed as such laws always have been and ever should be. But while it is said that penal statutes are to receive a strict construc-

tion, nothing more is meant than that they shall not, by what may be thought their spirit of equity, be extended to offenses other than those which are specially and clearly described and provided for. A court is not, therefore, as the appellant supposes, precluded from inquiring into the intention of the legislature. However clearly a law be expressed, this must ever, more or less, be a matter of inquiry. A court is not, however, permitted to arrive at this intention by mere conjecture, but it is to collect it from the object which the legislature had in view and the expressions used, which should be competent and proper to apprise the community at large of the rule which it is intended to prescribe for their government." \* \* \* "If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the legislature." \* \* \* "The attention of the court has been called to a history of the progress of the several laws relating to the embargo, and to the mischiefs which were unprovided for, at the time of the passage of the one under consideration, in order to show what was intended by the legislature. Almost every possible evasion, it is said, had been previously guarded against by adequate sanctions, except that of loading clandestinely or by night, and then watching an opportunity of going to sea without a clearance or giving bonds, which was the evil to which it was intended to apply a remedy. Be it so. This may have been in the contemplation of congress, but we are not bound to conclude that they have done what was intended, unless fit words be used for the purpose."

And in the *United States v. Wiltberger* (opinion by Chief Justice Marshall) the court says: "It has been said that although penal laws are to be construed strictly, the intention of the legislature must govern in their construction. That if a case be within the intention, it must be considered within the letter of the statute. So if it be within the reason of the statute. The rule that penal laws are to be construed strictly is perhaps not much less old than construction

## Points decided.

produced, but are kept in the Chinese language. The assessor, being unable to understand the Chinese method of bookkeeping, demands an interpreter, upon the ground that it is an implied duty on the part of the corporation to furnish one.

Even admitting that implied duties or prohibitions, within reasonable limits, may be considered in relation to penal statutes, in my opinion it is not such duty to furnish a guide in the one place or an interpreter in the other. Other judges might think otherwise, and thus we see some of the evils liable to arise from an equitable, rather than a strict, construction of penal statutes—some of the evils so vividly portrayed by Beccaria—thus we see that superintendents would be in continual doubt as to their duties, and, consequently, would not know with certainty when they could with impunity refuse a stockholder's request. The legislature may have intended to require of the superintendent all that is claimed by counsel for the state; but if such was the intention, they failed to use any fit words expressing the same. In their absence I am unable to arrive at the conclusion that the petitioner committed any offense in refusing to admit the complainant to the Hale & Norcross mine and works. It follows that he is detained without authority of law and must be discharged. I permitted to add, that in the above construction of the statutes referred to, my associates fully concur. The petitioner is discharged.

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[No. 970.]

A. L. GREELEY, RESPONDENT, v. DANIEL HOLLAND,  
APPELLANT.

**TRANSCRIPT ON APPEAL**—WHAT PAPERS AND DOCUMENTS SHOULD BE STRICKEN OUT.—The minutes of the court and all other matters not embraced in the statement on appeal, judgment-roll, or authenticated as by law required, should, on motion, be stricken from the transcript on appeal.

**ELECTION CONTEST—SUFFICIENCY OF COMPLAINT.**—Held, that the complaint, tested either by sections 4 and 5 of the quo warrantu act (1 C. L. 392, 393), or by section 40 of the election law (2 C. L. 2542) is sufficient.



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Statement of Facts.

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STATEMENT NOT CONTAINING ALL THE EVIDENCE.—When the statement on appeal does not purport to contain all the evidence: *Held*, that this court is bound to presume that there was evidence sufficient to sustain the findings of the court.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda county.

The complaint in this case alleged, among other things, that plaintiff is a citizen of the United States, a resident of Esmeralda county, and eligible to the office of district attorney; that at the general election held on the fifth day of November, 1878, plaintiff and defendant were candidates for the office of district attorney; that the plaintiff received the highest number of legal votes and was duly elected to said office; that against the protest of plaintiff, the board of county commissioners, sitting and acting as a board of election canvassers, declared the defendant, Holland, elected, and directed and caused the clerk of said county to make out and deliver to said Holland a certificate of his election; that said board of commissioners canvassed and counted for plaintiff four hundred and fourteen votes, which the plaintiff received, all of which, except fifteen votes, were legal; that said board canvassed and allowed the defendant four hundred and twenty-seven votes, one hundred and nineteen of which were illegal; that at election precinct No. 17, at Candelaria, there were polled one hundred and thirty-four votes, one hundred and nineteen of which were polled and counted for defendant, and fifteen of which were polled and counted for plaintiff, and that all of said votes were illegal and should not have been cast, or polled, or canvassed for the reasons: First, the said voters were not legally registered; second, no list of the voters of said precinct was posted as required by law, and no opportunity was given to challenge or object to such persons as voters; third, no list of the persons registered in said precinct was prepared, or posted, or distributed, as required by law; fourth, no notice of the time for receiving objections to the right to vote was given as required by law; fifth, no copy of the register was ever made by any person authorized to

## Argument for Appellant.

make the same, or delivered to the inspectors of election as required by law; that the votes polled at said election precinct, at said election, were illegal and fraudulent, and ought not to have been polled, or counted, or canvassed, because fraud and intimidation were resorted to and used in behalf of said defendant, and the voters were improperly influenced and coerced to cast their votes for said defendant by persons acting in his interest and on his behalf.

*D. J. Lewis*, for Appellant.

I. The complaint is insufficient. The alleged illegality consists of mere irregularity without fraud. (*Skerrett's case*, 2 Parsons, 509; *Brightly Election Cases*, 320; 2 C. L. 2535.)

II. If the requirements of the statute have not been substantially complied with, a contest may be instituted by any qualified elector of the district in the manner and for the causes specified in sections 2540, 2541, 2542, *et seq.*, C. L. Such contests are public matter and cannot by any intendment of law degenerate into a mere personal matter between individuals or claimants. (*Searcy v. Grow*, 15 Cal. 117.)

III. When a charge of fraud is relied on, it is incumbent on the contestant to show that an illegal act has been purposely committed, and that an evil result has flowed therefrom; or that an illegal vote has been purposely and unjustly received by the officers of election; or that a false estimate has been imposed on the public as a genuine canvass. (*Brightly's Election Cases*, 423, 432, cites *People v. Cook*, 8 N. Y. 67.)

IV. If there was a registry agent *de facto* or *de jure* in precinct No. 17, the proof of posting notices of time and place, of receiving objections, etc., to voters, is aided by the legal presumption that the officer did his duty in a legal manner. (*Broom's Leg. Max.* 945, 946, *ubi supra*, *Egery v. Buchanan*, 5 Cal. 53.)

V. Gross irregularities not amounting to fraud do not vitiate an election. (5 Abb. U. S. Dig. New Ser. 304, n. 25, cites *Morris v. Vanlaningham*, 11 Kan. 269; *People v.*

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*Cook*, 8 N. Y. cited in *Bright. Elec. Cases*, 423; *Littlefield v. Green*, *Bright. Elec. Cases*, 493, cites 1 Chicago Leg. New S. 330; *McCrary Elec. Law*, sec. 304 and cases cited.)

*T. W. W. Davies and A. C. Ellis*, also, for Appellant.

*M. A. Murphy, Robert M. Clarke, and N. Soederberg*, for Respondent.

By the Court, HAWLEY, J.:

Upon the oral argument in this case, on motion of respondent, the minutes of the district court, affidavit for continuance, bill of exceptions with the exhibits attached thereto, and all other matters not embraced in the so-called statement on appeal, judgment-roll, or authenticated as by law required, were stricken from the transcript on appeal.

The minutes of the court, affidavit for continuance, and some other matters, were stricken out because they were not embodied in the statement on appeal.

The minutes of the court, having been stricken out, can not be considered, and there is nothing left in the record to show that the bill of exceptions was filed within the time required by law.

A motion was also made to strike out the statement on appeal. This motion ought, perhaps, also to prevail.

The statement has no formal beginning or ending. It is difficult to tell, as counsel claim, "where the statement begins or what the judge certifies to as being correct."

If the certificate applies to all matters included in the transcript, which are contained in the so-called statement, still the other objection exists that it does not affirmatively appear that the statement was ever "served upon the adverse party," as required by section 332 of the civil practice act (1 Comp. Laws, 1393.) But, without deciding this motion, it is enough to say that the statement does not authorize a reversal of the judgment.

The complaint, tested either by sections 4 and 5 of the *quowarranto* act (1 Comp. Laws, 392-3) or by section 40 of the election law (2 Comp. Laws, 2543) is clearly sufficient. And, inasmuch as the court found that all the material allega-

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Points decided.

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tions of the complaint are true, and that there was such irregularity in the receiving of the votes at Candelaria precinct as amounted to malconduct on the part of the board of inspectors, and inasmuch as the so-called statement does not purport to contain all the evidence, we are bound to presume that there was evidence submitted sufficient to sustain the findings of the court.

The judgment of the district court is affirmed.

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[No. 949.]

**MAHER AND TOUSIGNANT, RESPONDENTS, v. S. T. SWIFT, APPELLANT.**

**SALE OF PERSONAL PROPERTY MADE TO HINDER, DELAY, AND DEFRAUD CREDITORS—FRAUDULENT GRANTORS CANNOT RELY UPON THEIR OWN FRAUD.**—M. and T., being indebted to divers persons, made, executed, and delivered to B. a bill of sale of certain personal property, for the purpose of hindering, delaying, and defrauding their creditors, and thereafter allowed B. to have an equivocal possession of the property and to hold himself out to the world as the true owner. E., a creditor of B., levied upon the property: *Held*, That the original transfer of the property to B., though fraudulent as to the creditors of M. and T., was valid between M. and T. and B.; that the bill of sale vested the legal title in B., and that the property was thereafter liable to be seized as his property at the instance of his creditors; and that M. and T. could not set up their own fraud in order to defeat the rights of such creditors.

**IDEM—SURRENDER OF BILL OF SALE.**—The bill of sale was surrendered, and the property delivered by B. to M. and T. prior to the levy by E.; *Held*, That such surrender and delivery did not defeat E.'s rights as a creditor of B. Such surrender and delivery having been made without any valid consideration.

**IDEM—ADMISSIBILITY OF EVIDENCE.**—The court excluded a sworn complaint made by B. after the transfer to him, that he was the absolute owner of the property, it being shown by the testimony of M. that he knew of, and consented to, B.'s filing the complaint: *Held*, error.

**IDEM.**—The court excluded the conversations and declarations of B. to divers parties, that he was the owner of the property: *Held*, error.

**ERRORS AGAINST RESPONDENT CANNOT BE CONSIDERED.**—The supreme court will only consider such questions as are assigned as error by appellant.

**APPEAL from the District Court of the Second Judicial District, Ormsby County.**

The facts are sufficiently stated in the opinion.

*Wells & Stewart and A. C. Ellis, for Appellant.*

I. The court erred in excluding defendant's questions to the witnesses Bovard, Stadtmuller, Hoover and others, to the effect that Bovard claimed the property as his own.

II. The court erred in excluding the sworn complaint of the witness Bovard against S. T. Swift, defendant, for a portion of the property in controversy. (*Gallagher v. Williamson*, 23 Cal. 331; 12 Nev. 38; 7 Cal. 391; 8 Id. 109; 12 Pick. 89 and 306.)

III. The court erred in excluding the following questions put to witness Elder by the defendant, upon the plaintiff's objection, to wit:

"Were you told by any one, before the levy of the execution in the case of Bovard against Elder, that Maher, plaintiff in the case, had stated that the property in controversy, or any part thereof, was the property of Bovard, the execution debtor?" (*Mitchell v. Reed*, 9 Cal. 204; *Goodale v. Scannell*, 8 Id. 27; *Chapman v. O'Brien*, 34 N. Y. Sup. Ct. 524; *Horn v. Cole*, 51 N. H. 287; *Stevens v. Dennett*, Id. 324.)

*Robert M. Clarke and N. Soederberg, for Respondents.*

I. The facts pleaded and sought to be proved were insufficient to establish an equitable estoppel. (*Sharon v. Minnock*, 6 Nev. 386; *Ward v. Carson Riv. Wood Co.* 13 Nev. 44; *Bigelow on Estoppel*, 480-600; 4 Saw. 17; 55 N. Y. 229; 14 Cal. 368; 109 Mass. 57.)

II. The conduct of plaintiff upon the seizure of his property by the sheriff, was properly allowed in evidence. (1 Green. ev. sec. 108.)

III. There was no judgment ever entered by the court in the case of *Bovard v. Elder*, and hence the execution under which defendant attempted to justify was a nullity.

By the Court, HAWLEY, J.:

This action was brought to recover twenty-six animals (horses and mules), seven wood wagons, and other personal property connected therewith, or the value thereof.

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The defendant, Swift, in his official capacity as sheriff of Ormsby county, levied upon, took possession of, and sold the property by virtue of a writ of execution in favor of George S. Elder, in the suit of *C. M. Bovard v. George S. Elder*, as the property of said Bovard.

Plaintiffs obtained judgment. Defendant appeals.

The testimony is quite voluminous, and is, in several particulars, somewhat conflicting and very unsatisfactory.

The property in controversy was purchased by the plaintiffs from different parties, mostly on credit, prior to the thirty-first day of October, 1877.

A portion of the property—"eight animals, four wagons and twelve harness"—was purchased from C. M. Bovard for the sum of one thousand dollars. Two notes of five hundred dollars each were given to Bovard—one became due in September and the other in October, 1877. The note that became due in September was paid. The other was not.

On the thirty-first day of October, 1877, the plaintiffs agreed with C. M. Bovard that the property purchased from him should be returned; that he should become the owner of the property, and should pay to plaintiffs five hundred dollars and surrender their note for the other. Bovard then paid one thousand dollars to Maher & Tousignant. M. & T. paid back to Bovard the sum of five hundred dollars, and Bovard surrendered the unpaid note to M. & T. The plaintiffs thereupon executed and delivered to said Bovard a bill of sale for "thirty-two head of animals, six wood wagons, a kit of blacksmith tools, and harness for the thirty-two animals."

This bill of sale was executed for the purpose of avoiding anticipated trouble with one James Mayberry, on account of the plaintiff's failure to complete a contract with him for hauling wood. Maher, in his testimony, says: "We hadn't finished our contract; \* \* \* we wanted to get a settlement out of Mayberry, and we were afraid he would take the stock for damages, because the contract wasn't finished. Therefore, we executed this bill of sale to save ourselves. That is what it was given for." In the course of his testi-

mony, he admitted that the object in executing the bill of sale was to prevent Mayberry from getting the property, if he had any claim against them for not completing their contract.

Bovard, in his testimony relating to the same transaction, says: "The property described in the bill of sale \* \* \* was got from Lufkins, Perry, and Hager. I had no interest in this property before this bill of sale had been made; never had any interest in it before. I had no interest with the plaintiffs \* \* \* in hauling wood or freighting wood for Mayberry. The bill of sale was made because they thought that Mayberry would probably attach their stock and prevent them from taking it out of there on account of their not fulfilling their contract. \* \* \* They gave me that bill of sale and I gave Mr. Tousignant one thousand dollars. \* \* \* Mr. Maher and Mr. Boyd were called in as witnesses. Then Maher and I went out into a little office they had there and he gave me back the money, and I took it in, and I counted the money over to Mr. Maher, the same one thousand dollars, and gave it to him, and he gave it to Mr. Tousignant. \* \* \* No other consideration or thing passed between me and these people for the property, except as I have stated." It does not appear from the record on appeal that Mayberry ever made any demand against the plaintiffs; that he ever brought any suit or obtained any judgment against them.

The jury, upon special issues submitted to them, found that Bovard did not, at any time, after the execution and delivery of the bill of sale, have the entire and exclusive possession and control of the property mentioned therein; that in the month of November, 1877, it was agreed between the parties that Bovard should have the use and possession of the property in question and receive the earnings of the same until the amount of one thousand dollars was realized, over and above expenses, and that then the Bovard property, to wit, "eight animals, four wagons, and harness," should belong to the plaintiffs; that Bovard, while using the property, was unable to pay the expenses of the same; that on the twenty-ninth of January,

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A. D. 1878, the plaintiffs and Bovard had a full and final settlement; that the plaintiffs executed and delivered to Mrs. Bovard, at the instance of the said C. M. Bovard, their notes for the sum of one thousand dollars, originally due to said Bovard for the purchase of the property, and the additional amount of two hundred and fifty-seven dollars and ten cents, the expenses incurred by Bovard while using the property; that Bovard thereupon surrendered and delivered to plaintiffs the bill of sale; that after the twenty-third day of December, 1877, the plaintiffs had the exclusive possession, use and control of the property, up to and including the fourth day of February, 1878, when the defendant levied upon and took possession of the same as the property of C. M. Bovard; that the plaintiff, Maher, after the month of November, 1877, "and previous to the levying of the execution, declared to two or more persons, not in confidence, that the property in controversy belonged to C. M. Bovard."

The majority of the members of this court entertain the opinion that the facts of this case bring it directly within the legal principles decided in *Allison v. Hagan*, 12 Nev. 38.

The record contains abundant evidence to show that at the time of the fraudulent transfer of the property to Bovard the plaintiffs were indebted to divers persons; that after that transaction occurred they allowed Bovard to have, at least, an equivocal possession of the property, and to hold himself out to the world as the true owner. They at divers times asserted, for the purpose of misleading their creditors and preventing them from attaching, that Bovard was the owner of the property.

Between the first and fifteenth of December, 1877, a member of the firm of Stadtmuller & Co., at Empire, called upon the plaintiff Maher and requested payment of the amount that Maher owed the firm. Maher represented to him "that Bovard owned everything, teams and wagons and all; that he had sold everything to Bovard."

On the twentieth of December, 1877, M. C. Tilden brought suit against Maher & Tousignant and attached part of the property in controversy in this suit. After the attachment



was levied Maher told Tilden that he did not own the property, and that it belonged to Mr. Bovard.

The bill of sale was always exhibited and used, or attempted to be used, as a cloak to hide the truth from their creditors.

The evidence which was admitted at the trial tends very strongly to show, if it does not clearly establish the fact, that the plaintiffs and Bovard acted in concert for the purpose of shielding each other from the legal rights of their lawful creditors. When any creditor of the plaintiffs sought to obtain a lien upon the property, Bovard claimed it, and the plaintiffs said it belonged to him. When the creditor of Bovard seeks to obtain a lien upon it as the property of Bovard, then the claim is made that it belongs to the plaintiffs, and Tousignant declares that "it was pretty hard for his property to go to pay another man's debts." Bovard also says that the property belongs to the plaintiffs. It then appears that the ubiquitous bill of sale, after having served its fraudulent purpose in one case and failed so to do in another, had been voluntarily surrendered up to the plaintiffs, so that they might exhibit it for the fraudulent purpose of frightening another class of creditors, for the payment of whose debts the property had in the meantime become liable. In brief, the fraudulent purpose of the whole transaction, from beginning to end, is exposed to view upon nearly every page of a very voluminous record.

The original transfer of the property to Bovard, though fraudulent as to the creditors of Maher & Tousignant, was perfectly valid as between the parties to the bill of sale. It vested the legal title in Bovard. The property was thereafter liable to be seized as his property at the instance of any of his creditors. The plaintiffs cannot set up their own fraud in order to defeat the rights of such creditors. Having made their bed in fraud, there they must lie. The aid of a court of justice can not be invoked to relieve them from their own iniquity. In order to establish their rights they must show that the justice of their case comes from a pure fountain. The law endeavors to environ every debtor who engages in transactions of this character with all pos-

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Opinion of the Court—Hawley, J.

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sible perils and, by its stern mandate, seeks to enforce upon his mind that, in weal or woe, "honesty is the best policy."

The bill of sale having been surrendered, and the property delivered by Bovard to the plaintiffs prior to the levy of the execution, will not defeat Elder's rights as a creditor of Bovard, such surrender and delivery having been made, as is clearly shown by the testimony, without any valid consideration.

Entertaining these views, it necessarily follows that the court below erred in several particulars.

The action of the court in giving and refusing certain instructions was at variance with the views herein expressed, and directly in conflict with the principle of law, as stated by this court, in the case of *Allison v. Hagan*, as will readily be seen by a mere recital thereof.

At the request of plaintiffs' counsel the court instructed the jury as follows: "The jury are instructed that if they believe from the evidence that prior to February 4, A. D. 1878, C. M. Bovard had a settlement with the plaintiff concerning all matters of difference between them concerning the property in question, and that prior to said fourth day of February, A. D. 1878, it was agreed between them that the property in question should belong to the plaintiffs, and that plaintiffs should have the use and control and possession of said property, and that the bill of sale of October 31, A. D. 1877, was surrendered by Bovard to the plaintiffs, and that at the time the defendant took the property said C. M. Bovard was not in the possession of the said property, and the plaintiffs were in the possession thereof, then the jury must find a verdict for the plaintiffs."

The defendant asked the court to instruct the jury as follows: "The jury are instructed that the return by Bovard to Tousignant of the bill of sale made by them to him, does not, of itself and alone, operate to convey to Maher & Tousignant any interest in the property in controversy." The court refused to give this instruction as asked, but modified and amended the same by adding thereto the words: "To operate as a conveyance, the property must have been either in plaintiffs' possession, or delivered to them at the

time of the return of the bill of sale, or at some time prior to the levy of the execution."

The court also erred in excluding the sworn complaint of the witness Bovard, filed December 22, 1877, wherein he swore, without any qualification, that he was the absolute owner of the property, it having been previously shown by the testimony of Maher that he (Maher) knew of and consented to Bovard's filing of that complaint.

The court erred in ruling out the conversation of Bovard with the witness Stadtmuller; to the effect that he (Bovard) owned the property, and that Stadtmuller & Co. might do the best they could to collect their debt of Maher & Tounsignant. The court erred in excluding the conversations and declarations of Bovard as to his ownership of the property, as made to the witness Hoover and other parties.

The testimony excluded by the court was admissible for the purpose of enabling the jury to arrive at the truth of the whole transaction. It tended materially to strengthen the position that there was a concert of action between the plaintiffs and Bovard to conceal the truth, and thereby defraud the creditors of the respective parties.

It was also admissible for another purpose. It tended to impeach the testimony of the witness Bovard, as given on the trial, to the effect that he held the property as security for the payment of the sum of one thousand dollars.

The views already expressed reach the merits of this controversy and render it unnecessary to examine or decide the question whether or not the court erred in excluding certain testimony tending to bring the facts of this case within the general rules of an equitable estoppel, as argued by the respective counsel.

One other question remains to be noticed. The suit of *Bovard v. Elder* was referred to a referee, who found the facts, conclusions of law, and reported a judgment in favor of Elder. The judgment in the record purports to be the judgment of the referee. It does not appear to have been entered by order of the court.

When the judgment-roll in that case was offered in evidence by the defendant, the proofs as to its correctness

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were expressly waived by the plaintiff's counsel; but they objected to its admission because it did not appear to have been entered by order of the court. The court below overruled the objection and admitted the judgment-roll in evidence. Respondents claim that this action of the court was erroneous.

Even if it was admitted that the court erred, it would not justify an affirmance of the judgment entered in this case. Appellant would have the right to offer the proofs upon another trial, and to show, if he could, that the judgment was entered by order of the court.

We might dispose of this question by simply saying that it is not properly before us for decision. We are only called upon to dispose of such questions as are assigned as error by the appellant. It is not the rule of appellate courts to look into the errors, if any, that may have been committed against the respondent. (*Jackson v. Feather River Water Co.* 14 Cal. 18; *Seward v. Malotte*, 15 Id. 304; *Paul v. Magee*, 18 Id. 698.) We deem it proper, however, to add that we are of the impression, from the cursory examination we have made, that it is not necessary to the validity of such a judgment that it should appear to have been entered by order of the court. (Civil Practice Act, sec. 189.) It will be time enough to decide the question when it is properly presented.

The judgment of the district court is reversed and the cause remanded for a new trial.

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[No. 974.]

JAMES SIAS, PETITIONER, v. JAMES F. HALLOCK.  
STATE CONTROLLER, RESPONDENT.

**REWARD—STATUTE CONSTRUED.**—In construing the statute authorizing and requiring the payment of rewards in certain cases (St. 1877, 92): *Held*, that it has no application to offenses committed against the United States and tried in the United States courts, but applies to persons who violate the state law, and who are arrested under process issued out of state courts, and who are therein convicted.

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Opinion of the Court—Leonard, J.

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DEB.—The reward, provided for in the statute, must be paid to the person or persons making the arrest.

APPLICATION for mandamus.

The facts appear in the opinion.

*Robert M. Clarke*, for Petitioner.

*A. C. Ellis*, for A. L. Nuckols.

*M. A. Murphy*, Attorney-General, for Respondent.

I. A reward offered for the apprehension of a thief and money cannot be claimed by a sheriff or constable, who arrests the thief, by virtue of a warrant delivered to him for that purpose. (12 Ohio, 281; 15 Wnd. 44; 16 Minn. 408; *Smith v. Whildin*, 10 Pa. 39.)

II. A public officer cannot receive, for performing an official duty, any other compensation or reward than that which is prescribed by law. (*Warner v. Grace*, 14 Minn. 487; *Day v. Putnam Ins. Co.* 16 Id. 408; *Hatch v. Mann*, 15 Wend. 44; *Gilmore v. Lewis*, 12 Ohio, 281.)

By the Court, LEONARD, J.:

This is an application by the petitioner, James Silas, for a writ of mandamus to compel respondent, the state controller, to draw his warrant on the state treasurer in favor of petitioner for the sum of five hundred dollars reward, claimed to be due for the arrest of Bell and Wilson, who were arrested by petitioner, and thereafter tried and convicted in the United States district court in and for the district of Nevada, for the crime of robbing the United States mails.

Petitioner bases his claim upon the following statute:

"The Governor shall offer a standing reward of two hundred and fifty dollars for the arrest of each person engaged in the robbery of, or in the attempt to rob, and any person or persons upon, or having in charge in whole or in part, any stage coach, wagon, railroad train, or other conveyance, engaged at the time in conveying passengers, or any private conveyance within this state, or for the arrest of any person

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Opinion of the Court—Leonard, J.

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engaged in the robbery of, or in the attempt to rob, any person or persons upon any highway in the state of Nevada, the reward to be paid to the person or persons making the arrest, immediately upon the conviction of the person or persons so arrested; but no reward shall be paid except after such conviction." (Stat. 1877, p. 92.)

A. R. Nuckols also claims the reward, upon the ground that he gave information of the whereabouts of Bell and Wilson which led to their arrest, and hunted up the evidence upon which they were tried and convicted. The warrants under which Bell and Wilson were arrested were issued by United States Commissioner J. H. Windle, at Elko, Nevada, upon the complaint of A. G. Sharp, special postal agent of the United States, who took the same to Eureka and delivered them to the petitioner, Sias. Petitioner was then a deputy marshal of the United States and sheriff of Eureka county. He received the warrants from Sharp and arrested Bell in Eureka. With the other warrant he went to White Pine county, and, at Hamilton, arrested Wilson. The prisoners were thereupon taken by him before Commissioner Windle, at Elko. He made his returns upon the warrants under which the arrests were made, showing that he had arrested both Bell and Wilson under and by virtue of said warrants, as Deputy United States marshal. It is also admitted that Nuckols was constable of the ninth township of White Pine county during the time of the performance of the services for which he claims the rewards in question. He lived at Cherry Creek, and in his affidavit he states that Bell and Wilson were at all times within his reach by telegraph, and that he had kept constant watch of their movements, with the full intention of arresting them and bringing them before the United States courts, having them under a shadow for more than two months, and that any subsequent arrest was nothing more than the execution of his plans and orders.

After the conviction of Bell and Wilson in the United States district court, for mail robbery, both the petitioner and Nuckols presented their claims in due form to the board of examiners of the state, each demanding two hun-

dred and fifty dollars reward for the arrest and conviction of Bell, and the same sum for the arrest and conviction of Wilson, which claims were both acted upon and allowed by said board, and were afterwards certified and delivered to the respondent as state controller, who refused, and still refuses, to act upon either by drawing his warrant upon the state treasurer. In our opinion neither petitioner Sias nor Nuckols is entitled to receive the rewards mentioned in the statute quoted.

We have no doubt that the legislature only intended the payment of a reward for the arrest of any person who violates the state law in relation to robbery, and who is arrested under process issued out of state courts, and then only after conviction therein.

Bell and Wilson were arrested under a United States warrant and tried and convicted in a United States court, for an offense committed against the United States. For the arrest and conviction of persons guilty of robbing or attempting to rob the mails, the postal department offers and pays its own reward. When the legislature provided that "no reward shall be paid except after such conviction," a conviction in the state courts was referred to. There was no intention to aid the United States government in the arrest and conviction of its criminals.

In the act concerning crimes and punishments we frequently find these words, "and upon convictions thereof shall be punished," etc. For example: "Section 91. every person who, by willful and corrupt perjury, \* \* \* shall procure the conviction and execution of any innocent person shall be deemed and adjudged guilty of murder, and, upon conviction thereof, shall suffer the punishment of death." The same words may be found in nearly every section of the act. It would not be denied that they refer to a conviction in the state courts only, although such courts are not designated in terms. It is equally plain to our minds that the same construction should be placed upon the statute under which the rewards are claimed in this case. There is another reason why Nuckols is not entitled to receive any reward. It appears that the petitioner, Sias,

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Argument for Petitioner.

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arrested both Bell and Wilson. Nuckols does not claim to have arrested either. The reward offered, and the only one that could have been offered under the statute, was for the arrest of the persons named in the statute, and it can be paid for no other service. What Nuckols' rights would be as between him and the petitioner, if the latter was entitled to receive, and should receive, the reward claimed, we do not say. But so far as the state is concerned, no person can recover a reward, under the statute of 1877, without first showing that he made the arrest. By the very terms of the statute, the reward is "to be paid to the person or persons making the arrest, immediately upon the conviction of the person or persons so arrested." No reward is offered for searching out the persons accused, or for hunting up testimony against them, or for watching them lest they go away. (See *Gilmore v. Lewis*, 12 Ohio, 286.)

The writ is denied.

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[No. 968.]

**JAMES MAYBERRY, PETITIONER, v. JOHN S. BOWKER, RESPONDENT.**

**MANDAMUS**—SECTION 583 CIVIL PRACTICE ACT CONSTRUED—APPEAL—REMEDY AT LAW.—Petitioner applied by motion under section 583 Civil Practice Act (1 C. L. 1644) to the district court for an order requiring the justice of the peace before whom this cause was tried, to transmit to the district court the papers on appeal. The order was refused. Petitioner thereafter, upon the same state of facts, applied to this court for a writ of mandamus to compel the justice to transmit said papers to the district court. *Held*, that the order of the district court denying petitioner's motion was a final judgment in that proceeding, from which an appeal lies. (Beatty, C. J., dissenting.)

**IDEM**.—The writ of mandamus will not be issued in any case where petitioner has a plain, speedy and adequate remedy at law.

**APPLICATION for mandamus.**

The facts are stated in the opinion.

*Boardman & Varian*, for Petitioner.

I. The remedy by application to the district court is sub-



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Opinion of the Court—Leonard, J.

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stantially the same as an application for a mandamus. This court cannot be deprived of a jurisdiction expressly conferred upon it by the Constitution. (*Levy v. English*, 4 Ark. 66.)

II. A writ of mandamus will be issued although petitioner may have some other remedy. (*State v. Wright*, 10 Nev. 175; *Jones v. McMahon*, 30 Tex. 730.)

*N. Soederberg*, for Respondent.

Relator has another appropriate and adequate remedy. (1 C. L. 1544; *State v. McAuliffe*, 48 Mo. 112; High's Ex. Rem., sec. 243; 12 Barb. 220; 12 Nev. 105; *Adams v. Woods*, 18 Cal. 30.)

By the Court, LEONARD, J.:

This is an original application in this court for a writ of mandamus, commanding respondent, a justice of the peace of Reno township, in Washoe county, to transmit to the clerk of the second judicial district court a copy of his docket, the pleadings and other papers filed in his court, in a cause tried therein, entitled *A. Charlebois v. James Mayberry*. Briefly stated, the facts are as follows: The plaintiff in the case just mentioned obtained judgment against the defendant therein for two hundred and fifty-nine dollars and his costs, taxed at thirty dollars and twenty-five cents. Defendant, Mayberry, duly appealed to the district court. He executed an undertaking not only to perfect the appeal, but to stay execution, in the sum of six hundred dollars, United States gold coin. One of the conditions of the undertaking was, that appellant would pay the amount of the judgment appealed from and all costs, if the appeal should be withdrawn or dismissed, or the amount of any judgment and all costs that might be recovered in the appellate court. Petitioner, Mayberry, paid to respondent, the justice of the peace, all court costs chargeable against him, besides two dollars, the statutory fees for making up and transmitting the transcript and papers on appeal, but refused to pay the plaintiff's court costs. Respondent, the justice, refused to transmit any of the papers to the district

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Opinion of the Court—Leonard, J.

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court until all his costs in the case were paid. Thereupon Mayberry applied by motion to the district court, under section 1644 C. L., for an order requiring the justice to transmit the papers to that court, but such order was refused, upon the ground that payment of all the fees due to the justice was a condition precedent to the right of demanding a transmission of any of the papers in the case to the appellate court. The application to the district court was made by motion based upon an affidavit containing the same facts as are set out in the petition for a writ of mandate in this court. After refusal of the district court to order the papers sent up, application was made to this court for the writ herein sought. An alternative writ was issued commanding respondent to show cause on the tenth day of March, 1879, at which time he appeared by counsel, and demurred to the affidavit or petition and writ, generally and specifically. Further hearing was postponed until March twentieth, when respondent made his return and filed his answer, stating that on the eighteenth day of March, 1879, in obedience to the alternative writ, he transmitted all the papers in said cause to the clerk of the district court, and denying that all the fees due from petitioner had been paid.

Counsel for petitioner thereupon moved that his costs in this court be taxed against respondent. In opposition to that motion it is urged, and we think correctly, that notwithstanding respondent did not transmit the papers until after the alternative writ was issued, still he should not be required to pay the costs, if it shall appear that a peremptory writ could not have been ordered. It is not claimed that this court could have ordered a mandamus directed to the judge of the second district court, commanding him to compel the justice to send up the papers after having acted judicially, by hearing and denying the motion made in that court. That would be against the whole current of decisions in this court and elsewhere. But it is said that the remedy provided by the practice act, and under which application for relief was made in the district court (C. L. 1644), is substantially the same as the one now made in this court, and that to give the effect sought for by re-

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Opinion of Beatty, C. J., dissenting.

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spondent is to deny to this court the exercise of a jurisdiction expressly conferred upon it by the constitution.

We need not decide whether the summary remedy provided by the statute just referred to would have deprived this or the district court of jurisdiction or power to order the issuance of the writ now asked, had application first been made for this writ, because that is not our case. Is petitioner now entitled to the writ? He is not, if at the time he made his application he had, or now has, another plain, speedy and adequate remedy in the ordinary course of law.

There is no dispute as to the facts in this court, and it does not appear that there was any in the district court. There is only a difference of opinion as to the proper construction of a statute. All the facts necessary to enable the district court to decide, were embodied in an affidavit and filed in that court. The court denied the motion, for the reasons before stated, and the order denying the same was a final judgment in that proceeding, from which an appeal lies to this court, notwithstanding it be true that that proceeding was substantially the same as this. Such being the case, petitioner's proper remedy was an appeal instead of an application for mandamus. That remedy was open to him at the time this application was made, and it was plain, speedy, and adequate in the ordinary course of law. (*The Board of Commissioners, etc., v. Hicks*, 2 Carter 530; *Marshall v. The State*, 1 Carter, 74; *The State ex rel. Reynolds v. The Board of Commissioners, etc.*, 45 Ind. 507; *Francisco v. M. I. Co.*, 36 Cal. 287; *High on Injunctions*, 148 *et seq.*; *State of Mo. ex rel. Wheeler v. McAuliffe*, 48 Mo. 115; *State of Mo. etc. v. Engleman, etc.*, 45 Mo. 27.)

We are of the opinion that petitioner should pay the costs, and it is so ordered.

BEATTY, C. J., dissenting.

The real objection to the petition in this case is not, in my opinion, that it shows that the petitioner has another plain, speedy, and adequate remedy, and therefore that he is not entitled to a writ of mandamus; but that it shows an-

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Opinion of Beatty, C. J., dissenting.

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other action pending, or a former adjudication of the cause of action.

It may be true that the petitioner, by appealing from the order of the district court denying his application there, would ultimately obtain all the relief that his petition shows him to be entitled to; but, supposing that he appeals, and is successful in his appeal, all the relief he can ever obtain will be an order or mandate from the district court, enforceable by attachment for contempt, compelling the justice of the peace to send up the appeal papers. Such an order, no matter by what name it may be called, is nothing more nor less than the writ of mandamus which this court has original jurisdiction to issue (Constitution, Art. VI, sec. 4). The section of the statute (C. L. 1509), which implies that the writ of mandamus shall not issue in cases where there is a plain, speedy, and adequate remedy in the ordinary course of law, refers to remedies other and different from the writ of mandamus, and not to the case where, as here, a party has commenced one proceeding for a mandamus, and without prosecuting it to final judgment in the court of last resort, commences the same proceeding in another court of concurrent jurisdiction. In such a case, it cannot be objected that the petitioner has another remedy, for in truth he has not. His only remedy is by mandamus, and all that can be said is that another action is pending or that the subject has been finally adjudicated. In this case, neither of these objections has been taken or relied upon, the whole contention being that the remedy given by section 1644 of the compiled laws is another remedy, and that because of that section this court could not have issued a writ of mandamus if the first application had been made here. I think, on the contrary, that if the proceeding under section 1644 is an original proceeding in which an appeal lies to this court, it is, after all, nothing but a summary mode of obtaining a mandamus, and that it does not deprive this court of its concurrent jurisdiction in such cases. To hold otherwise would be to admit the power of the legislature to deprive us of our constitutional jurisdiction by the simple device

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Points decided.

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of calling a writ of mandamus by some other name, or by making the practice in such cases, or a particular class of such cases, more summary or speedy in the district courts than in this court.

Undoubtedly an application to this court for a writ of mandamus in any sort of case would be defeated by showing another action pending or finally adjudicated in the district court, for the same cause; but in my opinion the respondent, in order to avail himself of either of those objections, should be required to make it specifically either by his demurrer or answer. In this case he has not done so. His objection is that the petitioner has another remedy, whereas all that appears is that he can obtain the same remedy, a writ of mandamus, by prosecuting another action, already commenced, in a court of concurrent jurisdiction. For these reasons I dissent from the conclusions of the court.

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RESPONSE TO PETITION FOR REHEARING.

By the Court, LEONARD, J.:

The rehearing in this case has strengthened us in the opinion that the decision before filed herein is correct. (Civ. Prac. Act, sec. 507; *Adams v. Woods*, 18 Cal. 31.)

The petitioner should pay the costs, and it is so ordered.

BEATTY, J. C., dissenting: I dissent.

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[No. 946.]

JEROME IVANCOVICH ET AL., APPELLANTS, v. LEOPOLD STERN ET AL., RESPONDENTS.

CLAIM AND DELIVERY OF PERSONAL PROPERTY—PLEADINGS—FRAUD.—S., as constable, levied an attachment upon certain goods as the property of Y. Plaintiffs thereafter brought suit against S. to recover the property. Y. was allowed to intervene. He alleged that plaintiffs, with the intent to defraud him and his creditors, had, upon certain false representations, induced him to execute a bill of sale to them: *Held*, upon a review of the facts, that under the pleadings it was proper to admit evidence as to the alleged fraudulent acts and intention of plaintiffs.

Opinion of the Court—Hawley, J.

**SALE—WHEN FRAUDULENT.**—Where a party executes and delivers a bill of sale to another with intent to hinder, delay, or defraud his creditors in the enforcement of their claims, or to secure any benefit to himself at the expense of his creditors, the transaction is fraudulent.

**IDEM—WHEN NOT FRAUDULENT.**—A debtor has a right to protect his property from being sacrificed, provided he does not do so at the expense of his creditors. Where a sale is made to a party who agrees to immediately pay all the vendor's creditors in full, the transaction is not fraudulent.

**IDEM—FRAUDULENT REPRESENTATIONS.**—Where Y. was induced to part with his property to I. and C., under the false promise that they would pay all his debts, and prevent his property from being sacrificed, such statements having been made by them for the purpose of misleading and deceiving him, so as to enable them to secure the possession of the property: *Held*, that such a sale would be fraudulent, and that Y. would be entitled to relief upon that ground.

**ACTUAL POSSESSION—EMPLOYMENT OF CLERK OF VENDOR.**—The mere fact of the re-employment of the clerk of the vendor by the vendees does not render a sale of personal property invalid.

**RULE AS TO CONFLICT OF EVIDENCE ENFORCED.**

**FRAUDULENT SALE.**—An instruction which declares that if the sale was actually made with the intention to hinder, delay, and defraud the creditors of the vendor, and the vendee had knowledge of such intention, then the sale was fraudulent: *Held*, correct.

**APPEAL** from the District Court of the Second Judicial District, Ormsby County.

The facts are sufficiently stated in the opinion.

*Ellis & King*, for Appellants.

I. There is no allegation on part of defendant of any fraud, actual or constructive. Defendants cannot recover upon that ground. (*Kent v. Snyder*, 30 Cal. 666.)

II. The intervenor alleges his own fraud only, or at least a collusive fraud, and is not entitled to recover. (*Allison v. Hagan*, 12 Nev. 38.)

III. The representations of Ivancovich could only be mere expressions of opinion, and did not amount to fraud in law. (*Banta v. Savage*, 12 Nev. 151.)

*Wells & Stewart*, for Respondents.

By the Court, HAWLEY, J.:

The plaintiffs, claiming to be the owners of, and entitled

to the possession of, the entire stock of merchandise, consisting of fruits, vegetables, etc., "in the store lately occupied by one C. Yantovich," proceeded, in the manner provided by statute for the claim and delivery of personal property, to take possession of the same.

The defendant, Leopold Stern, as constable of Carson township, justifies his possession of the property by virtue of a writ of attachment issued in the suit of *Jacob Tobriner v. C. Yantovich & Co.*, and in his answer alleges, among other things, that the plaintiffs hold and possess the property "wrongfully and unlawfully as against the rightful and lawful claims and possession of this defendant."

C. Yantovich was, on motion, allowed to intervene and unite with the defendant Stern in making a defense to the action. In his plea of intervention he alleges that, on the thirty-first day of July, 1877, he was the owner of the personal property mentioned in the complaint; that it was of the value of one thousand four hundred dollars; that he was then indebted to plaintiffs in the sum of about one hundred and thirty dollars, and to one Jacob Tobriner in the sum of one hundred and thirty-nine dollars, and to other parties in various sums, making in all an aggregate of indebtedness of about nine hundred dollars; that on said day the said "plaintiffs, intending to defraud this intervenor, and planning and contriving how they might defraud him, did falsely and fraudulently represent and say to him in substance and effect that his creditors were about to sue him and attach all his said personal property, and that if they did so it would break up his business, take all his property, and not pay all his debts;" that plaintiffs further advised him to sell said property to them to prevent such suits, and proposed in that connection to buy his property, on condition and with the understanding that they, on receipt of the property, would assume and pay all his debts, including that of Jacob Tobriner, and then return the remainder in value, if any, of said property to him; that he believed the statements and representations of the plaintiffs; that he was anxious to pay his debts and to prevent his property from being sold at a sacrifice; that he gave, as he supposed, a bill of

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Opinion of the Court—Hawley, J.

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sale of his property to the plaintiffs, "but never read the same or heard it read;" that plaintiffs, without making any inventory thereof, forced him to give them immediate possession of the building where the property was; that they have not paid any of his indebtedness, and that their acts were intended "to wrong, cheat, delay, and defraud him" and his creditors, and "did wrong, cheat, delay, and defraud his said creditors."

The plaintiffs deny these averments, and claim that the intervenor was at the time of the sale indebted to them in the sum of four hundred and ninety-five dollars; that the sale was made "for a good and valuable consideration," and was absolute in its terms.

The testimony—as is usual in cases of this kind—was conflicting upon all the material points.

Special issues were submitted to the jury and the following facts were found: That the sale was fraudulent "as to the creditors of said Yantovich;" that it was fraudulent "as to the said Yantovich;" that the value of the property was one thousand three hundred dollars; that there was not a complete actual delivery of the property by Yantovich to Ivancovich, nor a full or complete possession thereof by them up to the time of the levying of the attachment in the case of *Tobriner v. Yantovich*, "except as that possession may be modified in law by the retention by the Ivancovichs of the former clerk of Yantovich;" that Yantovich in making said sale did not intend to hinder, delay, or defraud his creditors; that Nobly, the former clerk of Yantovich, was in the employ of the Ivancovichs, by re-employment at an agreed salary, at and before the levying of the attachment, and that Yantovich, at the time of the sale, was indebted to the Ivancovichs in the sum of four hundred and ninety-six dollars and forty cents.

The court thereupon rendered judgment in favor of the intervenor for the return of the property; that if return could not be made, "plaintiff do pay to defendant the sum of one thousand dollars," \* \* \* the value as stated in plaintiffs' complaint, "less the sum of four hundred and ninety-six dollars and forty cents," amount due them from



Yantovich. Provision is also made for the payment of the Tobriner judgment.

Upon this statement of facts the several questions raised by appellant may be briefly disposed of:

1. Under the pleadings it was proper for the court to admit the evidence as to the alleged fraudulent acts and intentions of the plaintiffs.

2. The plea of intervention did not allege any fraud on the part of the intervenor. If his averments and his testimony in support thereof were true, there was no fraud on his part. The position of appellants, that if any fraud existed it was a collusive fraud, and within the rule announced by this court in *Allison v. Hagan*, 12 Nev. 38, and *McCausland v. Ralston, Adm'r*, Id. 195, is not upheld by the pleadings or the proofs.

If the purpose of the intervenor in making the bill of sale of his property was to hinder and delay his creditors in the enforcement of their claims, or to secure any benefit to himself at the expense of his creditors, the transaction would be fraudulent under the statute.

The testimony, however, warrants the conclusion that his intention was that the plaintiffs should, on receipt of the goods, immediately pay all his creditors in full, and that the sale was made on that understanding. If so, the transaction was entirely innocent.

A debtor has an undoubted right, under the law, to protect his property from being sacrificed, provided he does not do so at the expense of his creditors. If he sells his property in order to raise money to pay his debts, his creditors are not defrauded, and this is what the intervenor claims to have done. There is nothing to prove that he intended to put off the payment of his debts for a single day. It is true that the sale of his goods was attended by some suspicious circumstances; but he explains those circumstances in his testimony, and the verdict of the jury is in his favor.

3. The testimony of Chinda, the former partner of Yantovich, as to the value of the stock of merchandise on the twenty-ninth of July, 1877, with the testimony as to the

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Opinion of the Court—Hawley, J.

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average daily sales about that time, tended to corroborate the testimony of Yantovich and others as to its value on the first day of August, 1877, and was, therefore, properly admitted. The plaintiffs could not, in any event, consistently claim that they had been prejudiced by this testimony, because the value of the property, as set forth in the judgment, is the same as is alleged in the plaintiffs' complaint.

4. The court did not err to the prejudice of appellants by allowing the testimony that plaintiffs had not paid the debt due from Yantovich to Tobriner, as, upon the intervenor's statements of the transactions between the parties at the time of the alleged sale, they had agreed to do. It tended to show a failure on their part to comply with the conditions of the sale.

5. The jury, from the issues found, must have decided that the statements made by plaintiffs to Yantovich at the time of the alleged sale were not "mere expressions of opinion," as claimed by appellants.

If plaintiffs actually made the statements alleged and testified to, and if Yantovich, believing the statements to be true, was induced to part with his property under the false promise that plaintiffs would pay all his debts and prevent his property from being sacrificed, and such statements were made by the plaintiffs for the purpose of misleading and deceiving him, so as to enable them to secure the possession of the property and thereby obtain an undue and unfair advantage, the sale was fraudulent and the intervenor was entitled to relief upon that ground.

6. The finding of the jury, that there was no delivery and continued change of possession of the goods, is not unsupported by the pleadings or proofs.

Under certain circumstances and conditions the retention of a former clerk in the same capacity in which he had previously acted is not a badge of fraud. The essential fact to be proved, under the circumstances of this case, was whether or not there was an actual and continued change of possession. If this was sufficiently shown, then the mere fact of the re-employment of the clerk of the vendor

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Points decided.

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by the vendees would not render the sale invalid. (*Gray v. Sullivan*, 10 Nev. 417.)

The question as to what facts are necessary to be proved in order to constitute an actual and continued change of possession is always more or less dependent upon the particular facts and circumstances of each case; but in every case the change of ownership must, under the law, "be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the new owner."

There was a direct conflict of evidence upon the question of possession, and the jury upon this point, as well as upon all others where there was a conflict of testimony, found the facts in favor of the intervenor and defendant. The record, in our opinion, as before stated, contains sufficient evidence to support their conclusions.

7. Instruction number one declares that if the sale was actually made with the intention to hinder, delay, and defraud the creditors of the vendor, and the vendee had knowledge of such intention, then the sale was fraudulent.

This instruction is not erroneous. (*Greenwell v. Nash*, 13 Nev. 286.)

It must be considered in connection with the other instructions, wherein the court distinctly stated the claims of the respective parties to the property in controversy, and properly announced the principles of law applicable thereto.

The judgment of the district court is affirmed.

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[No. 983.]

THE STATE OF NEVADA, RESPONDENT, v. M. M. McCORMICK, ET AL., APPELLANTS.

JURISDICTION OF SUPREME COURT—CRIMINAL CASES—APPEAL.—In construing Art. VI., sec. 4, of the constitution: *Held*, that the right of appeal in criminal cases is restricted to cases where the punishment adjudged is a sentence to confinement in the state prison, or to death.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

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Opinion of the Court—Hawley, J.

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The facts appear in the opinion.

*A. L. Fitzgerald and Thomas S. Ford*, for Appellants.

The supreme court has jurisdiction of this appeal. (*State v. Borowsky*, 11 Nev. 119.) Defendants were indicted for a felony, and convicted of a felony.

*M. A. Murphy*, Attorney-General, for Respondent.

The defendants were sentenced to be confined in the county jail, and to pay fines. The judgment of the court is to determine the character of the case for the purpose of the appeal. (*People v. Cornell*, 16 Cal. 187; *People v. Appgar*, 35 Id. 389; *People v. Applegate*, 5 Id. 295; *People v. Shear*, 7 Id. 139; *People v. Vick*, 7 Id. 165.)

By the Court, HAWLEY, J.:

The defendants were jointly indicted, tried and convicted of unlawfully and feloniously resorting to a certain house in Eureka, "for the purpose of indulging in the use of opium, by smoking the same," contrary to the provisions of the opium act. (Stat. 1879, 121.) They were sentenced to a term of imprisonment in the county jail, and to pay a fine.

The attorney-general moves to dismiss the appeal on the ground that this court has no jurisdiction.

The constitution provides that the "supreme court shall have appellate jurisdiction \* \* \* in all criminal cases in which the offense charged amounts to a felony." (Art. VI. sec. 4.)

"A felony is a public offense punishable with death or by imprisonment" in the state prison. (Criminal Practice Act, sec. 3; 1 C. L. 1677.)

"Every other public offense is a misdemeanor." (Sec. 4; 1 C. L. 1678.)

The charge in the indictment is of a felony; but under the provisions of the statute the offense may be punished either as a felony or a misdemeanor.

The attorney-general contends that the punishment inflicted by the court determines the grade of the offense.

*The People v. Cornell*, 16 Cal. 187; and *The People v. Apgar*, 35 Cal. 389, are cited in support of this position. The principles decided and the conclusions reached in these cases authorize the dismissal of the appeal herein, unless, as claimed by appellant's counsel, there is a distinction to be drawn by the change of the phraseology in the constitution of the respective states that will warrant a different construction.

The constitution of California gives an appeal "in all criminal cases amounting to felony." The Nevada constitution "in all criminal cases in which the offense charged amounts to a felony."

We do not think there is any difference in the meaning of the language used.

If a defendant is indicted for grand larceny, the "offense charged amounts to a felony," but he may, under the indictment, be only convicted of petty larceny, which is a misdemeanor. Could it, in such a case, consistently be argued that because the "offense charged" in the indictment was a felony, this court had jurisdiction on appeal? We think not.

A defendant may be indicted for an assault with intent to kill, and upon trial be convicted only of an assault and battery, or simple assault. In all such cases it is clear to our minds that the judgment appealed from determines the "offense charged."

The same rule would prevail where the defendant is indicted for an assault with a deadly weapon, with an intent to inflict upon the person of another a bodily injury. If the defendant is found guilty of the offense charged in the indictment, he may, as in the case under consideration, be punished for a felony or for a misdemeanor, at the discretion of the court.

If punished as a felony, that is the "offense charged," from which an appeal may be taken. If punished as a misdemeanor, that is the "offense charged," and an appeal will not lie.

We are of the opinion that the right of appeal, under the

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Opinion of the Court—Hawley, J.

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constitution, is restricted to cases where the punishment adjudged is a sentence to confinement in the state prison, or to death.

In this case the judgment appealed from is a misdemeanor.

The appeal is dismissed.

REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,  
OCTOBER TERM, 1879.

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[No. 964.]

A. J. BUNTING, APPELLANT, v. THE CENTRAL PACIFIC RAILROAD CO., RESPONDENT, AND MICHAEL HARRISON, APPELLANT, v. THE CENTRAL PACIFIC RAILROAD CO., RESPONDENT.

**ACTION AGAINST RAILROAD COMPANY—CONTRIBUTORY NEGLIGENCE—DAMAGES.**

—Where it affirmatively appears that plaintiff was careless, and that his negligence proximately contributed in producing the injury complained of, he is not entitled to recover any damages.

**IDEM—NEGLIGENCE—QUESTION OF LAW.**—If a party, knowingly about to cross a railroad track at a regular crossing on a public street of a town, can have an unobstructed view of the railroad, so as to know of the approach of a train a sufficient time to clearly avoid any injury from it, and he fails to use his ordinary faculties, and an injury occurs, he can not, as a matter of law, recover.

**IDEM—NEGLIGENCE—QUESTION OF FACT.**—If the view of the railroad is so obstructed by the act of the railroad company as to render it difficult to learn of the approach of a train, or there are other circumstances calculated to deceive a party approaching the track, such party has the right to presume that the usual and proper signals will be given by the railroad company; and if not given, then the question whether it was negligence on his part, is a question of fact for the jury to determine.

**IDEM—SUDDEN DANGER.**—Where a party suddenly finds himself in great peril, the law does not demand the exercise of the soundest discretion, without regard to the surrounding circumstances.

## Argument for Appellants.

WHEN QUESTION OF NEGLIGENCE SHOULD BE SUBMITTED TO A JURY.—Whenever the question whether plaintiff was guilty of contributory negligence, whether he exercised ordinary and reasonable care, is dependent upon a state of facts, in regard to which reasonable men might honestly differ, the question should be submitted to the jury.

VERDICT—NONSUIT.—Upon a review of the testimony: *Held*, that the court erred in granting a nonsuit.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

*Thomas E. Haydon*, for Appellants.

I. *Solen v. V. and T. R. R. Co.*, 13 Nev. 106, is conclusive in favor of appellants.

II. Where a railway is carried across a public highway so that those approaching on the highway can neither distinctly see nor hear approaching trains, the company is required to use a greater degree of care than in other places. (*Richardson v. N. Y. Cent. R. R. Co.*, 45 N. Y. 846; 35 Id. 75.)

III. If no signal be given at the crossing of a street, a person crossing has the right to presume the track clear. *Philadelphia and Trenton R. R. Co. v. Hagan*, 47 Pa. St. 244; *Pittsburg, Fort Wayne and Chicago R. R. Co. v. Dunn*, 56 Pa. St. 280; 36 N. Y. 132; 38 Id. 445.)

The bell should be rung so long as there is danger of encountering passers-by. (*Whiton v. Chicago and N. West. R. R. Co.* 2 Bissell, U. S. C. C. 282.)

IV. If the view of the track is obstructed it is a question of fact for the jury to determine whether the injured party was guilty of any negligence in going upon it. (*Artz v. Chicago, Rock Island and Pacific R. R. Co.* 34 Iowa, 153.)

V. A traveler is not bound to stop his team or leave it to go on to the track to see if a train is coming; he has the right to presume, at a street-crossing, that signals will be given by bell or whistle, sufficient to overcome the noise of vehicles ordinarily passing over such crossings. (*Davis v. N. Y. Cent. and Hud. R. R.* 47 N. Y. 400; *Duffy v. Chicago and N. W. R. R.* 32 Wis. 269; *Egan v. Fitchburg*



## Argument for Respondent.

*R. R. Co.* 101 Mass. 315; 34 N. Y. 622; 31 How Pr. 181; *Kennayde v. Pac. R. R. Co.* 45 Mo. 255; *Taber v. Missouri Val. R. R. Co.* 46 Id. 353.)

VI. A railroad company can not impute negligence to a person if his want of vigilance is occasioned by an omission of duty on the part of defendant. (*Penn. R. R. Co. v. Ogier*, 35 Pa. St. 60, 1860.)

The company must run its trains with reference to the safety of persons rightfully on its track. (*Kan. Pac. R. R. Co. v. Pointer*, 9 Kan. 620.)

It is neglect in a railway company to permit its cars to stand upon or obstruct the view of public streets. (*McGuire v. Hudson River R. R. Co.*, 2 Daly, N. Y. 76.)

VII. It is only where a question of fact is entirely free from doubt that the court has the right to apply the law without the action of the jury. (*Bernhardt v. Rens. and Saratoga R. R. Co.* 32 Barb. N. Y. 165; 18 How. Pr. N. Y. 427; 19 Id. 199; 23 Id. 166; *Central R. R. Co. v. Moore*, 4 Zabris. N. J. 824.)

Due care of a person may be inferred from his ordinary habits. (*Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65.)

The speed of a railroad in a town or city must be regulated with due regard to the safety of the inhabitants. (*Meyer v. Midland Pacific R. R. Co.* 2 Nebraska, 319.)

VIII. The act of the railroad company after an accident, in removing obstructions and lowering rate of speed, etc., is an admission of negligence on their part at time of the accident. (*West Chester and Phil. R. R. Co. v. McElwee*, 67 Pa. St. 311; 2 Wharton on Evidence, 1081.)

IX. Where a person is startled or alarmed, the law does not require his efforts to escape to be regulated by the soundest discretion. (*Robinson v. W. P. R. R. Co.* 48 Cal. 421.)

*Harvey S. Brown and W. H. L. Barnes*, for Respondent.

I. In an action to recover damages for an injury to plaintiff caused by an accident at a street crossing, the burden of proof is on the plaintiff, not only to show negligence and misconduct on the part of the defendant, but ordinary care

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and diligence on his own part. (*Lane v. Crombie*, 12 Pick. 176; *Gay v. Winter*, 34 Cal. 164; *Gribble v. Sioux City*, 38 Iowa, 390; *Lewis v. Baltimore & O. R. R.*, 38 Md. 588; *Johnson v. Tillson*, 36 Iowa, 90; *Muldowney v. Ill. R. R. Co.*, Id. 465; *Bangor & Piscataquis R. R. Co. v. Jones*, 15 Pac. L. Rep. 29; *North Penn. R. R. Co. v. Heileman*, 49 Pa. St. 60; *Hanover R. R. Co. v. Coyle*, 55 Id. 396; *Central R. R. Co. of N. J. v. Feller*, 84 Id. 228; *Gerety v. Phil. Wil. & Balt. R. R. Co.*, 81 Id. 274; *Gerety v. Phil. Wil. & Balt. R. R. Co.*, 16 Am. Ry. 164; *Grows v. Maine C. R. Co.*, 16 Id. 326; *Allyn v. Boston & A. R. R. Co.*, 105 Mass. 77; *Todd v. Old Colony & F. R. R. Co.*, 7 Allen, 207; *Nicholls v. Great West. R. R. Co.*, 27 Upper Can. Q. B. 382; *Morrison v. Erie R. Co.*, 56 N. Y. 302.)

II. The omission to put up signboards or ring bells at public crossings even when required by statute does not render the company absolutely liable for injuries to persons or property. Evidence of such omissions merely establishes the negligence of the company, and if it appears that the plaintiff's negligence contributed to the injury, he can not recover and should be nonsuited, or the court should instruct the jury to find for defendant. (*Dodge v. Burlington C. R. & M. R. R.*, 34 Iowa, 277; *Havens v. Erie R. Co.*, 41 N. Y. 296; *Baxter v. Troy and Boston R. R.*, Id. 502; *McGrath v. N. Y. Centr. & H. R. R.*, 59 Id. 470; *Cin. C. C. & I. R. R. v. Elliott*, 28 Ohio, 340; *Harlan v. St. L., Kansas C. & N. R. R.*, 64 Mo. 480; *Fletcher v. Atlantic & Pac. R. R.*, Id. 484; *Chicago, R. I. & Pac. R. R. v. Houston*, 10 Chicago L. N. 139; *Stackus v. N. Y. C. & H. R. R. Co.*, 7 Hun. 560; *Gorton v. Erie R. Co.*, 45 N. Y. 660; *Butterfield v. Western R. R. Co.*, 10 Allen, 532.)

III. Where a person who is about to cross a railroad track at a public crossing could either see or hear an approaching train, but fails to look or listen, he is guilty of negligence, and is not entitled to recover for injuries caused by a collision happening immediately thereafter. (*Haines v. Ill. Cen. R. R.*, 41 Iowa, 227; *St. L. & T. H. R. R. v. Manly*, 58 Ill. 300; *Solen v. V. & T. R. R. Co.*, 13 Nevada, 106; *Brown v. Mill. & St. Paul R. R.*, 22 Minn. 165; *Pa. R.*

*R. v. Beale*, 73 Pa. St. 504; *Flemming v. W. P. R. R.*, 49 Cal. 253.)

IV. The court did not err in refusing to allow the witnesses to give their opinions as to the speed of defendant's train.

Where opinions of witnesses are admissible and competent at all, they must be in some way peculiarly qualified to speak on the subject, and have knowledge not possessed by the mass of persons of ordinary experience and intelligence. (*Harris v. Panama R. R. Co.*, 3 Bos. 7; *Reynolds v. Jordan*, 6 Cal. 108; *Enright v. S. F. & S. J. R. R. Co.*, 33 Cal. 236; *Hastings v. The Uncle Sam*, 10 Cal. 341; *Harpending v. Shoemaker*, 37 Barb. 270; *Page v. Parker*, 40 N. H. 59.)

*I. B. Marshall*, also for Respondent.

By the Court, HAWLEY, J.:

The above entitled causes were, by consent of the respective counsel, tried together. The district court granted a nonsuit.

The statement on appeal shows that, on the morning of the twelfth of June, 1877, at a regular crossing on a public street in the town of Reno, a collision occurred between the locomotive of the defendant, attached to its regular passenger train of cars, and a two-horse team and wagon then being driven, or attempted to be driven, over the railroad tracks. The horses were killed. Each of the plaintiffs was injured and their property damaged.

There was sufficient testimony tending to prove that defendant was negligent in not ringing its bell or blowing its whistle, and was traveling at an unusually fast rate of speed, to have authorized the court to submit the question of defendant's negligence to the jury.

If the defendant was negligent in these respects its negligence would not, under the principles decided by this court in *Solen v. Virginia and Truckee Railroad Company*, 13 Nev. 106, relieve the plaintiffs from their duty or exercising ordinary care and prudence. If it, therefore, affirmatively ap-

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pears, as claimed by respondents' counsel, that the plaintiffs were careless, and that their negligence proximately contributed in producing the collision, they are not entitled to recover any damages; but must bear the consequences of their own folly.

Were the plaintiffs negligent? Did they use ordinary care and prudence? Was the collision caused by the improper conduct and negligence of the defendant; or, did the plaintiffs so far contribute to the injuries received by their own negligence, that but for such negligence and want of due care on their part the accident would not have happened? Was the court right in deciding, as a matter of law, that plaintiffs did not exercise ordinary care and prudence; or, were the plaintiffs entitled to have that question submitted to the jury as a question of fact?

The authorities which bear upon these questions are not entirely uniform; yet an examination of them clearly shows that courts have usually closely scrutinized the peculiar facts, surroundings and conditions, of each particular case, and the apparent conflict of the decisions can, in many cases, be readily reconciled by the difference in the state of facts which each case presented.

The testimony in this case tends to show that there were passenger and box cars standing on the north side track that obstructed the view of the main track, and prevented the plaintiffs from seeing the approaching train until they came nearly on a line with the side track. The distance from the wagon-shop—alluded to in the testimony—to the north side track is about seventy-five feet. The distance from the south rail of the north side track to the north rail of the main track is twenty-one feet. There is some testimony tending to show that there were places between the wagon-shop and the north side track where the plaintiffs, if they had been looking in that direction, might have seen the approaching train. The evidence tends to show that they could have seen the approaching train before they crossed over the north side track if they had been looking in that direction. Some of the witnesses testified that if plaintiffs had stopped for one quarter of a minute the collision would

not have occurred. The team was constantly moving from the time it left the stable until it arrived at the north side track. The wagon did not make much noise until it got on the track. Harrison says: "The wagon made a noise, but not enough to dim my hearing from anything else."

The testimony tended to show that defendant, in running its passenger train down the grade before arriving at the crossing, where the collision occurred, did not use any steam; that the train was worked by air brakes, and that the noise of the approaching train was not near as great as if steam had been applied.

The plaintiff Bunting testified that he was familiar with the crossing and with the trains of the defendants' cars that were running on the road, and knew the time of their usual arrival and departure; that whenever he crossed the track, which was quite frequently, he was always on his guard; that on the morning of the accident he left the stable a little after seven o'clock, and drove directly to the track at a slow trot; that he "looked up the track and down and saw nothing;" that as he came near the north side track, opposite the box or passenger cars, he heard a rumbling sound. To quote his exact language: "It sounded as if the locomotive was moving, and then I saw the locomotive was coming, and Harrison looked up and said, 'My God, we are killed!' and he grabbed the lines, and I struck the off horse with the whip. As I moved around, and came quartering down the track, I hit the off horse; then the train struck me. I heard no sound whatever. It was just like the rumbling of a train switching down cars. The noise I thought I heard was the train coming west, and I have often taken notice that it sounds as if it was down the track, passing the streets on that side. When a train is coming from the west, and passing along the open streets west of this main crossing, the sound will be echoed there. I was almost sure that the rumbling sound that I heard was the lower locomotive that was moving. I looked that way to see before I got on the track. I saw the train was standing and I kept on going on a fast walk."

Harrison's testimony is substantially the same. He said:

"I did not hear the train coming. I looked up to see if there was a train coming. I looked when I got to the corner of the blacksmith shop. I did not see any train from there. I looked from the west and also down. Just as we started to go on the track I first heard the sound of the train. There was a string of cars as we started to go up on the track. As we crossed I did not see any train. When they were within twenty or thirty feet, right on top of us, I first heard the train. We could not move either way. When I saw her coming through the string of cars that backed up the track I grabbed the lines and hollered out, 'We are killed!' That is the first sound I heard. When I first saw the train the fore wheels were not quite on the first track. I was looking up in that direction. Most of the time I felt as if we could get across in the wagon. I saw nothing to interfere up to that time. To my knowledge there was no signal or sound of warning given by the train."

In our opinion the real question, upon which the decision in this case must necessarily turn, is whether or not in law the plaintiffs' were bound, in the exercise of proper care, to have stopped their team and listened for the approach of the coming train.

The testimony of several witnesses is very positive and direct that if the plaintiffs had stopped at any point between the corner of the wagon shop and the north side track and listened, they could have heard the rumble of the approaching train.

An examination of the authorities which we had occasion to review in *Solen v. Virginia and Truckee Railroad Company*, and of other cases to which our attention has since been called, leads us to the conclusions that where a traveler, knowingly about to cross a railroad track at a regular crossing on a public street of any town or city, can have an unobstructed view of the railroad so as to know of the approach of a train, a sufficient time to clearly avoid any injury from it, and he fails to use his ordinary faculties and an injury occurs, he cannot, as a matter of law, recover, although the railroad company may also have been negligent; but, on the other hand, if the view of the railroad, as the cross-

ing is approached, is so obstructed by the act of the railroad company as to render it difficult or impossible to learn of the approach of a train, or there are peculiar or complicating circumstances calculated to deceive or throw the traveler off his guard, he has the right to presume that the usual and proper signals of the approaching train will be given by the railroad company, and if they are not given, then whether it was negligence on his part, under the particular circumstances of the case, is always a question of fact for the jury to determine. Although the traveler, whenever so situated as to enable him to do so, must make vigilant use of his eyes and ears in approaching a railroad track to ascertain if there is a train coming, he is not always bound to stop for the purpose of listening.

In *Pennsylvania Railroad Company v. Beale*, the railroad from "natural and other obstructions, could not be seen nor the whistle heard," and the court held that the failure of the traveler to stop before crossing was "negligence *per se* and a question for the court." (73 Pa. St. 504.)

In *Flemming v. The Western Pacific Railroad Company*, the plaintiff was driving along the county road, which was extremely dusty. In front of him were other wagons, "which together with his own, raised a cloud of dust which was so dense that he could not see the railroad track," and the court very properly held that "if his vision was so obscured by dust that he could not see a train within fifty feet of him, the most ordinary prudence would have suggested the necessity of stopping his team, that he might listen, under the most favorable circumstances, to ascertain whether a train was approaching."

In *Mackay v. New York Central Railroad*, where the difficulty of crossing the track had been caused by the defendant itself in erecting a building and piling up wood so as to entirely obstruct the view, the court quotes with approval the remarks of the justice who gave the opinion at general term that no case had gone to the length of holding "that a person approaching a railroad crossing was bound to stop his team and wait until he could ascertain whether a train was coming, or to leave his team and go and look up and

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down the track, or the law would hold him" negligent. (35 N. Y. 78.) To the same effect are the subsequent decisions of the court in *Davis v. N. Y. C. & H. R. R. Co.*, 47 N. Y. 402, and *Dolan v. D. & H. C. Co.*, 71 N. Y. 288.)

In *Duffy v. The Chicago and Northwestern Railway Company*, the railroad track approached the highway through a deep cut in such a manner as to prevent a person approaching along the highway from the south from seeing a train coming from the north until he came very near the track. Cole, J., in delivering the opinion of the court, upon the question of contributory negligence, said: "It does not appear that the plaintiff was guilty of any carelessness or want of care in approaching the crossing. He says that he listened some for the train, but did not hear anything. He supposed the train from the north had passed down, and he was looking out for the train from the south more than from the north. The track at the north was so obstructed by the high bank on the right that it was impossible for the plaintiff to see the train approaching from that direction, until he was within fifteen feet of the track. All the precaution he could take to ascertain whether a train was approaching was to listen as he advanced towards the crossing, unless he stopped his team, got out of his wagon and went upon the track and looked north for the train. But this would be exercising extraordinary care and diligence, greater than the law imposed upon him." (32 Wis. 274.)

Some stress was made in the oral argument upon the fact that the plaintiffs did not in direct terms testify that they listened at all. It is, perhaps, enough to say of this objection, that the testimony fails to show beyond controversy that if they were listening they could have heard the rumbling sound of the train any sooner than they did while their wagon was in motion, and unless they were in law bound to stop their team, their negligence in this respect, if established, would not necessarily determine that they were not in the exercise of due care. But we think their testimony, when fairly considered, clearly shows that they were listening, although they did not, in direct words, so



state. (*Ernest v. Hudson River Railroad Company*, 39 N. Y. 64.)

It was also claimed that the plaintiffs were negligent in not stopping their team at the north side track when they saw the train coming. Upon this point the authorities justify the statement that courts are not inclined, as a matter of law, to hold parties negligent in such a case of emergency for not acting coolly and wisely. (Wharton on Negligence, sec. 304.)

The plaintiffs, after arriving at the north side track, had no time for cool deliberation as to the best course to pursue. The schedule time for the passenger train to arrive at Reno was seven o'clock. It did not arrive that morning until half-past seven. The plaintiffs were under the impression that the train had passed by, until they heard the rumbling sound as they came upon the track. Like the plaintiff in *Duffy v. The Chicago and N. W. R. R. Co.*, *supra*, they first thought the sound came from a train approaching from the opposite direction, and looked that way, and, as Bunting testifies, when they saw the train coming "there was no chance to escape." Certain it is, that the situation in which plaintiffs suddenly found themselves placed was one of great peril. They had but little, if any, time to make even a hasty survey of the field of danger and decide correctly as to their chances. They were liable to be alarmed and excited and to err in their judgment. The law in such cases does not demand the exercise of the soundest discretion without regard to the surrounding circumstances. (*Robinson v. W. P. R. R. Co.*, 48 Cal. 421; *McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 421; *Moore v. Central Railroad*, 47 Iowa, 690; *Larrabee v. Sewall*, 66 Me. 381.)

The question, therefore, whether plaintiffs then, as well as at any other time, acted with as much care and prudence as an ordinarily prudent and reasonable person, in a fair and reasonable endeavor to perform his duty and avoid danger, would exercise under similar circumstances, was, in our opinion, a question of fact that ought to have been submitted to the jury.

Upon a careful examination of all the testimony in this

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credit; that at said dates Gordon represented and claimed to be the owner of the said certificates; and the defendants had no notice at any time, until the eighteenth day of December, 1877, that plaintiff owned, or claimed to own, said certificates, or either of them, or that she had any interest in either; that on the eighteenth day of December, 1877, the plaintiff demanded of the defendants the possession of said certificates of stock, and defendants refused to deliver the same; that said certificates of stock were in the usual form of certificates representing mining shares, one being in the name of and indorsed by "Cahill & Co., trustees," the other in the name of and indorsed by "Cope, Uhler & Co., trustees;" that it is the custom in the state of Nevada and in the state of California to deal in mining stocks and transfer certificates of the Ophir and other mining stocks by indorsement on the certificates in the same manner as the certificates in question were indorsed, and that such custom had prevailed from the first of January, 1877, up to the present time.

Upon this state of facts, we are of opinion that the court erred in rendering judgment in favor of the plaintiff.

The plaintiff having allowed McSweegan and Gordon to appear at different times as the true owners of said certificates of stock, with full power and control over the property, to be exercised in such a manner as to induce innocent third parties to deal with them, or either of them, as the true owner, is estopped from asserting her title to the same as against the defendants, who had no knowledge of the true state of the title.

The rights of the defendants, as stock-brokers, do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the acts of the real owner, which precludes her from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, she caused or allowed to appear to be vested in the party who delivered the certificates to the defendants.

All the authorities cited by appellant fully sustain this

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position. See also *Moore v. The Metropolitan National Bank*, 55 N. Y. 46; *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616.)

The judgment of the district court is reversed, and cause remanded for a new trial.

[No. 999.]

## EX PARTE L. SIEBENHAUER.

**CONSTRUCTION OF STATUTE—INTENTION OF LEGISLATURE.**—In order to reach the intention of the legislature, courts may modify, restrict, or extend the meaning of the words used in a statute so as to meet the evident policy of the act.

**IDEM—ABSURD RESULTS SHOULD BE AVOIDED.**—The meaning of the words may be sought by examining the context; by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The subject-matter and policy of the law may be invoked, and the statute should be so construed as to avoid absurd results.

**IDEM—LICENSE TAX—MEANING OF WORD "SOLICITOR."**—The word "solicitor" as used in the act of reincorporate Virginia City, stat. 1879, 79, applies to individuals who are engaged or employed specially for the purpose of soliciting importuning, or entreating for the purchase of goods as an independent occupation or business for a profit or as a means of livelihood. (Hawley, J.)

**IDEM—CITY LICENSE AND COUNTY LICENSE MAY BE REQUIRED FOR THE SAME BUSINESS.**—The city of Virginia, under its charter, may require a license for carrying on any trade, business or profession, although an act of the legislature also requires a license to be taken out for carrying on the same trade, business, or profession within the county, and can enforce a penalty in case of a refusal to take out such license.

**ORDINANCE OF VIRGINIA CITY—LICENSE TAX VALID.**—*Held*, that the ordinance of Virginia City, requiring a license tax, does not discriminate against, or in favor of, any class of citizens.

**TRAVELING MERCHANT REQUIRED TO PAY A LICENSE AS A MERCHANT.**—Petitioner kept a stock of goods in San Francisco, California, and comes to Virginia City, Nevada, for the purpose of soliciting orders for goods: *Held*, that the city of Virginia was authorized to impose and collect a license tax from him as a merchant. (Beatty, C. J., and Leonard, J.)

**HABEAS CORPUS.** The facts appear in the opinion.

*Lewis & Deal*, for Petitioner.

I. The charter of a municipal corporation must be strictly construed. (Sedgwick on Stat. Const. 281-83.) If there be any doubt, the doubt must be resolved in favor of

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the petitioner. (1 Dillon on Munic. Corp. sec. 55 and n.) The mode and manner of taxation must be strictly followed. (1 Dillon on Munic. Corp. sec. 620.)

II. Persons in the petitioner's business are never known as, or called, solicitors. The court can not conclude that such persons were intended by the legislature.

III. The state or county under a state law collects the same kind of tax, and imposes a penalty for refusal. The city cannot do the same thing. (23 Conn. 128.)

IV. The ordinance discriminates against foreign solicitors or goods brought from without the city of Virginia, and is therefore void. *Ward v. Maryland*, 12 Wall. 418, and authorities cited in *Ex parte Robinson*, 12 Nev. 271; 49 Mo. 559; Sedgwick on Construction, 360, note.)

*John Knox Brown and Wm. Woodburn, for Respondent.*

I. The word "solicitor" in the ordinance is not used in any sense contrary to the general meaning.

II. A municipal corporation may tax the business of such persons as may have already obtained license from the state to prosecute their respective callings. (*Wright v. Mayor of Atlanta*, 54 Ga. 645; *Simpson v. Savage*, 1 Mo. 255; 1 Dillon on Munic. Corp. sec. 53.)

III. The ordinance applies solely to persons doing business, regardless of their places of residence. By coming within the town and acting there, a person becomes liable as an inhabitant and a member of the corporation. (*Commissioners of Wilmington v. Roby*, 8 Ired. 250; *Commissioners of Edenton v. Capeheart*, 71 N. C. 156.)

By the Court, HAWLEY, J.:

1. Petitioner is a citizen of the state of California. He came from San Francisco for the purpose of soliciting orders from the merchants of Virginia City, and did obtain orders for merchandise, which orders were to be filled in San Francisco by petitioner and shipped to said merchants in Virginia City. He testifies that he and others, who are engaged in this occupation or business, are known among merchants as commercial or traveling agents, and are not

called solicitors. He was arrested upon a complaint charging him with soliciting such orders without taking out and paying a license therefor as provided in section 2 of an ordinance of Virginia City, which reads as follows:

“Every person or firm engaged in the business of soliciting the purchase of goods, wares or merchandise within the limits of the city of Virginia, to be sent to said city of Virginia from places beyond the limits of said city, or upon orders to be filed elsewhere than in said city, and every person bargaining or selling any goods, wares, or merchandise, by sample or otherwise, in said city, where the same are to be sent to said city from beyond its limits, shall be deemed a solicitor and shall pay quarterly for a license to carry on said business, according to the monthly receipts or sales of such solicitors,” as set forth in a schedule.

Section 3 of said ordinance provides that any person, firm or association who shall be engaged in said business without having first taken out a license therefor shall, upon conviction, be punished by a fine or by imprisonment in the city jail, as therein prescribed.

The authority for the passage of said ordinance is derived from the act of the legislature “approved March 6, 1879,” which gives to the board of aldermen power “to fix and collect a license tax on and regulate \* \* \* solicitors.” (Stat. 1879, 79.)

The statute does not attempt to define the word “solicitors.” Lexicographers give it two meanings. First. One who solicits, importunes, entreats, or asks with earnestness; one who solicits for another. Second (law.) An attorney or advocate; a person admitted to practice in courts of chancery or equity.

Under the code and practice in this state, the term solicitor is never applied to attorneys-at-law. It relates to attorneys practicing in the federal courts in chancery or equity. We think it is manifest that the word solicitors, as used in the statute, was not intended to apply to attorneys-at-law.

Counsel for petitioner claim that its meaning is too vague, general, and indefinite to enable the court to determine who

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was intended. It is undoubtedly true that the first definition, as above given, applies, in its general and broadest sense, to all persons who solicit orders or favors of any kind or character. To so apply it would lead to manifold absurdities. It would, if so construed, authorize the municipality of Virginia City to fix and collect a license tax upon every individual who might, at any time, be called upon to solicit money for political, charitable, religious, and many other similar purposes. But it does not necessarily follow that we are bound to give to the word any meaning that would lead to such absurdities.

Our duty begins and ends with determining the meaning intended by the legislature. If that can be ascertained by any legal means, we are compelled to so construe it as to give effect to the intention of the legislature. This principle is cardinal and universal.

In order to reach the intention of the legislature, courts are not bound to always take the words of a statute either in their literal or ordinary sense, if by so doing it would lead to any absurdity or manifest injustice, but may in such cases modify, restrict or extend the meaning of the words so as to meet the plain, evident policy and purview of the act and bring it within the intention which the legislature had in view at the time it was enacted. (*Gibson v. Mason*, 5 Nev. 285; *Reiche v. Smythe*, 13 Wal. 164; *Burgett v. Burgett*, 1 Ohio, 480; *McIntyre v. Ingraham*, 35 Miss. 52; *Camp v. Rogers*, 44 Conn. 291; *Castner v. Walrod*, 83 Ills. 178; *Fisher v. Patterson*, 13 Pa. St. 338; Bishop on Statutory Crimes, section 212.)

The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The entire subject-matter and the policy of the law may also be invoked to aid in its interpretation, and it should always be so construed as to avoid absurd results. (*Roney v. Buckland*, 4 Nev. 45; *State ex rel. Keith v. D. and V. T. R. Co.*, 10 Id. 155; *Silver v. Ladd*, 7 Wal. 219; *State v. Judge*, 12 La. An. 777; *State v. Mayor etc.*, 35 N. J. L. 196.)

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Plowden says that the "intent of statutes is more to be regarded and pursued than the precise letter of them, for oftentimes things which are within the words of statutes are out of the purview of them, which purview extends no further than the intent of the makers of the act, and the best way to construe an act of parliament is according to the intent rather than according to the words." (2 Plowden's Rep. 464.)

Can we, by applying these or any other well-recognized rules of construction, ascertain the meaning which the legislature intended should be given to the word "solicitors"? The evident object of the law was to authorize the board of aldermen of Virginia City to fix and collect a license tax upon every kind and character of business that might be conducted or carried on within the corporate limits of said city. The act names almost every conceivable sort of occupation or business: "Auctioneers, assayers, barbers, bootblacks, bootmakers, \* \* \* cobblers, brokers, factors, \* \* \* general agents, \* \* \* grocers, merchants, traders, \* \* \* manufacturers, \* \* \* public criers, bellringers, \* \* \* solicitors, tailors, \* \* \* tradesmen, artisans, \* \* \* and stock brokers."

What was meant, in this connection, by the word "solicitors"? The other words apply to individuals who conduct or carry on some particular occupation or business. Does not this fact afford a key which will unlock and throw open the true meaning and intention of the legislature with reference to the word "solicitors"? In my opinion this word has the same specific meaning as the other words; that is, it applies to all individuals who are engaged or employed specially for the purpose of soliciting, importuning or entreating for the purchase of goods, etc. It is an independent occupation or business. The legislature only intended to reach those persons who might be employed in this particular business as a means of making a living. The assayers, barbers, and bootblacks, as well as the tailors, merchants, and tradesmen, solicit custom in their respective callings, but they are only required to take out a license as assayers, etc., to enable them to carry on and conduct their

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particular occupation or business. The word solicitors, as used in the ordinance, does not apply to them from the mere fact that in conducting their business they solicit custom from the public.

In *Joyce v. City of East St. Louis*, the charter gave the city power "to license, tax, and regulate and control wagons and other vehicles conveying loads in the city." Joyce kept a family grocery store, and used a one-horse spring wagon, without having any license therefor, in delivering goods sold to his customers. He did not use the wagon for hire, nor in any other manner than in the prosecution of his business as a grocery merchant. The court said it was not intended by the charter to fix a tax upon such vehicles "as should only be used by persons in the prosecution of their ordinary private business," and that the true construction of the charter "does not authorize the licensing of all vehicles conveying loads in the city, but such, only, of them in respect to which it is proper and customary with municipal authorities to prescribe the rates of carriage, viz., those used \* \* \* by common carriers in the city for hire." (77 Ill. 158.)

Of course, if any person combines within himself more than one distinct occupation or business, he could be compelled to take out a license for each occupation or business. (*Neal v. Commonwealth*, 21 Gratt. 519.) To determine this question, the good faith of the party may often be involved. (*Carter v. The State*, 44 Ala. 31.) But in every case, it is only the occupation or business that is taxed. The mere fact that a clerk, merchant or other person solicits orders or favors in their line of business, does not necessarily bring them within the law authorizing a license tax to be imposed upon solicitors.

The law means persons engaged in that particular class of business for a profit, or as a means of livelihood. (*Wesl v. State*, 52 Ala. 19; *Gillman v. State*, 55 Id. 248; *Commonwealth v. Gee*, 6 Cush. 179; *Merriam v. Langdon*, 10 Conn. 468.)

It may be admitted that the legislature did not select the most appropriate word to express their actual meaning.



Traveling merchants or commercial agents would perhaps have been better; but, as was said by this court in *Thorpe v. Schooling*, "the intention of the legislature controls the courts," and "whatever that body manifestly intended, is to be received by the courts as having been done by it, provided it has in some manner, no matter how awkwardly, indicated or expressed that intention." (7 Nev. 17.)

Taking a plain, common-sense view of the statute, and keeping within the well-defined canons of construction, it seems to me that the word "solicitors," as used in the statute, does apply, and was by the legislature intended to apply, to that class of persons, of whom petitioner is one, whose occupation and business as conducted within this state is that of a solicitor, and that by virtue of said act the board of aldermen had authority to pass said ordinance, and that the courts are bound in such cases to sustain and enforce its provisions.

2. The city of Virginia, authority therefor being given in its charter, may require a license for conducting or carrying on any trade, business, or profession within its corporate limits, although an act of the legislature also requires a license to be taken out for conducting or carrying on the same trade, business, or profession within the county, and can enforce a penalty in case of a refusal to take out such license. (1 Dillon on Municipal Corporations, sec. 53; *Simpson v. Savage*, 1 Mo. 359; *Ambrose v. State*, 6 Ind. 351.) There are cases, like that of *Southport v. Ogden*, 23 Conn. 132, cited by petitioner's counsel, where the offense consists in the commission of an act also prohibited by the general law of the state, where the courts have held that, by the passage of the general law, the legislature intended to assume the exclusive regulation of such acts, and that if the by-laws of the city were sustained, and if the prosecution and conviction of a person under the general law would not be a bar to a subsequent prosecution for the same act under the by-law, the consequence would be that such person might be tried and punished twice for the same offense, and upon this reasoning the by-laws were declared invalid. (*Jenkins v. Mayor*, 35 Ga. 145; *Town of Washington v.*

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Opinion of Beatty, C. J., and Leonard, J., concurring.

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*Hammond*, 76 N. C. 34.) But in cases like the present no such reason or results follow. If petitioner refuses to take out either a county or a city license, and should be prosecuted and convicted in both cases for such refusal, he would not be twice convicted for the same offense. The conviction, in each case, is for an act of omission upon the part of petitioner. In one case it is his refusal to take out a county license as the law requires. In the other case it is his refusal to take out a city license as required by the ordinance. The law requiring parties to take out a county license does not, in our opinion, in any manner conflict with the law authorizing the municipality of Virginia City to pass an ordinance requiring such persons to also take out a city license.

We have not been referred to any authority, and we do not believe any can be found, in opposition to the views herein expressed.

The great weight of authority seems to sustain the position as stated by Cooley, that "the same act may constitute an offense against both the state and municipal corporation, and may be punished under both without any violation of any constitutional principle." (Cooley on Constitutional Limitations, 199, and authorities there cited; *Howe v. Treasurer of Plainfield*, 37 N. J. L. 145.)

3. The ordinance does not discriminate against, or in favor of, any class of citizens. It applies to all persons, irrespective of their place of residence, who may be engaged in the business therein designated, within the corporate limits of the city. (*Ex parte Robinson*, 12 Nev. 271.)

Petitioner is remanded into custody.

BEATTY, C. J., and LEONARD, J., concurring:

It is unnecessary, in my opinion, for the purpose of deciding this case, to ascertain the meaning of the word "solicitors," as employed in the amended charter of Virginia City. It is admitted that the petitioner is a traveling merchant—that is, he keeps a stock of goods in San Francisco and comes to Virginia City for the purpose of soliciting orders. He carries on the business of selling goods in Vir-

## Argument for Appellant.

ginia City, and he is none the less a merchant doing business there because he keeps his stock of goods in another state and travels about from place to place. The charter empowers the city of Virginia to impose a license tax upon merchants, and the class of persons described in the ordinance are merchants. It is of no consequence that the ordinance calls them "solicitors." If the city has authority to tax them as merchants, it may call them by any name it pleases.

Upon the other points discussed, I concur in the opinion of Justice Hawley, and I concur in the judgment.

[No. 973.]

THE BANK OF CALIFORNIA, APPELLANT, v. W. S.  
WHITE ET AL., RESPONDENTS.

**WRITTEN CONTRACT—WHEN MAY BE VARIED BY PAROL EVIDENCE.**—Defendants were jointly liable, under a written contract, to H. and B. for the construction of the International Hotel. Plaintiff loaned defendant White certain money, which was used in the construction of said building, and brought suit against all the defendants as partners. On the trial, each of the defendants, other than White, was allowed to testify that he was not a partner with the defendant White; that he had no account with plaintiff, and that he had nothing to do with the contract except as a bondsman: *Held*, that this evidence was properly admitted.

**IDEM.**—The rule that parol evidence is not admissible to vary the terms of a written contract, is confined in its operation to the parties to the contract, their representatives, and those claiming under them; it has no application against any party who is a stranger to the instrument.

**IDEM—BOTH PARTIES MUST BE BOUND.**—Unless both parties are bound by the contract, either is at liberty to show, by parol, a different state of facts from that set out in the writing.

**APPEAL** from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

*Whitman & Wood*, for Appellant.

I. Even under the evidence of defendants, the contract constituted them partners in the special enterprise between

## Points Decided.

It has no application whatever as against any party who is a stranger to the instrument. (Greenl. on Ev., sec. 279; *Krider v. Lafferty*, 1 Whart. 314; *Woodman v. Eastman*, 10 N. H. 359; *Edgerly v. Emerson*, 3 Fos. 565; *Furbush v. Goodwin*, 5 Id. 453; *Hughes v. Sandal*, 25 Tex. 165; *Blake v. Hall*, 19 La. An. 52; *Talbot v. Wilkins*, 31 Ark. 420; *Van Eman v. Stanchfield*, 10 Minn. 265; *Hussman v. Wilke*, 50 Cal. 251.)

The Bank of California was not a party to the contract and is not bound by it. It was at liberty to show, if it had so desired, that the written contract did not disclose the true *status* of the respective parties.

As it could not be bound by the terms of the contract, the defendants were at liberty to show the true character of the transaction. Unless both parties are bound, either is at liberty to show, by parol, a different state of facts from that set out in the writing. (*Reynolds v. Magness*, 2 Ire. 30; *Venable v. Thompson*, 11 Ala. 148; *Strader v. Lambeth*, 7 B. Mon. 590; *Smith v. Moytihan*, 44 Cal. 64; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 234.)

The ruling of the court in admitting the testimony of defendant was correct.

The judgment of the district court is affirmed.

[No. 901.]

A. M. COHEN, RESPONDENT, v. EUREKA AND PALISADE RAILROAD COMPANY, APPELLANT.

**ACTION AGAINST RAILROAD COMPANY—NONSUIT—WHEN SHOULD NOT BE GRANTED—QUESTIONS OF FACT.**—Plaintiff and his companions were strangers in Eureka, and ignorant of the existence of the defendant's railroad. At the close of the plaintiff's case, there was no evidence to show that plaintiff could have seen the train, as it approached the crossing, in season to avoid the accident, except that other people in different localities, near where the collision occurred, heard and saw the approaching train in time to have avoided the accident: *Held*, that a nonsuit was properly refused.

**IDEM—RIGHTS OF STRANGERS.**—The fact that plaintiff and his companions were strangers in Eureka, and did not know they were approaching a railroad crossing, was an important fact to be considered by the jury

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Statement of Facts.

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**ISSUE—CONTRIBUTORY NEGLIGENCE.**—The testimony upon the part of the defendant tended to show that if the plaintiff, or any of his companions, had looked and listened, they could have seen and heard the approaching train in time to have avoided the accident: *Held*, upon a review of all the testimony, that the question whether or not plaintiff was guilty of contributory negligence, was properly submitted to the jury as a question of fact.

**EVIDENCE SUFFICIENT TO SUSTAIN VERDICT.**—Rule as to substantial conflict of evidence enforced.

**REASONABLE CARE—NEGLIGENCE.**—At the request of plaintiff, the court gave the following instruction to the jury: "No. 4. You are instructed, that if you believe, from the evidence, that the plaintiff, at or about the time set forth in the complaint, was traveling upon the road which is crossed by the track of the defendant, and was exercising reasonable care for his own safety, and in attempting to cross the railroad track of the defendant, the wagon, upon which the plaintiff was riding, was overturned by the cars of the defendant; and that, at the time that said accident occurred, the said defendant was operating their said cars and locomotive in a negligent manner, or neglected to ring the bell, or blow the whistle, or otherwise signal their approach, and, by reason of such neglect, the plaintiff was injured, you will find a verdict for the plaintiff." *Held*, correct.

**DAMAGES—WHAT MAY BE CONSIDERED.**—The court, at plaintiff's request, gave the following instruction: "No. 5. You are instructed, that if you find for the plaintiff, in assessing damages, you will take into consideration, not only the cost of medical treatment and loss of time which the plaintiff has sustained, but also bodily suffering; and, if the injury is permanent, such damages as he may sustain by reason of such suffering, as well as his incapacity for earning money in the future." *Held*, correct.

**RIGHTS AND DUTIES OF TRAVELER AND OF RAILROAD COMPANY—EQUAL.**—The court instructed the jury, "That where a railroad is crossed by any street, road, or public highway, the rights of the traveling public and the railroad company, to the use of said crossing, are equal, and both parties are bound to use ordinary care, the one to avoid committing, and the other to avoid receiving, an injury." *Held*, correct.

**ISSUE—SPEED OF THE TRAIN.**—The court instructed the jury, that it is the duty of the employes of a railroad company "to approach the crossing at such rate of speed as would enable them to check the train, if necessary." *Held*, erroneous.

**APPEAL** from the District Court of the Sixth Judicial District, Eureka County.

The reason given by the court for the refusal of the fifth instruction asked by appellant (referred to in the opinion)

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Statement of Facts.

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was: "That the law asked for has been given in the instructions asked for as modified by the court."

The fourth and fifth instructions given for respondents, and referred to in the opinion, are inserted in full in the head notes.

The second, twelfth, fourteenth, and fifteenth instructions asked by appellant, read as follows:

2. "You are instructed that it is the clear duty of a person as he comes near to and upon a railroad crossing, to use all proper precautions to avoid injury, and the least he can do is to look in both directions; if he does not do so, and the omission contributes to his injury, he is guilty of such negligence as will bar his recovery, notwithstanding the negligence of those in charge of the train in omitting to sound the whistle or ring the bell."

12. "You are instructed that it is the duty of every person approaching a railroad track to look for and to see the track itself, if visible to a person of ordinary eyesight; and if you find from the evidence that the accident in this action was primarily due to the fact that the plaintiff's driver was negligent in looking for and seeing the track itself as he approached the crossing, then your verdict must be for the defendant."

14. "You are instructed that persons approaching the track of a railroad are bound to use their eyes in looking for a track; and if you find that the driver of the plaintiff's wagon did not see the track at all as he approached it, if the track was visible, it is a circumstance indicating such negligence on the part of the driver, as would prevent a recovery by plaintiff in this action."

15. "You are instructed that if you find from the evidence that the driver of the plaintiff's wagon, and the witness, Algyn, were engaged in talking to each other, as they approached the railroad crossing, and neither looked nor listened for any sign of approaching danger, nor for the track itself, such conduct is evidence of negligence sufficient in itself to bar a recovery by plaintiff in this action."

The district judge modified the second, twelfth and fourteenth, by the addition of the following sentence: "This

## Argument for Appellant.

is true, provided the plaintiff, or the driver, knew of the existence of the railroad track, or it could be seen by them, or ought to have been seen by a prudent man."

The fifteenth was modified by adding the following: "Provided that the plaintiff or the driver knew that the track was there, or it could be seen by them if they had looked for it, or that there was no obstruction which prevented them from seeing the coming train."

*Thomas Wren, Crittenden Thornton, and C. J. Lansing,*  
for Appellant.

I. The evidence was insufficient to justify the verdict, and the court erred in overruling defendant's motion for a nonsuit. There is no substantial conflict of evidence upon any material issue. The rule that appellate courts will not interfere with the verdict where there is a substantial conflict of evidence is only applied where there is a real and substantial conflict upon material points, and has no application where the conflict is more apparent than real, or does not relate to controlling issues. (*Rice v. Cunningham*, 29 Cal. 495; *Lyle v. Rollins*, 25 Id. 440.)

If the plaintiff's cause of action, or the defendant's defense, be proved by a single witness, who stands unimpeached before the jury, and his testimony not denied, it must be received as true. In such a case, the court may direct the jury in terms to find for one party or the other. (1 Phillips' Evidence, C. & H.'s Notes, 4th Am. ed. 711-12; *Newton v. Pope*, 1 Cowen, 109; *Beekman v. Bennis*, 7 Id. 29; *Saville v. Lord Farnham*, 2 Mann. & Ryland, 216; *Nichols v. Goldsmith*, 7 Wendell, 160; *Demyer v. Souzer*, 6 Id. 436.)

The testimony of witnesses apparently inconsistent is always to be so construed as, if possible, to exempt them from the imputation of perjury. (*Johnson v. Scribner*, 6 Conn. 185; *Woodcock v. Bennet*, 1 Cowen, 750.)

The testimony of witnesses that they did not hear the bell is not entitled to any weight against the positive evidence of other witnesses, unless it appears that they were looking, watching and listening for the bell to ring. (*Steeves v. Oswego and Syracuse R. R. Co.* 18 N. Y. 424; *Culhane v.*

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*N. Y. C. & H. R. R. Co.* 60 Id. 187; *Beiseigel v. N. Y. C. R. R. Co.* 40 Id. 19; *Wilds v. Hudson River R. R. Co.* 29 Id. 329.)

The following facts were established in this case beyond controversy:

1. The plaintiff and his fellow travelers were riding together on a straight road, in broad daylight, in the direction of a railroad track, which ran at right angles to their line of approach.

2. At any point within ninety feet of the track, the railroad was visible for a distance of two hundred and forty feet in length, and was raised above the level of the surrounding country, on an embankment of from three to five feet in height.

3. Neither the plaintiff nor his fellow-passengers saw the track, or looked for it.

4. The only reasons for their not seeing it were their inattention as to where they were going, and talking among themselves.

5. The noise of the approaching train was distinctly audible, heard, in fact, by others at ten times greater distance from the train than the plaintiff and his companions, and which ought to have been heard by the latter.

6. The speed of the train was certainly not more than eight miles an hour, and that of the team equally fast.

7. The bell on the train was ringing up to the instant of the accident.

If the first six of the facts above stated are correct, or if the seventh is established, then the conclusion of contributory negligence upon the part of the plaintiff is unavoidable. Where the facts are admitted or established by uncontradicted evidence, the question of negligence is a matter of law for the court. (*Gavitt v. Manchester & Lawrence R. R.* 16 Gray, 505; *Flemming v. Western Pacific R. R.* 49 Cal. 257; *Pittsburg R. Co. v. McClurg*, 56 Pa. St. 294; *Beiseigel v. N. Y. C. R. R.* 40 N. Y. 19; *Solen v. Virginia and Truckee R. R. Co.* 13 Nev. 107.)

A person approaching a railroad-crossing must use his eyes and ears to detect and perceive even apprehended



## Argument for Appellant.

peril from trains. (*Baxter v. Troy & Boston R. R.*, 41 N. Y. 502; *Ernst v. Hudson River R. R.*, 39 Id. 61; *Wilcox v. Rome, W. & O. R. R.*, Id. 358; *Grippen v. N. Y. C. R. R.*, 40 Id. 34; *Gaynor v. Old Colony R. R. Co.*, 100 Mass. 208; *Butterfield v. Western R. R. Co.*, 10 Allen, 532.)

If the place of danger is visible to the person approaching it, such person cannot excuse himself upon the plea that he was not aware of its existence. A railroad-crossing is a place of danger; and common prudence requires that a traveler on the highway, as he approaches one, should use the precaution of looking to see if a train is approaching. (*Allyn v. Boston & Albany R. R. Co.*, 105 Mass. 77; *Gaynor v. Old Colony & Newport Railway Company*, 100 Id. 208; *Baxter v. Troy & Boston R. R. Co.*, 41 N. Y. 502.)

II. The court erred in refusing to give the fifth instruction requested by defendant. This instruction stated the law correctly. (*Butterfield v. Forrester*, 11 East, 60; *Gay v. Winter*, 34 Cal. 153; *Needham v. S. F. & S. J. R. R.*, 37 Id. 419; *Robinson v. Western Pacific R. R.*, 48 Id. 423.) There is no remedy for an injury which is the consequence of negligence on both sides. (*Wynn v. Allard*, 5 Watts & S. 524; *Simpson v. Hand*, 6 Whar. 311; *Fox v. Glastonbury*, 29 Conn. 204.) Where the negligence of the two parties is contemporaneous, and the fault of each relates directly and proximately to the occurrence from which the injury arises, the plaintiff cannot recover, if by due care on his part he might have avoided the consequences of the carelessness of the defendant. (*Lucas v. New Bedford R. R. Co.*, 6 Gray, 64; *Waite v. North Eastern R. R. Co.*, 1 Ellis, Blackburn & Ellis, 719; *Robinson v. Cone*, 22 Vt. 213; *Troy v. Vermont Central R. R.*, 24 Id. 487; *Birge v. Gardiner*, 19 Conn. 507; *Button v. H. R. R. R. Co.*, 18 N. Y. 248; *Greenland v. Chaplin*, 5 Exch. 243.)

III. The allusion as to the rate of speed in the third instruction asked by plaintiff was unnecessary and misleading.

IV. The court erred in modifying the second, twelfth, fourteenth, and fifteenth instructions asked by defendant. These instructions simply declared the legal proposition

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Argument for Respondent.

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that a man approaching a railroad track in broad daylight, which is in full view for a hundred feet before he reaches it, must see the track. If he does not, it is gross negligence. Any danger which is conspicuous must be seen. An omission to look is negligence. To look and to see is an imperative duty. (*Gilman v. Inhabitants, etc.*, 15 Gray, 580; *Hill v. Seekonk*, 119 Mass. 88; *Fallon v. City of Boston*, 3 Allen, 38; *Raymond v. City of Lowell*, 6 Cush. 535; *Cox v. Westchester Turnpike Company*, 33 Barb. 418.) In modifying these instructions, the district judge confused what was clear, and repeated that which needed no repetition, in multiplying excuses for the plaintiff which had no foundation in the evidence, and no necessary relation to the case presented to the jury.

*R. M. Beatty and G. W. Baker, for Respondent.*

I. The evidence is sufficient to justify the verdict. The court did not err in refusing to grant a nonsuit.

1. A man driving along a public road is not compelled to stop his team and run ahead and look up and down a railroad track and into a long deep cut to ascertain whether the train is coming or not, although he may know that the track is there, and trains frequently pass the point where he wishes to cross, and much less is he required to do so when he does not know, and as a prudent man can not know, that even the track is there.

2. A railroad company is compelled by law to signal the approach of its trains to a crossing, and our statute provides a particular signal or warning, namely, that a bell be rung.

3. The failure to ring the bell, or give other sufficient warning under the peculiar circumstances of this case, was gross negligence.

4. The jury, by their verdict, decided that defendant did not ring the bell, or give other signal of their approach.

5. If the bell did not ring, and the servant of defendant saw plaintiff's team at a distance of twenty-five feet from the track, with the driver's attention attracted away, and did not use any endeavor to warn the plaintiff of his danger,

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his failure in this of itself is gross negligence upon the part of defendant sufficient to entitle the plaintiff to recover.

6. To warrant this court in ordering a new trial, it must appear that if defendant had admitted that the bell was not rung, and no signal or notice given of the approach of the train, plaintiff could not recover.

The failure to give any signal of the approach of defendant's train of cars, at this crossing, was established by the clear weight of evidence, and is fortified by the verdict of the jury, and therefore ceases to be a debatable question in this court. (*State v. Yellow Jacket Mining Co.*, 5 Nev. 415; *Lewis v. Wilcox*, 6 Id. 215; *Longabaugh v. V. & T. R. R. Co.*, 9 Id. 302; *State v. C. P. R. R. Co.*, 10 Id. 49; *Solen v. V. & T. R. R. Co.*, 13 Id. 106.)

The numerous authorities cited by appellant contain no legal principles in opposition to the verdict of the jury in this case.

II. The third instruction is not erroneous. The testimony shows the crossing was a public one. This justified the giving of this instruction. (*Kennayde v. W. P. R. R.*, 45 Mo. 262; *Delany v. Mil. & St. P. R. R.*, 33 Wis. 71; *K. P. R. R. v. Pointer*, 9 Kan. 628; *Shearman & Redfield on Negligence*, sec. 491; *Solen v. V. & T. R. R.*, 13 Nev. 106; *Continental Imp. Co. v. Stead*, 5 Otto [95 U. S. Supreme Ct.] 161.)

III. The fifth instruction asked by defendant was erroneous. The principle asserted, that it must be shown that the plaintiff was free from negligence, presupposes the necessity of the plaintiff establishing by his own evidence the absence of negligence in himself; and it was therefore properly refused. (3 Saw. 446; 48 Cal. 409; 15 Wall. 401; *Shearman & Redfield on Negligence*, sec. 34; 16 Pa. St. 463; 29 N. J. Law. 544; *Needham v. S. F. & S. J. R. R.*, 37 Cal. 409.)

By the Court, LEONARD, J.:

Appellant seeks a reversal of the judgment in this case: First, because of the refusal of the court to nonsuit the plaintiff, upon the ground that his own negligence con-

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tributed to the injury complained of, and that the evidence was insufficient to justify the verdict; and second, upon exceptions to the charge to the jury.

Respondent was injured by appellant's cars while attempting, with a team, to cross appellant's railroad track in the town of Eureka, and this action was brought to recover damages for such injury.

He recovered judgment for one thousand eight hundred and seventy-five dollars.

This appeal is taken from an order denying appellant's motion for a new trial, and from the judgment.

Before any witnesses were examined, by consent of both parties, the court and jury visited and inspected the place of the accident, at which time a train of cars was run over the road. All the material testimony, and all the instructions given, are contained in the transcript. A map of the scene of the accident, which was before the court and jury, is not before us.

The testimony given on behalf of respondent, before appellant's motion for a nonsuit, showed the following facts:

On the morning of October —, 1877, respondent, with two men, named Algin and Lawrie, the latter having been his driver, were riding in a two-horse covered wagon from Eureka to Ruby Hill. The blinds on the side of the wagon were rolled up. The driver and Algin were sitting on the front seat, while respondent was upon the back seat. They were strangers in Eureka, and did not know of the existence of the railroad. As they approached the crossing, Algin and Lawrie were talking, and none of them looked for, or saw, the railroad or the crossing. The horses were trotting. As the team came to the crossing appellant's train struck it, upset the wagon and seriously injured respondent. No one in the wagon saw the track until the collision. The engine was in the rear of the train, which was running at about its usual rate of speed, say eight miles an hour. The cars were flat, and were used for carrying ore from the mines. South of the crossing the cars passed through a cut. Neither of the persons in the wagon heard any bell or whistle, or the moise of the train. Other persons differently situated heard

the train, but none of them heard either bell or whistle. Respondent testified: "I am positively certain the bell was not rung; if so I should have heard it." Algin did not hear the bell or whistle, and said if the bell had been rung they would have heard it. Quantrell, who was working at Fiske's house, 150 feet north of the crossing, heard neither bell nor whistle, and would have heard them had they been sounded. Mrs. Fiske was certain the bell was not rung or the whistle blown, otherwise she would have heard them. Mrs. Combs knew the bell was not rung or the whistle blown, or she would have heard them.

The crossing was made some time in 1874, or thereabouts, by Mr. Shaw, president of the Eureka Consolidated Mining Company, which built and then owned the road. It was made for the use, and at the request, of Mr. Chandler, the witness. When first made, it was not a public crossing; as at that time no one resided on the west of the track. Afterwards, however, houses were built on that side, and the people used it as a crossing. For the accommodation of the people, Mr. Shaw changed the road leading through Clark street to that point, for the reason that the crossing in question was more convenient than the one where Clark street crossed.

After proof of the above facts by respondent, appellant moved for a nonsuit, upon the ground before stated, and now claims that the court erred in refusing it. This alleged error may be summarily disposed of.

In their brief, counsel for appellant say:

"We do not contend that the burden of proof devolves upon the plaintiff to show diligence or freedom from negligence. But if, upon the whole evidence, all care, diligence, heedfulness, vigilance, and caution appear to be lacking, the plaintiff can not recover." It can not therefore, be claimed that appellant was entitled to a judgment of nonsuit, if a *prima facie* case of negligence on its part was clearly established, unless respondent's evidence also showed that, by his own negligence or want of ordinary care and caution, he so far contributed to the injury complained of, that but for such negligence or want of care and caution, the injury

would not have happened. (*Solen v. V. & T. R. R. Co.*, 13 Nev. 126-128.)

That the testimony given for respondent showed that no bell was rung or whistle blown, cannot be doubted. Under the statute, a failure to ring the bell for a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, is negligence *per se*. It is true that one or two of respondent's witnesses merely said: "I did not hear the bell," while the rest said, either, "I did not hear it, but if it had been rung I should have heard it;" or "I am positive that it did not ring; if it had I should have heard it;" but the witnesses were in position to hear, and their testimony was just as positive as such testimony can ever be. It was just as positive as it would have been had it not been fortified by the statement, "if it had been rung I should have heard it." It was much more than a mere, "I did not hear." No honest witness could have testified as several did, without saying in substance: "The bell was not rung. My reasons for so testifying are, that it could not have been rung without my hearing it, and I did not hear it." What has been said in relation to the ringing of the bell is equally true of the blowing of the whistle. Two witnesses were just as positive that the latter was not blown as they were that the first was not rung.

A *prima facie* case of negligence on the part of appellant was clearly established, and damages resulting from the accident were shown by respondent's testimony. It now remains to be considered whether or not respondent's testimony also showed, by clear and undisputed facts, such contributory negligence on his part, that he should not recover.

When he rested, there was no evidence tending to show that any portion of the railroad was visible to a person approaching the track in a wagon from the east, or that respondent and his driver could have seen any portion of it, before they did, if they had looked for it. Proof that respondent and his driver did not look for or see the railroad, without also showing that they could have seen it if they had looked, did not tend even to prove contributory negligence.

Nor was there any evidence that respondent could or should have seen the train, as it approached the crossing, in season to avoid the accident. Other people in different localities saw it before it reached the crossing; but that fact did not tend to show that respondent could or should have seen it; other persons differently situated heard the train; but there was no evidence that plaintiff could or should have heard it. Besides, it was in proof that the engine was in the rear of the train as it was approaching the crossing through the cut. Under such circumstances, especially in view of the further fact that respondent and his companions were strangers and ignorant of the existence of the railroad, it was for the jury to decide, from all the facts and circumstances, whether or not respondent contributed to his injury. *Commonwealth v. Fitchburg R. R. Co.*, 10 Allen, 191, 192; *Solen V. & T. R. R. Co.*, *supra*; *Bunting v. Central Pacific R. R. Co.*, recently decided by this court.

The motion for a nonsuit was properly denied. But it is contended that the evidence is insufficient to justify the verdict, because the whole evidence shows that the appellant was *not* negligent and that respondent *was*. It is conceded that the proof of the latter consists only in the omission of respondent and his companions to see the track, if it was visible. To contradict the claim of negligence on its part, appellant introduced a witness, who was riding on the cow-catcher of the locomotive at the time of the accident, the engineer in charge of the train, and two brakemen upon the same. They all testified that the bell was rung for a greater distance than the statute requires. The engineer stated that he did not sound the whistle, while one brakeman testified that it was sounded.

Upon the whole testimony in relation of the ringing of the bell, or giving other signal, little need be said. First, there was much to sustain the verdict upon this point; and, second, there was a substantial conflict of testimony upon this material issue. Unless it shall appear that the court erred in its instructions to the jury, we shall consider appellant's negligence established by the verdict.

We now come to the question of respondent's omission to

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see the track. Can this court say from the whole case as presented, as a question of law, that the omission was such negligence on his part, that he ought not to recover, although it be true that appellant's negligence is fully established? There is no proof or pretense that the track in the cut or the train when passing therein, could have been seen by respondent. It was only fifteen feet from the north end of the cut to the crossing. But it is contended that respondent ought to have seen eighty yards of the track north of the cut which was in sight. Mr. Rock, a civil engineer, testified as follows for appellant: \* \* \* "I made the map of the scene of the accident which is now on the blackboard (in court). It was made by actual measurement by myself, and is correct. \* \* \* The road laid down on the map which crosses the railroad track from the east, is the road on which plaintiff's wagon came up to the crossing. This road, as laid down on the map, is about seventy-five or eighty feet long, and is slightly up hill all the way. This road crosses the track very nearly at a right angle. \* \* \* From the mouth of the cut running north, the track is in sight for nearly eighty yards. It is upon an embankment of an average height of three to five feet. It is in sight for that distance from any point on the road coming from the east as you approach the track." Upon the above testimony, which was uncontradicted by any evidence given in court, counsel for appellant claim that this court should declare, as a question of law, that respondent was guilty of contributory negligence, and cannot recover. This is the interesting portion of the case; but we entertain no doubt as to our duty. This case, like all others of its kind, must be decided upon its own facts and all the circumstances surrounding it. That a case might arise where a stranger crossing, or attempting to cross, a railroad track at a regular crossing, would be deemed negligent in failing to see the track, is undoubtedly true. Is this such a case? We are referred to *Allyn v. Boston and Albany Railroad Company* as an authority in favor of the proposition that it is. In that case, the plaintiff and a companion were riding, in the daytime, in an open wagon at the time of the acci-



dent. The highway over which they had driven ran for a mile or more nearly parallel with the railroad, which for most of the distance was plainly visible from it. As the crossing was approached, the highway bent a little, and in order to cross the railroad, rose four and a half feet. The ascent commenced twenty feet from the railroad track, and the track and the usual sign over the railway were visible for five rods or more before the railroad was reached. According to the plaintiff's own testimony, he could look up the railroad track towards the west (the direction from which the train which caused the injury came), and there was nothing to intercept the view. As they approached the rise, their horse was going at a moderate trot, and when they ascended the rise he walked. Plaintiff did not see where they were until the horse had got onto the track. He did not look up. Upon that state of facts the court held, that the jury should have been instructed that the plaintiff could not recover, and said: "There is nothing in the evidence to show any excuse for the neglect to ascertain whether a train was approaching. The fact that the plaintiff did not know that there was a railroad there is no admissible excuse, because it is obvious that any man who had his sight and used it, must have seen that he was approaching a railroad crossing. If the plaintiff did not see it, it shows conclusively that he was not using the circumspection and care which every prudent man does, and is a traveler, using ordinary care, could, in the daytime, and with nothing to interfere with his vision, get upon this railroad crossing without seeing it." (105 Mass. 77.)

It should be remarked that Massachusetts is one of the few states which hold that the burden of proof is upon the plaintiff to show ordinary care and caution on his part, as well as negligence upon the part of the defendant. But aside from that fact, there are marked differences between the facts of that case and this. There, the plaintiff had driven a mile or more nearly parallel with, and in plain sight of, the railroad. Alongside the track there was the usual sign over the highway, which was visible for five rods or

more before the railroad was reached. There was nothing to intercept plaintiff's view if he looked up the track in the direction from which the train came. Here, it is not claimed that respondent ought to have seen more than eighty yards of the track, and that only while he was traveling on a trot, eighty or ninety feet. If his horses were traveling four miles an hour, he was little, if any, more than fifteen seconds in sight of the track before the accident occurred. Besides, witness Rock stated that the eighty yards of track in sight were built upon an embankment of an average height of from three to five feet. The road leading to the crossing is slightly up hill. Under such circumstances the track proper might not have been plainly in sight, even for the whole length of time above stated.

Again, Rock testified that the wagon road from the east was "nearly at a right angle" with the railroad, but it does not appear how nearly. The map used on the trial is not before us, and the expression of the witness is indefinite. So far as we know, it departed so much from a right angle, that respondent would have been compelled to turn his head in order to see the track that was visible. In *Richardson v. New York Central Railroad Company*, 45 N. Y. 850, it is said: "The defendant, again, by its own act, caused this injury, in its erection of the watch-house, now not used, but preventing the traveler from seeing the train, which he otherwise might. That it obstructed this traveler's view is found by the referee. That it caused the injury may be fairly inferred, as nothing could be seen as he approached the track 'owing to the formation of the ground and the situation of the watch-house.' There was a map at the trial in evidence, and none is produced here. Presumptions are in favor of affirming a judgment. Error is not presumed. If there were doubts on this point, in the absence of the map, the presumption is against error." Respondent had a right to travel on that road and to trot his horses at a reasonable rate of speed; and as a stranger, he was justified in acting upon the presumption that if there was a railroad in the vicinity, the bell would be rung for a distance of a quarter of a mile before any railroad crossing. He was not

obliged to be looking out for railroad tracks simply because there happened to be one there; but he was obliged to see it, and seeing it, to act accordingly, if a man of ordinary care and watchfulness in like situation would have seen it, or ought to have seen it, in season to avoid the accident.

*Allyn v. Boston & Albany Railroad Company, supra*, is the only case to which our attention has been called, or which we have been able to find, wherein the effect of ignorance of the existence of a railroad by the injured party has been discussed. But there are many cases which recognize the plaintiff's knowledge of the location of the road, or of defects in a highway, as an important fact to be considered.

"The mere fact that a traveler is familiar with the road, and knows of the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it. Such knowledge is a circumstance, and perhaps a strong circumstance; but it should be submitted, with the other facts of the case, to the jury, for them to determine whether, with such knowledge, the plaintiff exercised ordinary care to avoid injury." (Shearman and Redfield on Neg., sec. 414.)

In *Smith v. City of Lowell*, 6 Allen, 40, the court instructed the jury that the care required of travelers must be such as ordinary persons, in the ordinary exercise of their faculties, are accustomed to use, and must be adapted to the particular circumstances of each case; that the jury, and not the court, must determine what circumstances were proven, and must also determine, in the exercise of their practical judgment, what degree of care was made reasonable by these circumstances; that if the plaintiff was accustomed to pass over the place in question, and was well acquainted with it, they should take these facts into consideration, and determine whether, on account of them, she ought to have used increased care, or to have avoided the place altogether. The supreme court sustained the instructions fully and said: "These things were rightly left to the jury, with the instruction that the care required in the plaintiff was such as the condition of the street and her knowledge of it made reasonable care under the circumstances."

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And see further: *Smith and wife v. The City of St. Joseph*, 45 Mo. 449; *Frost v. Inhabitants of Waltham*, 12 Allen, 85; *Clark v. The City of Lockport*, 49 Barb. 580; *Read v. Northfield*, 13 Pick. 98; *Mackey v. New York Central Railroad Company*, 27 Barb. 533, *et seq.*; *Dickens v. New York Central Railroad Company*, 1 Keys, 27; *Sheffield v. Rochester and Syracuse Railroad Company*, 21 Barb. 342; *Gilman v. Inhabitants of Deerfield*, 15 Gray, 581; *Flemming v. W. P. R. R. Co.* 49 Cal. 257; *Snow v. Housatonic Railroad Company*, 8 Allen, 450.

There may be a defect in a public road, and if a traveler knows of its existence, he must use ordinary care to avoid it, although it is invisible. Such defect may be readily seen by one having knowledge of its whereabouts, when an ordinarily careful man, if a stranger, might not see it in season to avoid an accident. No traveler sees every object in plain view the first time he passes through a strange country. Under the circumstances of this case, we think the fact that respondent and his companions were strangers in Eureka, and did not know they were approaching a railroad crossing, was an important fact to be considered, with others, by the jury, under proper instructions; and, we can not say, as a question of law, that respondent was guilty of contributory negligence, which should bar his right of recovery for any injury occasioned by appellant's negligence.

Exceptions to the charge to the jury remain to be considered. We have carefully examined all the instructions, and are satisfied that, with the exception of the third, given for respondent, they correctly state the law, unless it be true that appellant's eighth instruction is too favorable to it. But upon the latter question we express no opinion at this time. The fifth, requested by appellant, was properly refused, for the reason given by the court; the fourth and fifth, given for respondent, were correct, and the second, twelfth, fourteenth and fifteenth, given for appellant, were correct as modified and given. Without the modifications made the jury would have been told that it was respondent's duty to see the track itself, and to look both ways and listen for any train, although neither himself nor his driver

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knew they were approaching a railroad track, or, as ordinarily careful travelers, ought to have known it or seen the track. Such is not the law. Certainly, appellant cannot complain because the court informed the jury that it was negligent if it failed to ring the bell or blow the whistle, or otherwise signal the approach of the train. The test of negligence adopted by the court was more favorable to appellant than it would have been had it been limited to a failure to comply with the statute by ringing the bell.

The third instruction given for respondent is as follows: "You are instructed that where a railroad is crossed by any street, road, or public highway, the rights of the traveling public and the railroad company to the use of said crossing are equal, and both parties are bound to use ordinary care, the one to avoid committing, and the other to avoid receiving, an injury. For this purpose, it is the duty of the employes of the company to give sufficient signal of the approach of the train, by ringing the bell, sounding the whistle, or otherwise, *and to approach the crossing at such rate of speed as will enable them to check the train if necessary; and if you find from the evidence in this case that the defendant failed to exercise the degree of caution as above specified, and an accident occurred, by which plaintiff was injured, you will find a verdict for plaintiff, provided the plaintiff was free himself from negligence.*"

The italics are ours.

The first objection made to this instruction is, that it was error to charge that the rights of the traveling public and the railroad company to the use of the crossing were equal.

The case shows that the crossing was put in about three years before the trial, by Mr. Shaw, President of the Eureka Consolidated Mining Company, which built and then owned the road, for the private use of N. A. Chandler. Afterwards it became a public crossing, and was generally used by the public. In fact, Mr. Shaw changed the road leading through Clark street to that point, because the latter was more convenient as a crossing than where Clark street then intersected the railroad. There was no testimony on the part of the appellant tending to show that the crossing

was used by the public without its consent, or that it ever forbade its general use. Under such circumstances, respondent was not a wrong-doer in passing or attempting to pass over the track. He had the same right to pass over the crossing that the railroad had to run its cars. (*Solen v. V. & T. R. R. Co.* 13 Nev.) Of course, in one sense, trains have the superior right of way in the use of public crossings; that is to say, travelers in other vehicles are bound to yield the way to the train, if one must stop, because it is but reasonable and just that the vehicle, which can halt with comparative ease and safety, shall do so. But in every other sense, the rights of appellant and respondent to the use of the crossing were equal.

It is also urged that the court erred in instructing the jury that the employes of appellant were bound to give sufficient signals of the approaching train by ringing the bell, etc., *and to approach the crossing at such rate of speed as would enable them to check the train, if necessary.*

We think the court erred in giving the last part in relation to the rate of speed when approaching the crossing, and that there is nothing in other portions of the instructions to correct the error or mitigate the evil. The instruction informed the jury that appellant was negligent if it failed to ring the bell, etc., and to approach the crossing, as stated. In other words, they were told that, even though the bell was rung, or other signal given, still appellant was guilty of negligence, if its train did not approach the crossing at such rate of speed that it could be checked if necessary. They were told that if appellant failed to exercise the degree of caution specified; that is to say, if it failed to approach the crossing as stated, and also to ring the bell, or give other signal, then their verdict must be for the respondent, provided the latter was free himself from negligence.

The jury were justified in understanding from the instruction (if respondent was free from negligence) that appellant was negligent, and responsible for all damages sustained by respondent, if the train did not approach the crossing at such a rate of speed that it might be so checked

that respondent would receive no injury, even though, in fact, the bell was rung or other sufficient signal given. The jury may have found the appellant negligent under the instruction in question, because the train could not be checked before the accident, rather than because the bell was not rung. We can not tell. Should this instruction be upheld, it would overturn every principle which has hitherto guided courts in determining the liability of railroad companies in similar cases, and would seriously impair the usefulness of their services. Let us see. There was no proof that the crossing was in any respect a crowded thoroughfare. It does not appear that any vehicle, other than respondent's, was there, or that any other person was crossing, at the time of the accident. It is not shown that at any time it had been often frequented by man or beast, but if anything is shown, the contrary appears. Now, suppose respondent had known of the railroad, and in approaching, had both looked and listened; had taken all necessary precaution before attempting to cross. He would then have been free from negligence in crossing, if he neither saw nor heard signs of the approaching train. Suppose, again, that the engineer did, in fact, ring the bell for eighty rods before reaching the crossing, and did not run his train faster than the usual rate of speed (which was reasonable), can it be said, if he was not otherwise negligent, that appellant would have been responsible in damages for an injury, simply because the speed of the train, although usual and reasonable, was too great to permit of a check sufficiently sudden to avoid an accident? And yet that is just what the instruction means. It required of appellant extraordinary, rather than ordinary, care.

There was no proof at the trial, and it is not pretended in the argument, that the train was going at an unusual or improper rate of speed. Such being the case, if the bell was rung, there was no occasion for directing the minds of the jury to the rate of speed; and there could have been no object in so doing, unless it was to inform them that appellant was negligent if it failed either to ring the bell, etc., or to approach the crossing at such a rate of speed

that the train could be checked if necessary. There was no necessity of checking the train except to avoid the accident. It therefore follows, as before stated, that the jury were instructed that appellant was negligent if it approached the crossing at such speed that the train could not be checked in season to avoid the accident, although, in fact, the bell was rung according to law, and the speed was usual and reasonable. Such is not the law in a case like this.

It is said that "both parties are equally bound to use ordinary care—the one to avoid committing and the other to avoid receiving injury. For this purpose, it is the duty of the engineer to keep watch for travelers, to give sufficient signals of the approach of the train, by ringing his bell, sounding the whistle, or otherwise, as may be usual, and also to approach a crossing which he knows to be continually thronged with travelers, and unprotected by the company, at such rate of speed as will enable him to check the train, if necessary." (Shearman and Redfield on Negligence, sec. 481, third ed.)

The authority for the text just quoted is the *Lafayette and Indianapolis Railroad Company v. Adams*, 26 Ind. 76. In that case, however, the defendant's road ran through a populous street, and the track was commonly used by the inhabitants as a foot-way. The rate of speed was so great as to show that those managing the train had no care whatever as to who or how many might be killed or injured. "The case," says the court, "was so put to the jury by the instructions of the court that, upon the evidence, the verdict must have been for the defendant, unless the fact of gross negligence by the defendant, evincing a willingness to injure, had been found."

So it is apparent that neither the text nor the case cited upholds the instruction in this case; because here, as before stated, there was no proof that the crossing was, or ever had been, thronged with travelers, but the contrary, rather, appears. But in the same section of Shearman and Redfield referred to, the authors say: "But an engineer is not bound to lower his speed on approaching the ordinary highway crossings in the open country, where travelers only pass



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Points decided.

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occasionally. And even if he sees persons or teams approaching or waiting to cross the railroad, he is not bound to anticipate that they will attempt to cross in view of the train; and, therefore, he is not required to check his speed so much as would be necessary to enable them to cross in front of him."

See, also, *Warner v. N. Y. Cent. R. Co.*, 44 N. Y. 465; *Telfer v. Northern R. Co.*, 30 N. J. Law. 188; *The Madison and Indianapolis R. Co. v. Taffe*, 37 Ind. 365. Without quoting we make particular reference to *Telfer v. Northern R. Co.*, *supra*.

We are not unmindful of the fact, that the train in this case was passing through a cut as it approached the crossing, and that respondent's view of the train was obstructed. But he testified that he should have heard the bell if it had been rung; so for the purposes of this discussion, the fact above mentioned becomes immaterial. If the bell could have been heard and was rung according to law, appellant was not negligent in approaching the crossing at its usual rate of speed. If it was not rung, the negligence was in failing to sound the bell, and not in approaching the crossing at such a rate of speed that the train could not be checked before the accident.

For the error found in the third instruction given for respondent, the judgment should be reversed, and it is so ordered.

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[No. 938.]

JAMES FINLAYSON, APPELLANT, v. WILLIAM A.  
MONTGOMERY, RESPONDENT.

**APPEAL MUST BE PROSECUTED—FAILURE TO FILE BRIEFS.**—If appellant's counsel fail to appear and orally argue the case when set for trial, and also fail to file any brief within the time allowed by the court, the judgment will be affirmed without any examination of the record on appeal.

**APPEAL** from the District Court of the Sixth Judicial District, Eureka County.

The facts appear in the opinion.

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Points decided.

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*Wren and Thornton*, for Appellant.

*A. M. Hillhouse*, for Respondent.

By the Court, LEONARD, J.:

On the eighteenth day of November, 1878, this case was set down for argument. No oral argument was had, but a stipulation was filed by the parties, agreeing to submit the case upon briefs to be filed. Appellant was given until December 1st, and respondent ten days thereafter.

Subsequently other stipulations of counsel were filed, extending the time for filing briefs. On the 3d day of the present month, counsel for appellant, when in court, were granted ten days further time. That time has expired, and still appellant has filed no brief.

Under such circumstances we do not consider it our duty to look into the record. The judgment of the court below is affirmed for appellant's failure to prosecute the appeal. (*Fulton v. Day*, 8 Nevada, 82.)

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[No. 950.]

ANGUS MCLEOD, RESPONDENT, v. W. R. LEE ET AL.,  
APPELLANTS.

ORDER GRANTING NEW TRIAL—WHEN IT WILL BE SUSTAINED.—Where, on appeal from an order granting a new trial, the record shows that the motion was made upon two grounds, without showing upon which of them the action was based, the order will be affirmed, if the action of the court can be sustained upon either ground.

IDEM—CONFLICT OF EVIDENCE.—If a new trial is granted upon the ground that the evidence is insufficient to sustain the verdict, the action of the court will be sustained by the appellate court, if there is a substantial conflict in the evidence.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

*A. W. Crocker and Robert M. Clarke*, for Appellants.

*M. A. Murphy*, for Respondent.

By the Court, LEONARD, J.:

Respondent brought this action to recover damages alleged to have been sustained by him by reason of an overflow of the waters of Walker river, caused, as is claimed, by the erection and maintainance by appellants of a dam across said river; also, to enjoin appellants from diverting any of the waters of Walker river at any point above the lands of respondent, described in the complaint, and particularly from a certain point and place mentioned and described therein; also, that appellants be commanded and required to remove from across the natural channel of said river the dam constructed by them, and that such requirement be embodied in the final judgment.

Appellants, in their answer, denied all the material allegations contained in the complaint, and alleged that "they constructed the dam and ditch described in plaintiff's complaint, under the provisions of a contract of permission from plaintiff, the conditions of which have all been fulfilled on the part of these defendants, and that they have in no wise exceeded their rights under said contract of permission."

The cause was tried by the court without a jury, and the facts found were wholly in favor of appellants.

Respondent moved for a new trial on the ground that the evidence was insufficient to justify the findings and judgment of the court, and the further ground of newly-discovered evidence. The court ordered a new trial without specifying the ground upon which the order was made, and this appeal is taken from that order.

It is urged by counsel for appellant, that the evidence overwhelmingly supports the findings; that the findings support the judgment, and that the judgment is in accordance with law; that it is reasonable to presume, under the circumstances, that the affidavits in support of the motion for a new trial, setting out what is claimed to be newly-discovered evidence, induced the court to order a new trial; that if those affidavits are eliminated from the record, no legal grounds exist for the order granting a new trial; that the

so-called, newly-discovered evidence is cumulative, immaterial, irrelevant, and inconsistent with respondent's testimony given upon the trial, and that, therefore, unless it can be shown that the court erred in the first instance, its judgment must be upheld and the order reversed.

Under the circumstances, we do not deem it necessary to decide whether or not the affidavits are obnoxious to the criticism of counsel for appellant. We think the rule which should govern appellate courts in cases like this is correctly stated in *Lawrence v. Burnham*, 4 Nevada, 365. In that case, as in this, the action was tried by the court without a jury; the findings were in favor of the appellant, and judgment was rendered for him. A motion for a new trial was subsequently made and granted. It did not appear upon what ground the motion was granted.

The court said: "When a verdict and judgment are in accordance with the evidence, and there is no substantial conflict in it, upon any material issue, and no error has intervened, the lower court has no right to disturb such verdict and judgment. If there be a conflict in the evidence upon some material issue, or if any substantial error is shown to have been committed, the appellate court will not disturb the order of the court below if it set aside the verdict and judgment; but when nothing of the kind appears in the record to warrant such order, its order will be set aside as unauthorized." In *Oullahan v. Starbuck*, 21 Cal. 414, defendant recovered judgment. Plaintiff moved for a new trial upon several grounds, one of which was, "insufficiency of the evidence to justify the verdict." The court granted the motion without indicating the ground upon which it acted. Defendant appealed from the order, and the court said: "It is stated by the appellant's counsel that the only ground upon which the court below based its action in granting the new trial, was a supposed error in its refusing to allow a peremptory challenge to a juror after he had been accepted, though not sworn. We do not doubt that such was the fact, but the record does not show this, and by its contents we must be governed. The record shows that the motion was made on the further

ground that the evidence was insufficient to justify the verdict, and does not indicate upon which of the two grounds the court based its ruling. There was conflicting evidence on the trial, though the evidence which is stated in the record appears to fully support the verdict. It is not enough, however, to authorize any interference with the action of the court below—either in granting or refusing a new trial for alleged insufficiency of the evidence—that an appellate court, judging from the evidence as it is reduced to writing, would have come to a different conclusion.”

It is said by counsel for appellant that the findings of a court are as conclusive as the verdict of a jury. We so understand the law. (*State v. The Yellow Jacket S. M. Co.* 5 Nev. 421.) The same weight and consideration are always to be given to such findings as to a verdict.

But we understand, also, that a court has the same right to grant a new trial, if upon more mature deliberation it concludes that a material finding is not supported by the evidence, as it has to set aside the verdict of a jury for the same reason; and the same rule obtains in the appellate court in both cases, as to the effect of conflicting evidence upon material issues.

Conceding it to be true, for the purposes of this appeal, that in 1873, prior to the building of the mill in question, and before the digging of the ditch or the erection of the dam, respondent gave Lee general permission and license to build the mill where it now stands, and to take water, as is stated in the first finding of fact; also that a parol license was given to all the appellants to dig the ditch and to erect a dam where they now are; and that such license to the extent then given is irrevocable after execution, under the doctrine stated in *Lee v. McLeod*, 12 Nev. 280; still, there was another most material issue in the case, wherein the court found for appellants, and upon which the evidence was extremely conflicting. It was not claimed by either of the appellants—and they were all witnesses—that they ever had permission to erect a permanent dam over eighteen inches or two feet in height. They did testify that they had leave to build a temporary or false dam upon the perma-

nent one, during low water, but they admitted that they were to remove the latter before high water, and claimed to have done so at the time of the overflow, in June and July, 1876, when the damage in question was done. It was in proof that the effect of a dam in Walker river is to cause the deposition of sand and sediment in the river bed until the deposit is raised as high as the dam itself; that, in this case, the sand deposited caused the water to spread out and overflow the banks, and run upon respondent's ranch and crops.

Under such circumstances, it of course became material to ascertain whether or not appellants had performed their agreement in relation to the license claimed, to erect false dams, and in consideration of which such license was given; and in determining that fact nothing was more important than to find whether, at the time of the overflow, the dam was higher than eighteen inches or two feet, and, if it was, whether such additional height caused the whole or any part of the damage sustained.

The court found that appellants had permission to build a permanent dam eighteen inches high, and that, afterwards, they had permission to temporarily raise said dam by means of brush and temporary additions to the extent that, at low stages of the water, it might still remain at the original height, to wit, eighteen inches higher than the bottom of the aperture of the head-gate of their ditch, but that it was agreed that the temporary additions made during low-water seasons should be removed before the high-water season. The court found, further, that at the time of the overflow the dam was no higher than it was at the time of its original construction. Upon the last fact seven witnesses testified positively for respondent and against the finding, while three testified for appellants and in support of the finding.

McLeod testified that on the first of June, 1876, the dam raised the water five feet; that it was of that height during the freshet on the fourth of July, 1876, the time the damage in question was done; that it was solid from bank to bank—not a break in it; that in the spring of 1875, when appellants started to raise their dam, he told them they must not raise it, as it would damage and ruin his ranch;

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that he always objected to raising the dam above eighteen inches high, and that was to be temporary.

Garrard, a surveyor, testified that he made a survey of the dam on the twelfth of September, 1876; that at that time the east end of the dam was washed away and all the water was running through the break; that the dam was higher than McLeod's meadows; that the bed of the stream had been filled up on a level with the top of the dam and ran up the stream to nothing; that it would have taken a four-foot dam above the surface of the water to force a head of water through the box and ditch, because of the presence of sand at the outlet of the box and elsewhere; that the dam caused the overflow.

Snyder testified that he was at respondent's ranch quite immediately after the flood; that he went to the dam and it was solid from one bank of the river to the other; that there was no break in it, and that it was five or six feet high.

Mickey said that on the twenty-eighth of August the dam was three feet above the water level, and that there was no break in it; that he had seen the dam five feet high or more.

Bennett said he saw the dam on the twentieth of August, and the water flowed over it from one bank to the other; that he saw it fifteen or twenty days after, when it was broken; that it was higher before the flood than it was on the twentieth of August, when he measured and found it three feet high above the water level.

Ross saw it on the second of July, when it was solid from bank to bank, and fully five feet high. He saw it again on the fifth of September, when it was solid, but in November he saw it broken.

Dunlap saw the dam in August, and said it was solid and fully five feet high.

Lee, one of the appellants, testified as follows: "McLeod never objected to the building of the dam until 1876. In the spring of 1876 he did object to the building of the dam and told us we must take the top off. Late in the season of 1874, when the river had fallen, and we were engaged in putting on a temporary addition of willows and stakes, in order to keep the water at its original height, he told us

that we would have to take it off before the water raised or it would overflow his ranch. We assured him we would do so. He made no other complaint or suggestion until in the spring of 1876, when he told me that the water was raising and that I had better remove the top dam. I went up to the dam and removed it. A day or two after I learned it was partly replaced. I found willows tied upon stakes with wire, evidently placed there by Indians. I removed what I could, and the next day went up with help and a horse and removed the balance. This was early in the spring, long before the highest water in June and July. \* \* \* At the time of the high water in the spring of 1876, the east end of the dam gave way. We built it up again. The west end did not float away. McLeod was growling about it, and we pulled some of the top off. McLeod saw the addition we had put to it and he said it was too high. We took off some of the top in March, 1876. McLeod said it was too high and would ruin his ranch, and we took off some in the middle. \* \* \* I was up and down the ditch every day in July, 1876, and saw the water running over the whole length of the permanent dam, no false dam or brush on the top of it, and no drift-wood lodged against it. \* \* \* We did not claim the right to the dam without McLeod's permission, and when he gave us permission we thought we had a right to build and maintain the dam. I do not acknowledge his right to require us to remove it now. In September or October, 1873, he (respondent) told me what he had told the Mills boys. The Mills boys told me that they had made arrangements with McLeod to build the ditch and put in an eighteen or twenty-inch dam. They also told me that they were to build the levees. \* \* \* McLeod did say we might keep a dam in the river eighteen or twenty inches high; so the Mills boys told me." The appellants, Mills, when witnesses, did not claim that they had leave to put in a dam higher than eighteen inches or two feet. They testified that the one they put in raised the water eighteen inches, and that they never raised the permanent dam an inch; that they put in false dams in 1874, 1875 and 1876; that the last was taken off in March.



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Statement of Facts.

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or April, 1876. James Mills said: "McLeod told us where and of what dimensions to build levees, and we built them to his complete satisfaction, and he so expressed himself. He at no time requested us to make others, or to do anything except remove the temporary dams during high water, and this we always have done." Jacob Mills testified substantially like his brother.

There was certainly a greater number of witnesses who testified against than in favor of the finding of the court in relation to the height and condition of the dam at the time of the overflow. We cannot know that the court did not grant a new trial under the conviction that it had erred in its conclusion upon this material issue.

The order of the court appealed from is affirmed.

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[No. 947.]

**WILLIAM SOLEN, APPELLANT, v. VIRGINIA AND  
TRUCKEE RAILROAD COMPANY, RESPONDENT.**

**EXECUTION MUST FOLLOW JUDGMENT—INTEREST.**—An execution must follow the judgment, and if the judgment does not call for interest, the execution cannot. (*Hastings v. Johnson*, 1 Nev. 617, affirmed.)

**APPEAL** from the District Court of the First Judicial District, Storey County.

On the thirteenth day of December, 1876, William Solen, appellant, recovered judgment against the Virginia and Truckee Railroad Company, respondent, for the sum of fifteen thousand dollars, with costs, being the amount of damages assessed by a jury for personal injuries received by appellant. Respondent appealed to the supreme court, and on the twenty-first day of June, 1878, the judgment of the district court was affirmed. (13 Nev. 106.) The judgment so affirmed contained no direction as to interest.

On the twenty-ninth day of June, 1878, the respondent paid to the clerk of the district court the sum of fifteen thousand dollars, with the costs as docketed in the court below. The court thereupon ordered that execution be

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Opinion of Leonard, J., concurring.

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stayed on said judgment. On the sixth of July, 1878, appellant moved the district court to set aside its order of June 29th, and for an order directing the clerk to issue execution on the judgment, with interest thereon from the entry thereof, at the rate of ten per cent. per annum. The court made an order denying said motion. Appellant appeals from both of said orders.

*C. H. Belknap and Kirkpatrick & Stephens*, for Appellant.

I. The judgment bears interest from its date at the rate of ten per cent. per annum. (Stat. 1861, p. 99, sec. 4 (1 Comp. Laws 32); *Burke v. Caruthers*, 31 Cal. 467; *Randolph v. Bayue*, 44 Id. 366; *Atherton v. Fowler*, 46 Id. 320; *Clark v. Dunnam*, Id. 204; *Dougherty v. Miller*, 38 Id. 548; *Bell v. Knowles*, 45 Id. 193; 5 Dana, 466; 6 B. Mon. 197; *Berryhill v. Wells*, 5 Bin. 56.)

*Whitman & Wood*, for Respondent.

I. The judgment was satisfied by the payment of money into court.

II. Execution must follow the judgment. (*Hastings v. Johnson*, 1 Nev. 613.)

By the Court, HAWLEY, J.:

The decision in *Hastings v. Johnson*, 1 Nev. 617, is directly in point, and adverse to the views contended for by appellant, upon the real question presented by this appeal.

It was therein decided that where the judgment of the court is silent as regards the collection of interest, it does not authorize the issuance of an execution calling for payment of interest on the judgment; that the execution must follow the judgment, and if the judgment does not call for interest, the execution cannot.

Upon the authority of that case, I think the orders appealed from ought to be sustained. It is so ordered.

LEONARD, J., concurring:

I concur in this opinion solely upon the ground stated by the court, that we are bound by the decision in *Hastings v.*

## Points decided.

*Johnson.* If the question decided by the majority of the court in that case was now presented for the first time, I could not agree with the conclusion arrived at. But the record in that case fairly presented the question decided by the majority, as well as the one upon which all agreed. Such being the case, the decision cannot be regarded as *obiter* (*Starr v. Stark*, 2 Sawyer, 605); and under the doctrine of *stare decisis* should be adhered to.

[No. 989.]

THE STATE OF NEVADA, RESPONDENT, v. JOHN  
DAVIS, APPELLANT.

## COMPETENCY OF JUROR—EXHIBITION OF NEWSPAPER ARTICLE—REFRESHING

**MEMORY.**—A juror testified that he had read in the *Carson Appeal* what purported to be a true account of the difficulty. Defendant's attorney asked him whether, if his memory was refreshed by "an exhibition of a newspaper article purporting to give an account of the transaction in question, he could answer whether he had formed an unqualified opinion, touching the matter in issue." *Held*, that this question was properly excluded, because it was not limited to the particular article the juror had read.

**PRELIMINARY EXAMINATION—WAIVER OF STATUTORY RIGHT.**—Defendant objected to proceeding with the trial because the testimony given at his preliminary examination had not been reduced to writing, as required by the statute. *Held*, that he could not avail himself of this irregularity without an affirmative showing that he was deprived of this statutory right without his consent.

**ITEM—CONTINUANCE.**—Some of the witnesses who testified at the preliminary examination were absent from the state. There was no showing made that their testimony was material, or that any effort had been made to procure their attendance. *Held*, that the court did not err in proceeding with the trial.

**ASSAULT WITH DEADLY WEAPON—INTENT.**—It is the character of a weapon and the manner in which it is used (not the purpose for which it is carried), taken in connection with the facts and circumstances of the assault, that indicate the intention of the defendant.

**ITEM—DEADLY WEAPON—QUESTION OF FACT.**—Where the character of the weapon, whether deadly or not, is doubtful, or where its character depends upon the particular manner in which it was used, the question is one of fact and should be submitted to the jury.

**INSTRUCTION—RIGHT OF COURT TO MODIFY.**—A court is not bound to give instructions in the exact language asked for by counsel; but may add to,

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Statement of Facts.

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or change. the phraseology in order to make them clear and explicit, or to prevent the jury from being misled.

**IDEM—WHEN SHOULD BE EXPLICIT.**—If a defendant desires explicit instructions to be given upon any point, it is his right and duty to prepare the same and ask the court to give them.

**APPEAL** from the District Court of the Second Judicial District, Ormsby county.

The instructions complained of by appellant, and referred to in the opinion of the court, are as follows:

Instruction given by the court of its own motion: "A reasonable doubt, in the law, is one founded upon a full and fair consideration of all the evidence in the cause and circumstances surrounding the transaction, shown and adduced by either the state or defendant, or both, and is not a doubt resting upon mere conjecture or speculation. The law presumes the defendant innocent of the crime alleged, and, to entitle you to find the defendant guilty of any offense, his guilt of such offense must be found by you from all the evidence adduced beyond a reasonable doubt, as above defined; and, if you have any such reasonable doubt, the defendant is entitled to the benefit thereof, and you must acquit."

Instruction number five, asked by the prosecution and given by the court: "The jury are further instructed that if they find, from the evidence, that on or about the nineteenth day of December, 1878, in this Ormsby county, Nevada, the defendant, John Davis, did, without provocation or excuse, assault one Albert Standing, and did beat him with a weapon, instrument, or other thing, and that such weapon, instrument, or other thing was not of a deadly character, then the jury should find the defendant guilty of assault and battery."

Instruction No. 1 asked by defendant: "If the jury believe from the evidence that defendant assaulted Albert Standing, at the time and place mentioned in the indictment, with a club or spoke of a wheel, without any sufficient provocation for such assault having been previously given by said Standing to said defendant for such conduct on

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Argument for Appellant.

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defendant's part; and if the jury believe that defendant then and there inflicted a serious wound upon the forehead of said Standinger, but that there was no intention on defendant's part to kill said Standinger, but only to inflict a blow, or at most a bodily injury upon Standinger, the defendant cannot be found guilty of the offense specified in the indictment."

The court modified this instruction by adding thereto, as follows: "But may find the defendant guilty of an assault and battery, or of assault with a deadly weapon, with intent to inflict upon the person of another a bodily injury, *provided*, that in the latter case you first find that the weapon, instrument or thing, if any, used by Davis, was a deadly weapon, instrument, or thing."

*N. Soederberg*, for Appellant.

I. The court erred in refusing to allow defendant to refresh the memory of the juror Laforge. The fact to be established was whether or not this juror had formed an unqualified opinion of the matter in issue. It was immaterial how the fact was established, whether by the juror himself or by other proof, and it was equally immaterial by what means the juror was enabled to give the desired information. (2 Phillips on Ev., Cow. & Hill., and Edw.'s Notes, 773 (top p. last par.), 774, 750, 760.)

II. It was error to reject defendant's evidence of hostile relations between himself and the witness, McArthur. The intention with which defendant carried the club at the time of the difficulty was the most important question in the case.

III. The court erred in leaving the question to the jury whether the club was a deadly weapon. (10 Nev. 284; Bish. Cr. L. 335.)

IV. The instruction upon the question of reasonable doubt was erroneous and calculated to mislead the jury to the prejudice of defendant. It authorized defendant's conviction upon a mere preponderance of evidence.

V. Defendant's instruction No. 1 should have been given

in its original form, without modification. (*State v. Ferguson*, 9 Nev. 106.)

VI. Plaintiff's instruction No. 5 does not correctly state the law. The character and severity of the blow, and not the kind or character of weapon used, determines the grade of the offense.

VII. The court erred in compelling defendant to proceed to trial, the testimony taken on the preliminary hearing not having been reduced to writing, and several material witnesses being absent from the state at the time of the trial.

*M. A. Murphy*, Attorney-General, for the Respondent.

I. Defendant's attorney did not offer to produce the paper containing the article the juror had read. The question asked the juror was improper. (*Morgan v. State*, 31 Ind. 196; *Clem v. State*, 33 Id. 425.) A mere impression or suspicion derived from reading a newspaper article, does not disqualify. (*Fahnestock v. State*, 23 Ind. 235; *People v. Mahoney*, 18 Cal. 180-183; *People v. Symonds*, 22 Id. 351; Cent. Law Journal, Aug. 29, 1879, p. 1.)

II. The evidence of the difficulty between defendant and McArthur was properly excluded. If A arms himself, intending to murder B, shoots C, supposing C to be B, and wounds C, he is guilty for an assault with intent to murder C. (*People v. Torres*, 38 Cal. 143.)

III. The instruction upon reasonable doubt was correct. (*U. S. v. Knowles*, 4 Saw. 521; *U. S. v. Foulke*, 6 McL. 355; *Long v. The State*, 38 Ga. 508; *Commonwealth v. Drum*, 58 Pa. 22.)

By the Court, HAWLEY, J.:

Defendant was indicted and tried for the crime of an assault with intent to kill. The jury found him guilty of "an assault with a deadly weapon, with intent to commit a bodily injury upon the person of Albert Standinger."

1. One Laforge, upon being examined by defendant's counsel touching his qualifications as a juror, testified that he had read in the Carson *Appeal* what purported to be a detailed account of the alleged commission of the crime

charged against defendant; that he had forgotten whether, from the reading of said account, or from any other information, he had formed or expressed an unqualified opinion as to the guilt or innocence of the defendant; but that it was possible, if he was taken as a juror, when the testimony was delivered, whatever opinion (if any) he might have formed, might be revived in his mind. Counsel for defendant then asked said juror, "Whether or not, if his memory was refreshed by an exhibition of a newspaper article purporting to give an account of the transaction in question, he could answer whether he had formed an unqualified opinion touching the matter in issue?"

Did the court err in excluding this question? Certainly not.

If for no other reason, it was properly excluded because counsel did not limit the question to the particular article the juror had read in the *Carson Appeal*, but referred generally to any "newspaper article purporting to give an account of the transaction."

2. Defendant objected to proceeding with the trial, on the ground that the testimony taken on the preliminary examination of defendant had not been reduced to writing, and also on the ground that several of the witnesses who testified upon the hearing were absent from the state, and were not present at the trial; that the testimony of said witnesses was material to the defense; that in the absence of the written testimony defendant's present attorney and defendant himself were unable to properly cross-examine the witnesses for the state who were present at the trial.

It was admitted by counsel for the state that the testimony at the preliminary examination had not been reduced to writing, and that some of the witnesses who testified before the magistrate were absent from the state.

In our opinion, the court did not err in proceeding with the trial. Upon this point—as well as the preceding one—the defendant failed to lay the proper foundation to have the question considered on its merits.

In justice to the state as well as the defendant, the testimony given at the preliminary examination ought al-

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Opinion of the Court—Hawley, J.

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ways to be reduced to writing and authenticated, as provided in section 151 of the criminal practice act (1 C. L. 1779). If the defendant waives this right, the state ought to insist upon it. The practice of waiving preliminary examinations, or dispensing with any of the statutory requirements in regard thereto, is irregular and ought to be discontinued. (*Ex parte Ah Bau*, 10 Nev. 265.) It is questionable whether the defendant could avail himself of this irregularity, if at all, except upon a writ of *habeas corpus*, on the ground that he was illegally restrained of his liberty. But in no event could he, at any time, avail himself of such an irregularity, without an affirmative showing that he was deprived of the statutory right without his consent. No such showing was made in this case. So with reference to the absent witnesses. There was no affidavit presented to show that their testimony was material or that any effort whatever had been made to procure their attendance.

3. The club or wagon spoke with which the alleged offense was committed was introduced in evidence without objection. The defendant testified in his own behalf that he struck Standinger with the club; that he was intoxicated and excited at the time of the difficulty, which occurred at a gambling table; that Standinger said something to defendant which displeased him; that bitter words ensued; that Standinger arose in his chair and defendant struck him in the forehead with the club once and then walked away. The testimony for the prosecution tended to show that the blow was struck by the defendant without any provocation; that defendant came up behind Standinger, and upon his turning around towards defendant the blow was inflicted. The defendant claimed that he did not carry said club for the purpose of striking Standinger, but that he carried it as a means of self-protection against one McArthur, with whom he had a difficulty shortly before, and that McArthur had made threats against him of personal violence. Counsel claim that defendant was not guilty of any offense except that of assault and battery. Upon this state of the case, counsel for the defendant asked the witness McArthur:



"What were your relations with the defendant, and was there any difficulty between you and defendant on and previous to December 19, 1878?"

This question the court refused to allow the witness to answer. We think this action of the court was correct. The proposed testimony was wholly irrelevant. It did not tend to show the intent with which defendant struck the blow. Under the facts of this case it was immaterial for what purpose defendant carried the club. He may have procured and carried it for the purpose of protecting himself against McArthur, but that fact would not relieve him from any responsibility for his acts if he assaulted and struck Standinger without any lawful excuse or provocation. It was the character of the weapon and the manner in which it was used (not the purpose for which it was carried), taken in connection with the facts and circumstances of the assault, that indicated the intention of the defendant.

4. The court did not err in leaving the question to the jury whether the club used by defendant was a deadly weapon.

It was peculiarly within the province of the jury, under the facts of this case, to determine, as a fact, whether the club in defendant's hand, as it was used by him, was likely to produce fatal consequences or not. The law is well settled that when it is practicable for the court to declare whether a particular weapon is deadly or not, the question "is one of law for the court, and not of fact for the jury" (1 Bish. Cr. L., sec. 335, 3d ed.), but in all cases where the character of the weapon in this respect is doubtful, or where the question depends upon the particular manner in which it was used, the question should be submitted to the jury. (*State v. Rigg*, 10 Nev. 290; *State v. Jarrott*, 1 Ire. (L.) 87; *U. S. v. Small*, 2 Curtis, C. C. 243; *Rex v. Grice*, 7 C. & P. 803.)

5. The several objections urged against the instructions are not well taken.

The court is not bound to give instructions in the exact language used by counsel, even if correct; but may add to, or change, the phraseology in order to make the language

## Argument for Respondent.

III. The phrase "all legal mortgages and liens," in section 36, means all legal mortgages and similar liens. It does not mean liens of a different character. An attachment is not a lien. (Foster's case, 2 Story, 131; 3 Story, 428; *Fisher v. Vose*, 3 Robinson (La.) 457.)

IV. The attachments were dissolved by the institution of proceedings in insolvency by Matthews and by the order of the district judge.

Upon the rendition of the judgments they became *functus officio*. The lien acquired by the levy of an execution is independent of all provisional remedies.

An attachment is a right created by statute in derogation of the common law, and is subject to strict rules of construction. The lien, at best, is nothing but security for the satisfaction of a future personal judgment. (*Meyers v. Mott*, 29 Cal. 365; Drake on Attachment, sec. 228.)

*T. Coffin*, for Respondent.

I. All liens are preserved in insolvency and may be enforced in the same manner as if no petition had been filed. (Comp. Laws, 461.)

II. An attachment duly levied becomes a lien upon the property attached, which nothing can divest, save the dissolution of the writ of attachment. (Drake on Attachment, sec. 224, and authorities there cited. Also, *Bagley v. Ward*, 37 Cal. 121.)

III. No act or proceeding in insolvency dissolves a writ of attachment. (Drake on Attachment (4 ed.), sec. 435; Drake on Attachment (5 ed.), 425, and authorities there cited.)

IV. The only way known to our practice of enforcing an attachment lien is to proceed through judgment, execution, levy, and sale. (Comp. Law, 1184, *et seq.*; Drake on Attachment, sec. 224a.)

V. In insolvency proceedings, where a lien is preserved, the ordinary means of enforcing it are also preserved. (*Kittridge v. Warren*, 14 N. H. 509; *Kittridge v. Emerson*, 15 Id. 227.)

*Wells & Stewart*, also for Respondent.

By the Court, BEATTY, C. J.:

The complaint in this action shows that on January 24, 1879, a number of suits had been commenced in a justice's court of Ormsby county against G. W. Matthews, and that attachments had been issued therein, and levied on his personal property; that in the first of said suits judgment had been entered in favor of the plaintiff for three hundred dollars, and costs and execution thereon issued, but not levied, when, on said day, Matthews having filed a petition in insolvency, the district judge of said county made an order staying all proceedings against him; notice of which order was served on the justice of the peace, and the defendant, who, as constable, had served the attachments under which the property of Matthews was held; that notwithstanding the order staying proceedings against Matthews, and notice thereof, judgments were entered, and executions issued in the pending suits, and that under said executions, and the one issued prior to the order staying proceedings, the defendant levied upon and sold all the attached property for about nine hundred dollars, and applied the proceeds to the satisfaction, first, of the judgment for three hundred dollars, above mentioned, and next, to the satisfaction of the several judgments entered after notice of the order staying proceedings, and before the appointment of plaintiff as assignee of the insolvent estate. Upon these facts, plaintiff, as representative of the creditors at large of Matthews, asked judgment against the defendant for nine hundred dollars, the value of the attached property.

To this complaint the defendant demurred, on the ground that it failed to state facts sufficient to constitute a cause of action. The district court sustained the demurrer, and, the plaintiff being unable to amend, defendant had judgment, from which plaintiff appeals.

The principal question raised by the demurrer, and the only question argued by counsel, is this: Has an attaching creditor a lien which is preserved and may be enforced, notwithstanding an order in insolvency, staying all proceedings

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Opinion of the Court—Beatty, C. J.

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against his debtor, made before judgment in the attachment suit?

The answer to this question depends upon the proper construction of the following proviso at the end of section 36 of the Insolvent Debtor's Act (C. L. sec. 461): "*Provided*, all legal mortgages and liens *bona fide* existing on such property at the time of the surrender aforesaid, shall remain good and valid, and may be enforced in the same manner as though no such surrender had been made."

Counsel for appellant contends that the word "liens" in this proviso should not be held to include attachment liens, but only such (like mortgages) as are created by the act of the owner of the property, and to which the creditor has a vested right under his contract—that insolvency, like death, should dissolve an attachment and destroy the lien. We think, however, that counsel has, at most, succeeded in showing that such ought to be, not that it is, the law. The decisions construing similar provisos have been collected by Mr. Drake in his work on attachments, and they are overwhelmingly in favor of the construction which makes them include attachment liens. (Drake on Attachment, sections 224, 224a, 435, and cases cited. See, also, 14 Cal. 47, and 37 Id. 121.)

It has been held in California (29 Cal. 365-6), that the death of the defendant in an attachment suit before judgment, dissolves the attachment. But, although there is a striking analogy between the cases of death and insolvency of a debtor, and strong reasons why the claims of creditors against his estate should be settled on the same principles, still it is undeniable that the Probate Act contains nothing equivalent to the proviso above quoted, but, on the contrary, contains several provisions of opposite import.

We are satisfied that under our statute the lien of an attaching creditor is preserved and may be enforced by judgment and execution, notwithstanding an order staying proceedings against the debtor, made in pursuance of the insolvent debtor's act (C. L. sec. 434), and consequently that the demurrer in this case was properly sustained.

We are not to be understood, however, as deciding that

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Points decided.

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any of the judgments against Matthews are valid except that which was entered before the order staying proceedings was made. The complaint shows that that was a valid judgment, and that execution was issued thereon before the order to stay proceedings. That execution gave the defendant authority to sell the property, and he is entitled to retain any surplus of the proceedings after satisfying the first judgment until the other suits are decided. If, as appellant contends, the judgments in those other suits are void by reason of the fact that they were entered before his appointment as assignee, and without substituting him as defendant, the result would seem to be that they are still pending, and that he may go in and defend in behalf of the creditors of Matthews. If he is permitted to do so, and succeeds in defeating those attaching creditors, he will then be in a position to demand of the defendant the money which remains, or ought to remain, in his hands. In the meantime the defendant not only has the right, but is bound to retain such surplus for the purpose of applying it in satisfaction of any judgments that may be recovered by those attaching creditors whose suits are claimed to have been suspended by the order staying proceedings.

The judgment of the district court is affirmed.

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[No. 944.]

CATHERINE DALTON, APPELLANT, v. PETER DALTON, RESPONDENT.

WHEN EQUITY WILL RELIEVE A PERSON WHO HAS BEEN DECEIVED.—Plaintiff is the mother of the defendant, and brought this action to recover certain lands upon the ground that defendant obtained the legal title thereto through fraud. She is over sixty years of age, and can neither read nor write. She was induced by certain alleged fraudulent representation of her son, to convey the property to M., who thereafter conveyed the same to defendant. *Held*, that the circumstances demanded of the defendant the utmost sincerity and fair dealing; that if plaintiff, having confided in defendant—as a mother has good reason to think she may confide in a son—was actually misled, she is entitled to relief in a court of equity.

## Argument for Respondent.

**EVIDENCE ADMITTED WITHOUT OBJECTION.**—Parol evidence to establish a trust was admitted without objection. *Held*, that it was too late to raise the objection on appeal to this court, and that it must be considered and given its full value.

**SUFFICIENCY OF EVIDENCE TO ESTABLISH A TRUST.**—Parol evidence to defeat a deed and establish a trust, must be clear, and attended with no uncertainty, and even then should be received with great caution.

**IDEM—INSUFFICIENCY OF EVIDENCE TO SUPPORT FINDING.**—*Held*, upon a review of all the facts, that the testimony was insufficient to support a finding, that plaintiff paid no consideration for the property in question, but held it in trust for defendant.

**APPEAL** from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

*W. Webster* and *W. L. Knox*, for Appellant.

The evidence shows a consideration for the deed made by McKay to appellant.

A trust cannot be shown by parol evidence. (2 Leading Cases in Eq. 670, 715.) To allow the defendant to attack the deed by parol evidence, would be clearly in contravention of the statute of frauds. (*Wilkinson v. Wilkinson*, 2 Dev. Eq. 376; *Morris v. Morris*, 2 Bibb. 311; 2 Eq. L. C. 716, 717; *Hill on Trustees*, 171; 2 St. Eq. J. 1199, note 1, to sec. 1199, 553.)

*Robert M. Clarke* and *N. Soderberg*, for Respondent.

I. The evidence in the record is sufficient to support the findings. (*Boskowitz v. Davis*, 12 Nev. 468.) The plaintiff voluntarily conveyed the property to Manning. Defendant's money paid for the land, and neither McKay nor plaintiff ever had any interest in the land, but acted solely as trustees for defendant. (1 Perry on Trusts, sec. 126.)

There was an express promise by plaintiff to hold the land in trust for defendant, and in pursuance of that understanding there was a delivery of possession, entry, and occupation of the property by defendant, whereby the contract was taken out of the operation of the statute. (*Church v. Sterling*, 16 Conn. 388; *Wagoner v. Speck*, 3 Ohio R. 294-6; *Bayles v. Baxter*, 22 Cal. 575; 18 Conn. 228.)

A resulting trust having once attached to real property (no rights of innocent purchasers being involved) continues to bind the property in the hands of the trustee and his grantees, until released by the *cestui que trust*. (*Williams v. Van Tuyl*, 2 Ohio St. 336; 53 Maine, 407.)

II. Defendant being a stranger to the deed from McKay to plaintiff, is not estopped by any recital in the deed, from raising a trust by parol in favor of himself. (5 Cush. 431.)

III. If the proof on that point was incompetent the objection should have been taken on the trial, or before the decree was entered. (*Johnson v. Brooks*, 29 Cal. 223; *Curia v. Packard*, Id. 194; *McCloud v. O'Neill*, 16 Id. 392; *Jackson v. Jackson*, 5 Cow. 173.)

By the Court, LEONARD, J.:

This action was brought to recover certain lands and a water right in connection therewith, upon the ground that respondent obtained from appellant the legal title thereto through fraud. The cause was tried by the court without a jury. Respondent recovered judgment in his favor.

Appellant moved for a new trial upon the grounds that the evidence did not justify the findings and decision of the court, and that they were against law. This appeal is taken from the order overruling that motion and from the judgment.

The findings of the court are as follows:

"1. On and prior to October 5, 1874, one Donald McKay had and held the title to the lands described in the pleadings herein, but in trust, for the use and benefit of defendant, Peter Dalton, and in no other manner, and for no other use, benefit, or purpose whatever.

"2. That afterwards, on the said fifth day of October, 1874, the said Donald McKay, at the instance and request of said Peter Dalton, the defendant, and without any consideration whatever, and for the use and benefit of the said Peter Dalton, conveyed the said land and premises to the plaintiff, Catherine Dalton, and the said Catherine Dalton then took and received the said conveyance for the use and benefit of the said Peter Dalton, defendant, and in trust for him, with-

out giving, paying, or surrendering any consideration therefor, but with the express agreement to hold the said title for the sole use and benefit of the defendant, and to convey the same to him, or to his use, whenever requested.

"3. That afterwards, and on the twentieth day of April, 1876, the plaintiff, Catherine Dalton, still holding the said title for the use and purposes, and in trust and in the manner, aforesaid, at the instance and upon the request of the defendant, Peter Dalton, and without any consideration paid, or agreed to be paid, conveyed the said premises to A. H. Manning in trust, and for the use and benefit of the defendant, Peter Dalton; and the said A. H. Manning, without the payment of any consideration, took the said conveyance in trust for the defendant, and agreed to hold the same for the sole use and benefit of, and agreed to convey the said premises to, the defendant, and to the defendant's use, whenever requested.

"4. That afterwards, and on the first day of May, 1877, the said A. H. Manning, at the instance and upon the request of said defendant, and without the payment to him of any sum of money or consideration whatever, conveyed the said title and premises to the defendant, Peter Dalton.

"5. That ever since the fifth day of October, 1874, the said Peter Dalton has had the equitable right to, and beneficial interest in, the said premises, and has had the possession, use, and benefit thereof, and ever since the first day of May, 1876, the said Peter Dalton has had the legal title to said land and premises, and has had the possession and use thereof, and has been, and now is, the owner of the same and every part thereof.

6. The court further finds that it is not true, as alleged in said complaint, that the plaintiff, Catherine Dalton, is the owner of any part of the real estate described in the complaint, or that she ever was such owner, or that she ever had any right to, or interest in, the same, otherwise than as hereinbefore expressly stated. That it is not true, as in the said complaint alleged, that the said plaintiff ever gave or rendered any consideration whatever for the said real estate, or that the said conveyance was made in considera-



tion of moneys advanced, or work or labor performed, or for care, or providing for defendant when sick, or for money charges incurred or paid in defendant's sickness, or in consideration of love and affection. That it is not true, as alleged in said complaint, that defendant committed any fraud, or made the alleged false and fraudulent representations, or any of them, or in any manner, as in the complaint alleged, or otherwise, defrauded, cheated, misled, deceived, or improperly influenced the plaintiff. On the contrary, plaintiff well knew the purport of her said conveyance to Manning, and that the same was to be without consideration to her, and for the use and benefit of the defendant."

"As conclusions of law, the court finds that the conveyance from Catherine Dalton to A. H. Manning, and the conveyance from A. H. Manning to the defendant, Peter Dalton, were not fraudulent, but were entirely valid, and that the defendant, Peter Dalton, is entitled to have judgment against the plaintiff; that she (he) go hence without day, and for his costs, and it is so ordered."

It is proper, first, to consider that portion of the sixth finding of fact, wherein it is found that respondent did not act fraudulently with appellant in obtaining the deed from her to Manning, and from the latter to himself; that he did not in any manner defraud, cheat, mislead, deceive, or improperly influence appellant; for the finding in question, if correct, should, and does, deprive appellant of the relief sought, regardless of other facts found and proved. If there was no fraud, concealment, or undue influence, by which respondent obtained the legal title to the property in question, then appellant is bound by her deed to Manning. If, on the contrary, fraud should have been found, she is entitled to relief, if the case in other respects entitles her thereto.

The record shows the following facts: Appellant is an old lady—over sixty years of age—and is respondent's mother. She can neither read nor write. He naturally had great influence over her, and such was evidently the fact. Indeed, one witness, Holt, testified that he had known them about seven years—had been to their place, and they had been to

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Opinion of the Court—Leonard, J.

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his; that he had an influence over her in business; that she trusted everything to him; that what he said was law to her; that he did all the business, and whether it was wrong or right, it was right with her.

She testified: "He told me he had sold his ranch (the Bowker ranch), to a man in Sierra Valley, and wanted me to sell mine. He said he would take the money and go to Oakland to live, and would give me all the money I wanted. He said he could sell his ranch better if I would sell mine. I consented to sell. I made a deed four or five days after this. He came to my bed when I was sick and told me this. When I made the deed, I thought I was making a deed to a man in Sierra Valley, but it was to a man in town. When I signed the deed, I was not informed to whom the deed was made. \* \* \* This was on Saturday. Peter went with me. He said he would go in on Monday and get the money. He said: 'Don't tell anybody what I have done.' I went to town afterwards, and Mr. Williams told me what I had done—that I had sold the ranch to Mr. Manning. \* \* \* I stayed as long as I could in the house with him and his wife after they married. I told him he and his wife might have trouble, and she would get his property. I told him if the deed was made to me, I would not sell it. When I got the deed from McKay I was living with him. \* \* \* I saw the deed in Mr. Williams' office. I put my hand to the pen. The deed was not read to me. I thought it was to a man in Sierra Valley. I have no money now. I believed what Peter told me about selling his ranch to a man in Sierra Valley, but what he told me was not true."

The testimony of Mr. Williams, who drew up the deed, shows that it was drawn at the request of respondent, two or three days before it was signed. The mother and son went to the office together. The latter asked for the deed. It was not read to her, nor did she have any notice of its contents before she executed it. The deed from appellant to Manning was executed on Saturday, and that from Manning to respondent on the Monday following. Manning testified: "I know of a deed being executed to me of the Libby and Lambirth ranch by Mrs. Dalton. Peter spoke

to me about it before the deed was executed. His mother did not. He wanted me to take the deed from her. I paid nothing. It was understood that I took the deed in trust for Peter Dalton—*understood with him*. Had no money interest in it. I did it as a favor to him.” The deeds from McKay to appellant, from the latter to Manning, and from him to respondent, were all bargain and sale deeds, containing covenants of warranty, with a consideration, as stated, of two thousand dollars.

Appellant claimed in her complaint, and testified at the trial, that the property in controversy was conveyed to her by McKay (who, in fact, held the title in trust for respondent), at the request of her son, in satisfaction of moneys due to her from him. Bridget Duffy testified to the same; while respondent claimed and testified that he owed his mother nothing; that she paid nothing, either to McKay or to him; that his mother wanted ten or twenty acres of the Bowker ranch, and to pacify her he concluded to give her a deed of the whole ranch in question; that she agreed to hold it for him. Respondent testified as follows: “At the time of the deed to Manning I had some talk of selling my ranch to a man in Sierra Valley. I told her I wanted to sell out, and so I did. She would be safe. I would always take care of her. I told her that she should be supported, if I had to go to work to do it. There was no agreement that any amount of money should be given her; nothing was said about the amount to be received, or about any money for her or her interest. I told her the deed was to Manning, but did not say what Manning. After the deed was made, she said ‘everything was mine now.’ She gave all up to me. She knew that I had not sold the ranch at that time. I have always been ready and willing to support her.”

The mildest possible construction that can be put upon his testimony, as well as hers, is that he intended to conceal from her many important facts, and to induce her to believe in the existence of other facts that did not have any real foundation. It cannot be doubted that at the time of the deed from her to Manning, his concealed intention was to

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get the legal title in himself. He had already asked Manning to take the title and hold it for him, and on the very next week day that object was consummated by a conveyance from Manning. He has held the property ever since, and there is no proof that he made any effort to sell either to a man in Sierra Valley or to any one else. It is plain to our minds that he kept his real intentions to himself, while he told her that his object was entirely different. No reason is given, and it is difficult to perceive what ones can be assigned, why he had the title passed from her to Manning, and directly from the latter to himself, instead of taking it in the first instance from her.

No reason is given why he asked her to keep secret the fact that she had conveyed the property, and we can perceive none except that he wished to get the deed from Manning before the truth should come to light. He does not deny that he told her not to tell what had been done, or that he told her, when she executed the deed, that he would go to Reno on Monday and get the money; thus showing that she supposed she was selling the ranch outright for money, instead of to Manning in trust for her son. All the circumstances demanded of him the utmost sincerity and fair dealing. She could not read, and it was his duty to tell her what she was doing, and the effect of her deed, without concealment of any important fact. She was old, and confided in him as a mother has good reason to think she may confide in a son. She was deceived, and equity comes to her relief. (Perry on Trusts, sec. 166, *et seq.*)

That portion of the sixth finding under consideration is not sustained by the evidence, so far as it relates to the only material question to be considered here, that is to say, whether or not respondent obtained the legal title by such arts and acts, that equity will not permit him to hold and enjoy any beneficial interest in, or use of, the property, if it ought to be enjoyed by appellant.

All the evidence in the case was admitted without objection, so far as the record shows. It is, therefore, too late now to object to the manner of proof. It was the duty of the court below to give it its full value, and our duty is the

same. (*Sherwood v. Sissa*, 5 Nev. 355; *McCloud v. O'Neill*, 16 Cal. 397.)

We shall not consider whether respondent was such a stranger to the deed from McKay, that the general rules applicable to parties to written instrument did not apply to him, and that he could contradict its terms by parol by showing that no consideration was paid by appellant; or whether such parol evidence when given was competent to raise a resulting trust, and thus vary the character of the deed as a bargain and sale with covenants of warranty between the parties, by engrafting upon it any condition, limitation, or reservation, inconsistent with its terms; or whether an express trust can be proven by parol testimony that is admitted without objection. But without expressing any opinion as to how they should be answered, if occasion required, and for the purpose of this case only, we shall resolve the above questions in favor of respondent.

How then does the case stand? The burden of proof to show a trust was upon respondent. His claim is opposed by the deed, and his answer setting up a trust is deemed denied by appellant. If it be admitted that a trust ought to have been found, if the proof was sufficient to sustain the finding that appellant paid no consideration, it certainly cannot be claimed that a trust arose, if appellant paid the valuable consideration stated in her testimony. If the clearest and strongest testimony must be produced to show a resulting trust in favor of one who claims to have paid the purchase money, when the deed is in the name of another, it must be true in this case, that the same certainty of proof is required to show that no valuable consideration was paid. Parol evidence of any fact that will defeat the apparent object and effect of a deed must be clear, and attended with no uncertainty, and even then should be received with great caution. If the law was otherwise, the door would be opened wide to fraud and perjury, and no man could rest in safety upon his title. In the great case of *Cook v. Fountain*, 2 Swanston, 591, it is well said that "there is one good, general, and infallible rule that goes

to both of these kinds of trusts (express and implied); it is such a general rule as never deceives; a general rule to which there is no exception, and that is this: the law never implies, the court never presumes, a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the lord chancellor to construe or presume any man in England out of his estate; and so at last every case in court will become *casus pro amico*."

In *Graves v. Graves*, 29 N. H. 145, it is said: "In the class of cases where it is held that a trust results to the party who owns the money, it is held that the evidence must be clear as to the ownership of the money. (2 Fonb. Eq. 117.) And in a case of this kind, the proof of want of consideration ought to be equally satisfactory." The fact on which the plaintiff relied in that case, was that there was never any consideration paid.

"The claim in this case is opposed by the face of the patent and by the answer of the trustee. These, we agree, may be contradicted by parol evidence, but to succeed against them, the clearest and strongest testimony must be produced. \* \* \* A bill, when denied, must be proved by at least two witnesses, or by one witness and corroborating circumstances." (*Jennison v. Graves*, 2 Blackf. 448; *Smith v. Brush*, 1 Johns. Ch. 459; *Boyd v. McLean*, Id. 591; *Clarke v. Quackenbos et al.* 27 Ill. 288; *Greer v. Baughman*, 13 Md. 268; *Brauner v. Staup*, 21 Id. 337; *Harrison v. McMenomy*, 2 Edw. Ch. 255; *McBarron et al. v. Glass et al.*, 30 Pa. St. 134; *Holder and wife v. Nunnally et al.* 2 Coldw. 288; *Grooms v. Rust*, 27 Tex. 231; *Frederick v. Haas*, 5 Nev. 394; *Millard v. Hathaway*, 27 Cal. 119.)

It remains to examine the testimony in the light of the above cases, keeping in mind also the fact, that if it was competent for appellant to show a want of consideration by parol, it was equally so for respondent to rebut such testimony by the same kind of proof.

Respondent was a witness for himself, and upon his testimony the findings must have been based.

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Opinion of the Court—Leonard, J.

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He testified that he paid for the Bowker ranch in 1870, which he now owns; also, that he paid for the property in question; that he got McKay to buy it for the reason that the parties who owned it would not sell to him; that no part of the money paid for either belonged to his mother; that it was all his own; that she paid nothing for it at any time, but was to take the title and hold it for him; that Mrs. Duffy was at the ranch when the deed was made by McKay; that he *never told his mother or Mrs. Duffy that he knew he owed his mother money that she gave him to buy the Dalton (Bowker) ranch; that he never said to Mrs. Duffy, or to his mother, that he owed her money and gave her the deed in satisfaction of the debt. But he did not testify that he did not owe her anything, or that he did not give the deed in satisfaction of the debt, except by inference from his statement that the purchase-money of both ranches belonged to him.*

Against the above is the testimony of appellant, Mrs. Duffy, Hill, and Lyell.

The first said: "I gave Peter all the money I made to buy the Bowker ranch. \* \* \* I gave him three thousand eight hundred dollars (probably two thousand eight hundred dollars) to buy the Bowker Ranch with, of my own money. I gave him the money to put in the bank at the Bay, and I gave him the book. I had been twenty years earning the money. Whenever I made a little money I gave it to him to put in the bank." She then stated that he was sick for a long time; that she took care of him and paid his doctor's bills, and continued: "He gave me this ranch for my money that I let him have to pay for his other ranch. Mrs. Duffy did this business for me. She talked to Peter about it, and he agreed to give me this ranch for my interest in the ranch he lives on. He said he could not get his wife to sign a deed of his other ranch, and he would give me a deed of this that McKay had. He brought me the deed, and told me what it was for. \* \* \* My son came with me from Illinois to California in 1864. He paid my passage, but I gave him some money to pay it. I brought with me one hundred and fifty dollars in gold and ten dollars in silver. I gave that money to him and he put it in

the bank. He and I earned more, and then he bought the property. We had a bank book. It was in his own name. I gave him all the money I had to put along with his own. I kept house. My son lived with me. I used to work out the house rent."

Hill testified that before purchasing the Bowker ranch respondent stated to him that he was going to buy a ranch; witness told him about the Bowker place, and told him it could be bought for four thousand dollars. Both went to look at it. Respondent told witness he had some money with him, but not enough to pay for the ranch; that his mother had some, and could pay three thousand dollars down. Respondent did not say how much he had.

Lyell knew that appellant kept house for her son before his marriage.

Mrs. Duffy testified that she knew appellant advanced money to respondent to purchase the Bowker ranch—knew she worked and saved money for six years, while he was sick and unable to do anything; that afterwards, for six years, she did the housework on the ranch, which entitled her to good wages. Witness said: "I heard Catherine Dalton and Peter converse about their business affairs. He stated to her in my presence that he knew his mother had advanced him money and rendered him services that entitled her to a home, and that he was willing to give it to her. It was after that he brought her the deed of the ranch held in the name of McKay. The conversation was on Peter's ranch. Dalton admitted to me that he had his mother's money or earnings, and all went to purchase the ranch. The amount I could not say; no amount was mentioned. Neither the mother nor the son knew the amount. There was no account kept between them. Peter did not say, and could not say, what amount he owed her, but was willing to give her a deed for that portion of the ranch for her services and money. About a week after their conversation he brought her the deed."

We have no hesitation in saying that respondent's unsupported testimony, opposed by appellant and by Mrs. Duffy, who were corroborated by Hill and Lyell, was wholly



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Argument for Petitioner.

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insufficient to support the finding that appellant paid no consideration for the property in question, but held it in trust for respondent. (See *Groff v. Rohrer*, 35 Md. 336.)

The order and judgment appealed from are reversed and the cause remanded.

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[No. 995.]

FLORAL SPRINGS WATER COMPANY, PETITIONER,  
v. HENRY RIVES, DISTRICT JUDGE, RESPONDENT.

**MANDAMUS**—WILL BE ISSUED TO COMPEL COURTS TO TRY CAUSES.—If the district court refuses to try a cause on the ground that it has no jurisdiction, and it appears that the court has jurisdiction, the writ of mandate will be issued to compel the court to hear and decide the cause upon its merits.

**JUSTICE OF THE PEACE—JURISDICTION—ACTION AGAINST COUNTY.**—A justice of the peace has jurisdiction of an action against a county for a sum less than three hundred dollars.

**APPLICATION** for mandamus.

The facts sufficiently appear in the opinion of the court.

*Geo. S. Sawyer* and *T. W. W. Davies*, for Petitioner.

Petitioner is entitled to the writ of mandamus. The writ is granted where a person has a legal right to insist that a certain act shall be done, the performance of which is by law made the duty of a public officer. (*Treadway v. Wright*, 4 Nev. 119; 3 Stephens' *Nisi Prius*, 2292; Redfield on Railways, 441 n. 5; *People v. Judge Wayne Co.* 1 Manning's; Michigan Rep. 359; *In the matter of Jas Turner*, 5 Ohio, 542; Moses on Mandamus, chaps. 2 and 3; Stat. of Nev. 1869, 264.)

The justice has jurisdiction of the action against the county. (Stat. 1861, 127-8, sec. 11 and 23; Stat. 1864, 45, 138, sec. 3, 257, sec. 24; Constitution, Art. VI., sec 8; Art. VIII., secs. 2, 5, 10; Art. IX., sec. 4; 1 Comp. Laws, 1570.)

A. C. Ellis, for Respondent.

I. A justice's court has no jurisdiction of any suit against a county. (Comp. Laws, 100, 101, 102, 103.)

At common law a county could not be sued at all in any court; and the authority to sue being strictly statutory, the statute must be strictly pursued as to the tribunal in which the action may be brought and tried, the mode of service, etc. (*Gilman v. Contra Costa county*, 8 Cal. 57; *Hunsaker v. Borden*, 5 Id. 290; *Hastings v. San Francisco*, 18 Id. 57.)

A county is a part of the state, a political subdivision of the state, and the sovereign can never be sued without its consent, and in the courts which it prescribes. (*Sharp v. Contra Costa county*, 34 Cal. 291; *Clarke v. Lyon county*, 8 Nev. 185; *McBane v. The People ex rel. Stout*, 50 Ill. 506.)

II. The act of the legislature of the state of Nevada, approved March 8, 1865, entitled "An act to create a board of county commissioners in the several counties of this state, and to define their duties and powers," does not confer the right to sue a county. This statute does not deal with the jurisdiction of the courts. Its title in no sense so indicates. It creates and defines the powers of a body, different from the courts of the state, and without judicial powers and functions.

But so far as it may be claimed that this law confers or regulates the jurisdiction of the courts of the state, the law is clearly unconstitutional. It was not intended to and does not confer jurisdiction on the state courts. (Art. IV., sec. 17, Const; *Waitz v. Ormsby county*, 1 Nev. 374; *Clarke v. Lyon county*, 8 Id. 186.)

III. The jurisdiction of justices' courts is limited and special, and no presumption can be indulged in favor of their jurisdiction. (*Swain v. Chase*, 12 Cal. 283; *Rowley v. Howard*, 23 Id. 401; *King v. Randlett*, 38 Id. 318; *Paul v. Beegan*, 1 Nev. 327; *McDonald v. Prescott & Clark*, 2 Id. 109; *Paul v. Armstrong*, 1 Id. 82; *Mallett v. Uncle Sam M. Co.*, Id. 188; *Little v. Currie*, 5 Id. 90.)

By the Court, BEATTY, C. J.:

This is an application for a peremptory writ of mandamus. The substance of the petition is that the petitioner in April,

1879, recovered a judgment against the county of Lincoln, in an action duly commenced in a justice's court; that the county appealed to the district court, and that the respondent, who is district judge, refuses to try the action, upon the ground that justices of the peace have no jurisdiction of actions against counties, and consequently that the district court could acquire no jurisdiction of this case, by appeal from the justice's court.

The respondent demurs, and answers at the same time. The answer, however, as well as the demurrer, admits all the allegations of the petition; and the new matter alleged on the part of the respondent was not proved, and is not relied on. The only question to be decided, therefore, is this: has a justice of the peace jurisdiction of an action against a county for a sum less than three hundred dollars? For, if he has, this case falls clearly within the rule of *Cavanaugh v. Wright*, 2 Nev. 166, in which it was held, or at least assumed—and we have no doubt correctly—that if upon a mistaken view of the law the district court refuses to try a cause, on the ground that it has no jurisdiction, and it clearly appears, from the admitted facts, that it has jurisdiction, and that all preliminary conditions to its action have been complied with, and the cause is still pending, in such case, if there is no other plain, speedy, and adequate remedy, this court should issue its mandate to the district court, to hear and decide such cause on its merits.

The decision in *Treadway v. Wright*, 4 Nev. 119, does not overrule that in *Cavanaugh v. Wright*, and if it be true that the distinction which it attempts to draw between the two cases is without any substance or validity, what follows is that the latter and not the former decision is wrong.

Returning, then, to the only question in the case, we are satisfied that the district court erred in holding that justices of the peace have no jurisdiction of actions against counties.

It is conceded that without express authority from the legislature a county can not be sued, and that the right to maintain such suits can only be enjoyed upon the condi-

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Opinion of the Court—Beatty, C. J.

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tions which the legislature sees fit to impose. It is conceded also that the only statute authorizing suits against counties in this state is the act of the territorial legislature approved February 16, 1864. (Stats. 1864, p. 45.) But it does not follow, as claimed by respondent, that the only courts in which such suits can be brought are those which are mentioned in that statute; for if this was so, a county could no longer be sued at all, the courts therein mentioned (*i. e.* the United States district courts for the territory of Nevada) having been abolished by the adoption of the state constitution and the organization of the state government. There is no more identity between the district courts of the state of Nevada and the courts mentioned in the statute of 1864 than there is between those courts and the justices' courts. Yet it has never been questioned since the decision of *Waitz v. Ormsby County*, 1 Nev. 370, that the right to sue counties remains, notwithstanding the fact that the only courts in which the statute authorizes them to be sued were utterly abolished on the admission of Nevada as a member of the federal union. In that case and in every subsequent case in which a county has been sued, it was either expressly decided, or tacitly assumed, that the right to sue a county, conferred by the act of 1864, not being repugnant to anything in the constitution or subsequent state legislation, remained intact. But it was not held, and could not have been held, that the jurisdiction of such actions continued as therein prescribed. The courts then in existence had been abolished, and the jurisdiction of the new courts which were erected in their place had been regulated by constitutional provisions, applicable to all kinds of actions. Under those provisions the jurisdiction of an action against a county is determined by the same rule that determines the jurisdiction of actions against natural persons. If the subject-matter of an action is a money demand not exceeding three hundred dollars, the jurisdiction of the district court is excluded (Constitution, Art. VI., sec. 6), and it must belong (originally) to the justices' courts if the right of action exists. (Constitution, Art. VI, sec. 8, and Statutes 1864-5, p. 114, sec. 29.)

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Points decided.

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That the right to sue a county on demands under as well as over three hundred dollars does exist can not be doubted. The statute of 1864 confers it, and nothing in the constitution or any subsequent statute has taken it away. But the jurisdiction of all such actions has been vested in other courts, and whether it belongs to the district court or to a justice of the peace is determined in each individual case by the subject-matter of the action, i. e. the amount involved. As the amount involved in petitioner's action against Lincoln county was less than three hundred dollars, it follows that the action was properly commenced in justice's court, and that the district court has jurisdiction of the appeal.

It is, therefore, ordered that the peremptory writ issue as prayed for.

HAWLEY, J., concurring.:

There is, in my opinion, a wide, plain and clear distinction, in principle, between the cases of *Cavanaugh v. Wright*, 2 Nev. 166, and *The State ex rel. Treadway v. Wright*, 4 Nev. 119. In my judgment both cases are correct.

In every case where an appeal has been taken from the justice's court it is the duty of the district judge, upon proper request, to make such disposition of the case as, in his judgment, the law and facts may warrant.

If he proceeds and disposes of the case, the writ of mandamus cannot be used to review his action. But if he refuses, the writ will be issued to compel him to act. As the district judge refused to act, I concur in the order directing the issuance of the writ.

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[No. 980.]

N. LEVY, APPELLANT, v. JAMES ELLIOTT, RESPONDENT.

SUNDAY—ATTACHMENT.—An attachment suit can be commenced and the writ served on Sunday whenever the plaintiff, or some person in his behalf, makes the affidavit required by section 50 of the act concerning courts of justice. (1 Comp. L. 955.)

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Argument for Respondent.

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**IDEM—SUFFICIENCY OF AFFIDAVIT.**—The use of the word *upon* instead of *by* in the affidavit: *Held*, to be a clerical mistake, which did not destroy the sufficiency of the affidavit.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts appear in the opinion.

*Robert M. Clarke*, for Appellant.

The power to issue the writ is expressly enumerated in the statute, and this by implication carries the power to do everything necessary to the issuance of the writ. Any other interpretation would destroy the act and overthrow the intention of the law-makers. The act in terms only provides that the writ may issue. The law grants the right to have the writ issue. It therefore grants also the right to do all things necessary to that end.

*Kirkpatrick & Stephens*, for Respondent.

Sunday laws are declared to be founded on public policy, and promotive of the principles of religion and morality, for it is held that the dedication of the Sabbath to religious rest and worship is of divine authority and perpetual obligation. (*People v. Hoym*, 20 How. Pr. 76; *Rice v. Mead*, 22 Id. 445; *Story v. Elliott*, 8 Cow. 27.)

It is obvious from the provisions of our statutes on the subject that the law-makers intended to require a strict observance of the fourth commandment, and it is irresistibly clear that they regarded the transaction of public or judicial business as a desecration of the Lord's day—to be rigidly prohibited. Such being the manifest spirit of this legislation, it must be read and interpreted in the light of the legislative intention, so as to promote the high moral and religious purpose in view. Nothing is to be taken by implication. The exceptions contained in the act must be restrained within their very letter.

The remedy by attachment is, under our system, a harsh one. In its practical operation it is always oppressive and generally inequitable and unjust. It exhausts the property

of the unfortunate debtor in costs. It breaks up and ruins his business and credit, and this, in advance of a hearing, and without allowing him his day in court. It ignores the principle of equitable distribution—giving an absolute preference to the prior attaching creditor. There is nothing in the end to be accomplished that should incline the court to relax the laws which protect the Lord's day from desecration.

*S. S. Grass*, also for Respondent.

By the Court, BEATTY, C. J.:

This action was, on motion of the defendant, dismissed by the district court, on the ground that the proceedings were void by reason of the fact that the complaint was filed and summons issued on Sunday.

The plaintiff appeals from the judgment of dismissal, and the only questions in the case are:

1. Can an attachment suit be commenced in this state on Sunday?

2. If so, did the plaintiff in this case make a proper affidavit to entitle him to the privilege?

The fiftieth section of the act concerning courts of justice, etc. (C. L. sec. 955), is as follows:

"Section 50. No court shall be open, nor shall any judicial business be transacted on Sunday, on New Year's Day, on the Fourth of July, \* \* \* except for the following purposes: \* \* \* Fourth—For the issue of a writ of attachment, which writ may be issued on each and all of the days above enumerated, upon the plaintiff, or some person in his behalf, setting forth in the affidavit required by law for obtaining said writ the additional averments, as follows: That the affiant has good reason to believe, and does believe, that it will be too late for the purpose of acquiring a lien by said writ to wait till a subsequent day for the issuance of the same. And all proceedings instituted, and writs issued, and official acts done on any of the days above specified, under and by virtue of this section, shall have all the validity, force and effect of proceedings commenced on other days," etc.

Respondent does not deny that under this fourth exception a writ of attachment may be lawfully issued on a non-judicial day, but he contends that the right to the writ does not necessarily include the right to commence an action, and he insists that the exceptions to the rule forbidding the transaction of judicial business on non-judicial days, and especially Sundays, must be narrowly and literally construed, and not extended by implication to embrace anything that it does not include in terms. It is giving full effect to the section, he says, to hold that it merely authorizes the issuance of the writ, leaving the action to be commenced afterwards, or if this is denied, to hold that it applies in those cases only in which an action has been commenced on a secular day, and is pending when the issuance of the writ is demanded.

We think, however, that a different rule of construction applies, and that a different result follows. The statute is remedial, and ought to be liberally and beneficially construed in accordance with its object and reason. It must also be construed in connection with the statutes *in pari materia*.

An attachment is a merely ancillary remedy, and in all cases an action must be commenced or must be pending at the time the writ is issued. (Comp. Laws, sec. 1184, *et seq.*) Construing this act together with the exception above quoted, it cannot be held that the latter authorizes the issuance of the writ first and the commencement of the action afterwards.

Neither can it be held that the privilege of issuing the writ on a non-judicial day is allowed only in cases where an action has been previously commenced. The plain intention of the legislature was to prevent debtors from availing themselves of the immunity of non-judicial days in order to make the remedy by attachment unavailable to some or all of their creditors; and this sole object of the law would be defeated in a great majority of instances by the construction contended for.

We think it clear that in all cases an action must be commenced or must be pending to authorize the issuance of



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Points decided.

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the writ of attachment, and equally clear that, under the statute, the writ may issue on a non-judicial day whenever the plaintiff, or some person in his behalf, will make the necessary affidavit. It follows necessarily that when he makes such affidavit in an action not yet commenced, his complaint not only may but must be filed, and summons issued, on Sunday the same as on other days.

But it is claimed that the plaintiff in this case did not make the necessary affidavit. Instead of saying it would be too late for the purpose of acquiring a lien *by* said writ if he waited till a subsequent day, he said it would be too late to acquire a lien *upon* said writ. This substitution of the word "upon" for "by" is evidently a clerical mistake, and does not detract from the sufficiency of the affidavit.

Our conclusion is that the court below erred in dismissing the action, and accordingly the judgment is reversed and the cause remanded for further proceedings.

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[No. 988.]

THE STATE OF NEVADA, RESPONDENT, v. JOHN  
DAVIS, APPELLANT.

**CONSTITUTION—TITLE OF AN ACT.**—The act supplementary to an act entitled "An act concerning crimes and punishments, approved November 26, 1861," does, in its title, express the subject embraced therein, as required by art. IV, sec. 17 of the constitution.

**ESCAPE FROM JAIL—BAD CONDITION OF JAIL NO EXCUSE.**—Defendant admitted that he left the jail, and offered to prove in excuse and mitigation of his act, that the condition of the jail was intolerable, and injurious to his health, without offering to show that he had used any lawful means of relief before escaping from the jail: *Held*, that the testimony as to the condition of the jail was properly excluded.

**IDEM—PLEA OF NECESSITY.**—The plea of necessity in justification of acts which, without such necessity, constitute the crime charged, is unavailable without a showing that lawful measures were first adopted to accomplish the desired result.

**WHAT CONSTITUTES AN ESCAPE.**—If a prisoner, with or without force, goes away from his place of lawful custody without authority of law, the offense of escaping from jail is complete.

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Argument for Appellant.

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**REASONABLE DOUBT—EXPLICIT INSTRUCTIONS.**—The court instructed the jury as follows: "A reasonable doubt in the law is one founded upon a full and fair consideration of all the circumstances and evidence in the cause, both for the state and for the defendant, and is not a doubt resting upon mere conjecture or speculation." *Held*, correct as far as it goes; that if the defendant desired a more elaborate definition, he should have asked for it.

**COMPETENCY OF JUROR—HYPOTHETICAL QUESTIONS IRRELEVANT.**—Defendant's counsel asked a juror: "If the prosecution in this case should claim, and a court should hold, that a man confined in jail under a charge of felony, leaving the jail, the doors being open, without force, is guilty of an escape under the law, then have you formed an unqualified opinion concerning the guilt or innocence of the defendant?" *Held*, that the question was properly excluded.

**IDEM—CHALLENGE PRACTICE.**—The proper practice is to dispose of each challenge in the order named in the statute. If there is no challenge to the panel, or if it is made and overruled, questions appertaining alone to general disqualification should then be asked, and a challenge for that cause interposed or waived; next, questions competent in view of a challenge for implied bias only should be propounded, and a challenge for that cause interposed or waived; and last, the same course should be pursued for actual bias.

**IDEM—IMPLIED BIAS—DEFENDANT'S CHARACTER.**—The fact that a juror had formed an unfavorable opinion of defendant's character will not sustain a challenge for implied bias.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts sufficiently appear in the opinion of the court.

N. Soderberg, for Appellant.

I. The act under which defendant was convicted (1 Comp. Laws, 589) is unconstitutional. (Const. Nev., Art. IV., sec. 17; *State v. Silver*, 9 Nev. 227; *Parkinson v. State*, 14 Md. 194.)

II. Defendant had a right to show, in mitigation and defense, that an absolute necessity for his leaving the jail existed. It was for the jury to decide whether the facts were sufficient to justify. It was error to exclude the testimony as to the filthy and unwholesome condition of the jail. This testimony was also material as to the question of intent with which defendant left the jail. (1 Comp. Laws, 2307-8;

## Argument for Respondent.

*State v. Gardner*, 5 Nev. 377; 37 Tex. 338; Bishop on Cr. L. 370.)

III. The definition of a reasonable doubt given by the court was calculated to mislead the jury. (*State v. Rover*, 11 Nev. 343; 51 Cal. 374.)

IV. It was error to deny defendant the opportunity of ascertaining whether the juror Stampley was competent. It was the juror's duty to know the law without any statement and he had the right to be informed what the law was. This ruling of the court deprived defendant of a substantial right.

Hypothetical questions are not always objectionable. (*State v. Arnold*, 12 Iowa, 479; *Freeman v. People*, 4 Denio, 9.)

If Stampley entertained the hypothetical opinion stated in the bill of exceptions, defendant would have been entitled to submit the question of actual bias in Stampley to triers. (*People v. Bodine*, 1 Denio, 281; *State v. Benton*, 2 Dev. & B. 196; *People v. Mather*, 4 Wend. 229.)

M. A. Murphy, Attorney-General, for Respondent.

The provisions of sec. 17 of art. 4 of our constitution is accomplished when the law has but one general object which is fairly indicated by its title. (Cooley on Const. Lim. sec. 144; *Humboldt Co. v. Churchill Co.* 6 Nev. 30; *The People v. Mahaney*, 13 Mich. 495; *Morford v. Ungar*, 8 Iowa, 82; *Bright v. McCullough*, 27 Ind. 225; *Mayor et al v. Maryland*, 30 Md. 118; *Davis v. The State*, 7 Id. 159; *Keller et al. v. Id.* 11 Id. 531; *Parkinson v. Id.* 14 Id. 190; *State ex rel. v. Town of Union*, 3 N. J. 351; *The Sun Mut. Ins. Co. v. Mayor of N. Y.*, 8 N. Y. 252.)

II. There was no error in excluding the testimony of Hart. The escape of a person arrested upon criminal process whether effected with or without force, before he is discharged by due course of law, is punishable as an offense against public justice. (2 Bish. Crim. Law, sec. 1093; *State v. Doud*, 7 Conn. 386; *Riley v. The State*, 16 Id. 47.)

III. The instruction as to reasonable doubt is correct. (*United States v. Knowles*, 4 Saw. 521; *United States v.*

*Foulke*, 6 McLean, 355; *Long v. The State*, 38 Ga. 508; *Commonwealth v. Drum*, 58 Pa. 22.)

IV. The questions asked the juror Stampley were properly excluded. The point to determine as to the qualification of a juror is whether at the time of his examination he has an unqualified opinion as to the guilt or innocence of the accused, and not what might be the state of his mind after hearing the evidence. (*People v. Johnston*, 46 Cal. 78; *State v. Arnold*, 12 Iowa, 479.) The forming of an opinion as to the bad character of the accused is no ground for challenge. (*People v. Allen*, 43 N. Y. 34; *People v. Mahoney*, 18 Cal. 180.)

By the Court, LEONARD, J.:

Appellant was convicted of the crime of escape from the jail of Ormsby county, when lawfully confined therein upon a charge of felony.

This appeal is taken from the judgment, from the order overruling appellant's motion in arrest of judgment, and from an order denying his motion for a new trial.\*

1. It is first urged by counsel for appellant that the statute under which appellant was indicted and convicted is unconstitutional, and therefore void, because it does not, in its title, express the subject embraced therein, as is required by section 17 of Article IV of the constitution. That section is as follows: "Each law enacted by the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." \* \* \* The title of the statute in question (1 Comp. Laws, 589) is as follows: "An act supplementary to an act entitled 'An act concerning crimes and punishments,' approved November 26, 1861."

It is a plain proposition, that if the statute last mentioned is unconstitutional for the reason stated, then the principal statute of the state in relation to crimes and punishments is unconstitutional for the same reason, because it is only entitled, "An act concerning crimes and punishments," and embraces murder, arson, robbery, larceny, and other crimes. (1 Comp. Laws, 557.) The fact just stated is no good

reason for declaring the statute in question constitutional, if it is not so, but it is an additional reminder of the necessity of carefulness in coming to a proper conclusion. If the statute in question, in relation to escapes, would have been constitutional, had it been embodied in the original act, under the title above stated, it must be constitutional now, under the title, "An act supplementary" thereto.

The constitution only requires that each law "shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." The subject of the statute to which the one under consideration is supplementary, is crimes; the matters properly connected therewith are the punishments therefor, and both are briefly expressed in the title. It embraces but one subject and matter properly connected therewith.

Escape, larceny, robbery, and murder are different crimes, but they are upon the same subject, viz.: *crimes*. The title truly and fairly indicates in general terms the subject of the statute. Nothing is contained therein that is not suggested by the title, and the title affords a clue to the contents of the statute. The objection under consideration is not well taken. (*Humboldt county v. The County Commissioners of Churchill county*, 6 Nev. 34; *Bright v. McCullough, Treasurer, etc.*, 27 Ind. 225; *Cooley's Const. Lim.* 141; *Davis v. The State*, 7 Md. 159; *Parkinson v. The State*, 14 Id. 196; *Mayor, etc. v. The State*, 30 Id. 118; *The Sun Mut. Ins. Co. v. The Mayor, etc.* 8 N. Y. 252.)

2. The court refused to permit Hart, witness for appellant, to answer the following question:

"What was the condition of the jail on and before the twentieth day of March last (the date of the alleged escape), as to whether it was a filthy, unwholesome, and loathsome place, full of vermin and uncleanness, or was it a clean, properly-kept institution?"

Counsel stated that he asked the question "for the purpose of showing that defendant had been confined in the jail a long time; that the condition of the jail during that time and on the twentieth day of March, 1879, was absolutely intolerable and injurious to the health of the defend-

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ant. This testimony is offered in excuse and in mitigation of the defendant's leaving the jail, and to show an absolute necessity of his leaving."

Counsel offered to prove the above state of facts by witness Hart and others. Without stating other reasons in support of the court's action, it is enough to say that appellant admitted leaving the jail. By the means employed he gained his liberty before he was delivered by the course of the law. In other words, he intentionally escaped from the jail, and in justification offered the testimony of Hart and others in relation to its condition. Appellant said in substance: "When legally confined in jail upon a charge of felony I escaped, but the condition of the jail was such that I was under the necessity of doing so." We consider it unnecessary to decide whether or not the proposed testimony would have been admissible in justification had a proper foundation been laid therefor, that is to say, had appellant shown or offered to show that he exhausted the lawful means of relief in his power before attempting the course pursued. It was not shown or claimed that he had even complained to the sheriff or the board of county commissioners, or that he had endeavored to obtain relief by any lawful means. The plea of necessity in justification of acts which, without such necessity, constituted the crime charged, was unavailable without also showing that lawful measures had first been adopted to accomplish the desired result. A person confined by the law should be delivered by the law; and no other means can be justified in any case, until the officers in charge, and the law, refuse him relief; and then the evidence of the necessity must be clear and conclusive, and the act must proceed no further than the emergency absolutely requires. (Bishop on C. L. col. 1, sec. 352.)

The necessity, to excuse, must be real and urgent, and not created by the fault or carelessness of him who pleads it. "Where the law," observes Story, J., "imposes a prohibition, it is not left to the discretion of the citizen to comply or not; he is bound to do everything in his power to avoid an infringement of it. The necessity which will excuse

him for a breach must be instant and imminent; it must be such as leaves him without hope by ordinary means to comply with the requisitions of the law. It must be such, at least, as can not allow a different course without the greatest jeopardy of life and property. He is not permitted, as in cases of insurance, to seek a port to repair, merely because it is the most convenient, and the most for the interest of the parties concerned. He is, on the contrary, bound to seek the port of safety which first presents itself, if it be one where he may go without violation of the law. In a word, there must be, if not a physical, at least a moral, necessity to authorize the deviation. Under such circumstances the party acts at his peril; if there be any negligence or want of caution, any difficulty or danger which ordinary intrepidity might resist or overcome, or any innocent course which ordinary skill might adopt or pursue, the party can not be held guiltless, who, under such circumstances, shelters himself behind the plea of necessity." (Id. sec. 352.)

The court did not err in rejecting the evidence offered in relation to the condition of the jail.

3. The refusal to give the second and fourth instructions asked by appellant was not error. There was no proof that the door of the jail was open; but if there had been the result would have been the same. Appellant testified that the door was unlocked. Bishop defines an escape as the "going away by the prisoner himself, from his place of lawful custody, without a breaking of prison." (Bish. Crim. Law, vol. 2, sec. 1065. See, also, Hale's Pleas of the Crown, vol. 1, 605, note; Comp. Laws, sec. 2466, *et seq.*)

The keeper of a prison, or other officer having a prisoner in custody, has no right to consent to an escape; and if he does, the escaping prisoner is no less guilty. (Bish. Crim. Law, sec. 1104, and cases there cited.)

And, for reasons before stated, the fifth instruction offered by appellant is not law. Besides, had it been given, the jury would have been justified in finding for appellant, if the jail was, to any extent, loathsome and injurious to his health. Such a doctrine finds no sanction in the books, and is hardly entitled to notice.

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4. It is urged that the court erred in instructing the jury that "a reasonable doubt in the law is one founded upon a full and fair consideration of all the circumstances and evidence in the cause, both for the state and for the defendant, and is not a doubt resting upon mere conjecture or speculation."

Our most distinguished jurists have found it difficult to define reasonable doubt to their entire satisfaction. This court has adopted as correct the definition given in *Commonwealth v. Webster*, 5 Cush. 320. See *State v. Rover*, 11 Nev. 344. The instruction in question was evidently taken from *United States v. Knowles*, 4 Saw. 521, where Justice Field defined it in the precise words used in this case. See further, *Bray v. State*, 41 Tex. 561. It would be better, probably, if courts would use the language that has been passed upon and settled as correct, but a careful examination of the portion of the instruction approved in *Rover's case*, and the one given here, shows that they are substantially the same. Certainly that given in this case contains nothing erroneous. It is, at any rate, correct as far as it goes. If counsel for appellant desired a more elaborate definition, he should have asked for it. (*State v. Smith*, 10 Nev. 122.)

5. The jury were instructed that "if a person legally committed to the custody of a sheriff to answer to a charge of felony, and by such sheriff confined in the jail of his county, escape or depart therefrom, with or without force, he is guilty of escape from such jail; and if the jury find from the evidence in this case that the defendant, John Davis, was so committed and confined on or about March 20, 1879, in the county jail of Ormsby county, State of Nevada, and that while so committed and confined \* \* \* he did depart from said jail without authority of law, then the jury are instructed that they should find the defendant guilty, as charged in the indictment."

The first portion of the instruction properly defines an escape from jail (Bish. C. L. sec. 1065; *State v. Doud*, 7 Conn. 386; Comp. Laws, 2467); and if appellant did what is stated in the last part, he was necessarily guilty; because



the doing of those acts completed the crime, even according to the theory of counsel for appellant, unless appellant was justified under the plea of necessity, and as we have seen, proof of the filthiness of the jail was not a justification without showing, or offering to show, that he first sought relief by legal means, even though he would have been justified had such proof been made or offered. So there was no proof of justification. No doubt an *intent to escape* was necessary, but no other intent was required, and that was admitted under a plea of justification which was wholly unsupported by the evidence.

6. One of the jurors, O. K. Stampley, testified upon his *voir dire*, that he knew the defendant and had read accounts in the local newspapers of the alleged escape; that he did not know what constituted the crime of escape from jail, and therefore could not answer whether he had formed or expressed an unqualified opinion touching defendant's guilt or innocence.

Counsel for appellant then asked the juror this question: "If the prosecution in this case should claim, and the court should hold, that a man confined in jail under a charge of felony, leaving the jail, the doors being open, without force, is guilty of an escape under the law, then have you formed an unqualified opinion concerning the guilt or innocence of the defendant?"

Counsel for the state objected to the question and the court excluded it, because it was hypothetical.

Counsel then asked: "Have you ever formed an unfavorable opinion of defendant's character?" That question was also excluded.

Appellant then challenged the juror for *implied* bias for having formed or expressed an unqualified opinion of the guilt or innocence of the defendant. No challenge was interposed for *actual* bias. Appellant exhausted all of his peremptory challenges, and Stampley was sworn as a juror to try the cause.

The criminal practice act (sec. 353) provides that challenges of either party must be taken separately in the following order, including in each challenge all the causes of

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the challenge belonging to the same class: "First—To the panel. Second—To an individual juror for general disqualification. Third—To an individual juror for implied bias. Fourth—To an individual juror for actual bias." Each party has an absolute right to interpose any one or all of the above-named challenges for cause, in the order named.

A challenge to the panel and for implied bias must be tried by the court, and for actual bias by triers.

One challenge has no connection with another, and the grounds for each are equally independent of others.

Questions that are competent to sustain a challenge for *actual* bias may be entirely incompetent in view of a challenge for *implied* bias. Questions to sustain a challenge for general disqualification are improper in view of a challenge for either implied or actual bias. Such being the case, the proper practice is to dispose of each challenge in the order named in the statute. If there is no challenge to the panel, or if it is made and overruled, questions appertaining alone to general disqualification should then be asked and a challenge for that cause interposed or waived; next, questions competent in view of a challenge for implied bias only, should be propounded and a challenge for that cause interposed or waived; and last, the same course should be pursued for actual bias. With such a practice the court and counsel can act intelligently, and neither party can be prejudiced. We are satisfied that such was the method intended by the legislature. In this case the court was justified in thinking (and we have no doubt that such was the fact) that the questions excluded were asked for the purpose of laying the foundation for a challenge for implied bias. The first was plainly for that purpose; the second followed immediately after the exclusion of the first, and then came a challenge for that cause only.

If the questions were not competent in view of a challenge for implied bias, but were competent to sustain a challenge for actual bias, then appellant should have challenged for the latter cause after his first challenge had been denied.

Counsel for appellant says: "It was error to deny de-

defendant an opportunity to ascertain whether Stampley was a competent juror. He answered that he did not know what constituted the crime of escape from jail, and for that reason could not say whether he entertained an unqualified opinion of defendant's guilt."

In the first place, it is plain that the juror did not entertain an unqualified opinion of appellant's guilt or innocence. He certainly had no definite, certain, positive opinion whether appellant was guilty or innocent of the crime charged, although he stated in general terms that he could not answer whether he had such opinion or not. If, without knowing the law, he had been so unreasonable as to form such an opinion, he then knew it, and must have answered in the affirmative. But such was not the case, and had he been pressed to an answer, he must have said that he had not such opinion, and could not have, until he knew what constituted the crime charged. His idea was, and properly too, that he should not arrive at a conclusion upon the question of guilt or innocence without knowing the law as well as the facts. He did not say he believed the newspaper accounts, but admitting that he did believe what he read, still, being a candid, reasonable man, he could not say he had the disqualifying opinion. Had the juror said: "I do not know all the facts, therefore I cannot say whether I have formed an unqualified opinion or not," it would hardly be claimed that he could have been asked the following question: "If the proof should show, and the defendant should admit, that when confined in jail on a charge of felony he, without force, left the jail and departed therefrom, then have you formed an unqualified opinion as to his guilt or innocence?" But why not, according to the theory of counsel for appellant, inasmuch as the proof and admission were as stated in the question? Was not the opinion asked for as purely hypothetical as the one supposed would have been? True, it may be said that, in the case in hand, the juror's opinion, if he would have had any, depended upon the proper construction of the statute yet to be ascertained, and in the other upon facts to be proven; still, if as claimed, the question under consideration was proper because it correctly stated the law.

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under which appellant was tried and convicted, we are unable to perceive why the one supposed would not have been equally proper, the proof and admission having been as therein stated.

Any question was proper which would have shown whether, as he then stood, he had formed or expressed an unqualified opinion of appellant's guilt or innocence. But none were competent which instructed him upon the law or the facts, to the end that he might form an opinion after receiving the information. Jurors are presumed to take the law from the court, and to gather the facts from the evidence admitted. But if they have formed a definite, fixed opinion—no matter why, whether upon a knowledge of the law and the facts, or either or neither—they are disqualified. On the other hand, if for any reason they have not such opinion without further instruction or information, then upon a challenge for implied bias, the law declares them competent. The law attaches the disqualification to the fact of forming or expressing an unqualified opinion upon the guilt or innocence, and does not look beyond to examine the occasion, or weigh the evidence on which that opinion is founded. (*People v. Mather*, 4 Wend. 243; *State of Iowa v. Thompson*, 9 Iowa, 190.) If a juror is in any manner, or for any cause, biased or prejudiced, by reason of what he knows, or because of his feelings, that fact can be ascertained only in view of, or upon a challenge for, actual bias.

The court did not err in excluding the first question. (*People v. Reynolds*, 16 Cal. 132; *People v. Mather*, *supra*; *People v. Honeyman*, 3 Denio, 123; *People v. Mallon*, 3 Lansing, 230; *People v. Stout*, 4 Parker's Crim. R. 71; *People v. Freeman*, 4 Denio, 10; *Schoeffler v. The State*, 3 Wis. 718; *McGowan v. The State*, 9 Yerg. 193; *Armistead's case*, 11 Leigh, 658; *State v. McClear*, 11 Nev. 39.)

7. If the juror had answered the second question in the affirmative, the answer would not have sustained a challenge for implied bias. (*People v. Allen*, 43 N. Y. 34; *People v. Mahony*, 18 Cal. 186) That question might have been competent to sustain a challenge for actual bias, to be consid-

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Points decided.

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ered with other matters by triers in ascertaining the state of the juror's mind; but as before stated, it was evidently asked for the purpose of sustaining a challenge for implied bias, and no challenge was interposed for actual bias.

"It is not in general sufficient to justify the triers in setting aside a juror as not indifferent that he has formed an unfavorable opinion of the character of the accused. If it should be, notorious offenders could not be tried at all. Whether it would be a valid objection that he had read a report of the facts in the public newspapers, and had thereby imbibed an impression against the accused, must, of course, depend upon the strength of such impression. If it should be weak it would not disqualify the juror. If, however, it should be so strong that it would have any influence in forming his opinion on the trial, then he would not stand indifferent and should be rejected." (2 Barb. 222.)

We find no error in the record, and the judgment and orders appealed from are affirmed.

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[No. 1010.]*EX PARTE WM. WILLOUGHBY.*

**COMMITMENT—REASONABLE OR PROBABLE CAUSE.**—Upon the preliminary examination of petitioner upon the charge of being accessory to the murder of P. L. Traver, testimony was given to the effect that T. was deliberately killed by one Owen, on the fifth of January, 1880, in front of petitioner's saloon; that three days prior to the killing, petitioner told O. that he would give him a month's whisky, and that another man then present would give him a month's board, if he would whip or kill T. *Held*, sufficient to authorize his commitment.

**FORM OF COMMITMENT.**—A commitment which recites that petitioner has been held to answer the charge of murder, by being accessory before the fact, to the killing of P. L. Traver, at Metallic City, Esmeralda county, state of Nevada, on or about the fifth day of January, A. D. 1880, satisfies the requirements of the statute. (1 C. L. 1794.)

The facts are stated in the opinion.

*John R. Kittrell*, for Petitioner.

*M. A. Murphy*, Attorney-General, for the State.

By the Court, BEATTY, C. J.:

The petitioner alleges that he is illegally imprisoned by Clem Ogg, sheriff of Esmeralda county, and asks to be discharged from custody upon the grounds:

1. That he was committed on a charge of murder without reasonable or probable cause; and,
2. That the warrant of commitment does not specify any offense known to the law.

Upon this petition, a writ of *habeas corpus* was issued, from the return to which it appears:

That at the examination before a justice of the peace of Esmeralda county, testimony was given to the following effect:

The petitioner keeps a saloon at Candelaria, in said county; on the second day of January, 1880, in his saloon, he told one Mike Owen that he would give him a month's whisky, and that another man then present would give him a month's board, if he would whip or kill old Traver; on the fifth of January Owen came out of petitioner's saloon and shot and killed Traver in the street; he was thereupon arrested, but was rescued by a gang of men, who took him back into the saloon, from which place he disappeared and made his escape.

The first question to be decided is whether this testimony, assuming it to be true, is sufficient in law to warrant the conclusion of the justice of the peace that petitioner was accessory before the fact to the crime of murder. We think it is. It makes out a *prima facie* case of a willful, deliberate and premeditated killing of Traver by Owen, without justification, excuse, or provocation, and it shows that petitioner counseled, advised, and encouraged it.

This being so, we consider ourselves bound to sustain the action of the committing magistrate. We cannot go into the question of the credibility of the witnesses. That was a question for the justice of the peace to decide, and our power in reviewing his action extends no further than to determine the question above stated: Was the testimony, assuming its truth, sufficient in law to warrant the finding?

## Argument for Appellant.

The second ground upon which the petitioner relies is equally unsustained. The warrant recites that William Willoughby has been held to answer the charge of murder by being an accessory before the fact to the killing of P. L. Traver, at Metallic City, Esmeralda county, state of Nevada, on or about the fifth day of January, A. D. 1880.

This satisfies all the requirements of the statute. (C. L. 1794.) It states the nature of the offense—murder—and the time when and place where committed.

The petitioner is remanded to the custody of the sheriff of Esmeralda county.

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[No. 982.]

THE STATE OF NEVADA, RESPONDENT, v. WILLIAM SOULE, APPELLANT.

GENERAL OBJECTION TO EVIDENCE—WHEN SUFFICIENT.—Where the evidence offered is wholly incompetent and inadmissible for any purpose, a general objection on the ground of incompetency is sufficient.

STATEMENT OF ONE DEFENDANT—WHEN INADMISSIBLE AGAINST HIS CO-DEFENDANT.—A statement made by one defendant, upon his preliminary examination, tending to exculpate himself and inculpate his co-defendant, is inadmissible against any one but himself.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts appear in the opinion.

*Bishop & Sabin*, for Appellant.

I. A deposition can not be introduced (save to correct or dispute the party who made it), unless the party be dead, out of the state, or absent. (1 Comp. Laws, 1779.)

II. Every person on trial in a criminal case has the right to a full and perfect cross-examination of every witness who is called to testify against him. (*State v. Larkin*, 11 Nev. 315; 1 Comp. Laws, 1779.)

The paper objected to is only a voluntary statement of one co-defendant against the other defendants and is inad-

missible. (*State v. Ah Tom*, 8 Nev. 213, and authorities there cited; *People v. Moore*, 45 Cal. 19; *Roscoe's Cr. Ev.* 50.)

*M. A. Murphy, Attorney-General*, for Respondent.

I. The statements made by the defendant, Gorman, before the committing magistrate, were competent evidence against Soule. (*Greenleaf on Ev.* vol. 1, sec. 111.)

II. Defendant's objections were too general. The objections should be so stated that the attention of the court below may be directed to the exact point, so that the objection may be thus obviated if it be one of that character. (*Civ. Pr. Act*, Comp. Laws, 1252; *State v. Jones*, 7 Nev. 408; *Martin v. Travers*, 12 Cal. 243; *State v. Murphy*, 9 Nev. 394; *Dreux v. Domec*, 18 Cal. 83; *Leet v. Wilson*, 24 Id. 399; *Kiler v. Kimbal*, 10 Id. 267.)

III. The objection that the paper read to the jury was not a deposition or statement such as is contemplated by the statute, comes too late. (*Covillaud v. Tanner*, 7 Cal. 38; *Sharon v. Minnock*, 6 Nev. 382; *Robinson v. Imperial Co.* 5 Id. 44; *Potter v. Carney*, 8 Cal. 574.)

By the Court, LEONARD, J.:

Appellant, George W. Cooper, and John Gorman were jointly indicted and tried for the crime of burglary. Appellant alone was convicted. Each defendant was represented and defended by his own counsel. This appeal is taken from an order overruling appellant's motion for a new trial and from the judgment.

A reversal is asked upon several grounds, one of which only will be considered.

The record shows that "the district attorney offered a paper purporting to be the statement of John Gorman, one of the defendants, made by him upon his examination before the justice of the peace, to the introduction of which objection was made by the attorneys of the several defendants. Attorneys for the defendant, Soule, objected to its introduction upon the grounds that it was an *ex parte* statement made in the absence of the defendant, Soule, and



without his having had the opportunity to cross-examine the party or explain the same by other evidence; that the defendant, Gorman, being upon trial, the state could only use his statement made before the examining magistrate for the purpose of explaining or contradicting the evidence that might be given by the party on the stand in this trial; \* \* \* that the said paper is incompetent as evidence to prove any material fact in this case; \* \* \* that the introduction thereof as evidence is unwarranted, contrary to law, and prejudicial to the rights of the defendant, Soule.”

The statement was admitted, and it cannot be doubted, that its tendency was to exculpate defendant Gorman and to inculcate appellant. If its admission in evidence was error, it follows that a new trial must be granted.

It is claimed by the attorney-general that “if for any reason the statement was inadmissible, it was upon other and different grounds from those stated by appellant’s counsel,” and consequently, that the court did not err in overruling the objection made.

It is undoubtedly true, in criminal as well as in civil cases, that, as a general rule, the point of objection should, and must be, specifically stated, to the end that the attention of the court may be directed thereto; and that the opposite party may have an opportunity to obviate the objection if it be in his power to do so. (*Sharon v. Minnock*, 6 Nev. 382.) But it is also true that, if the statement of Gorman was not competent evidence against appellant for any purpose, and was prejudicial to his case, it was error to admit it against his general objection, on the ground of incompetency alone. An objection to evidence on the ground of incompetency and illegality, without a specification of the point of incompetency or illegality, does not avail the objecting party, in case the objection is overruled, if the evidence is admissible for any purpose; but if it is wholly incompetent and inadmissible for any purpose, a general objection on the ground of incompetency is sufficient, and the error will be considered and corrected on appeal.

In *Sneed v. Osborn*, 25 Cal. 627, the court said: “The appellant makes a further point, that the court erred in ad-

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mitting the testimony of H. C. Boggs, concerning the declaration of Governor Boggs, as to the boundaries of the Boggs tract, and we think it well taken. The objection was general, the ground being that it was incompetent and illegal testimony, and it would be the duty of the court to overrule an objection thus taken if the evidence was admissible for any purpose. The party objecting should lay his finger on the point of objection (*Martin v. Travers*, 12 Cal. 243, and cases cited). But here the witness stated that Governor Boggs was not then in possession of any of the land, and for that reason his declarations were not competent as evidence."

Defendants jointly indicted may be tried together; but evidence that is admissible against one can not be admitted against another if it is inadmissible as to him and a proper objection is interposed. In such a case it must be received with proper limitations. Appellant's counsel appeared and acted for him alone. They had no interest in, or power to act for, the other defendants, consequently their objections must be considered as having been limited to their client, although they did not so state in terms. It therefore follows that if the statement objected to was inadmissible for any purpose as evidence against appellant, on the ground of incompetency, it was error to admit it generally in the case, even though it was proper to be admitted against defendant Gorman. (See *Voorman v. Voight*, 46 Cal. 397.)

It remains to be considered whether the statement admitted was admissible for any purpose against appellant.

We have no hesitation in saying that it was not, and that it would not have been, had it been certified and authenticated according to law. There is no authority in the statute for such a proceeding, and we are unable to find any decision sustaining it.

In the *State v. Ah Tom*, 8 Nev. 214, the court said: "During the trial of the cause the state was allowed to introduce in evidence certain declarations made by the defendant Ah Tom to Chinese merchants in San Francisco, several days after the larceny was committed, to the effect that he was entirely innocent of the offense but knew that

his co-defendants were guilty. Neither of the other defendants was present when this statement was made. The admission of this testimony against the objections of defendants Ah Mok, Ah Ping, and Ah Loy, was clearly erroneous.

If there had been complicity between all the defendants in the commission of the offense, the declarations made by either, after the commission of the offense, could not be used as evidence against the other defendants. A mere gratuitous assertion made by a defendant charged with a crime, exculpating himself and inculcating his co-defendants, should never be received as evidence against any one but himself.

We are satisfied that the error committed in this case was as great as in that. The fact that the statement of Gorman was made at his preliminary examination, instead of to some person out of court, can make no difference. It was still a mere gratuitous, voluntary assertion, exculpating himself and inculcating appellant, made in the absence of the latter. The admission of that evidence was prejudicial to appellant. It was incompetent as evidence against him for any purpose. It follows that the judgment and order overruling the motion for a new trial should be reversed, and it is so ordered.

Remittitur forthwith.



EXTRA ANNOTATION  
TO  
PRECEDING VOLUME



# NOTES

## ON THE

# NEVADA REPORTS.

### CASES IN 14 NEVADA.

14 Nev. 17-24, 33 Am. Rep. 523. **BLAISDELL v. HEISTER.**

**Water rights.** — Cited in *Boynton v. Loughley*, 19 Nev. 76, 3 Am. St. Rep. 781, 6 Pac. 440, as to prescriptive right to flow of surplus waters; *Hulsman v. Todd*, 96 Cal. 232, 31 Pac. 41, in discussing liability for unlawful diversion and consequent injury therefrom; *Lehi Irr. Co. v. Moyle*, 4 Utah, 340, 9 Pac. 876, to point that prior appropriator of water has prior right of use to extent, in amount of time, of his appropriation.

**Tort-feasors.** — Cited in *Miller v. Highland Ditch Co.* 87 Cal. 432, 22 Am. St. Rep. 255, 25 Pac. 557, and *City of Valparaiso v. Moffit*, 12 Ind. App. 254, 54 Am. St. Rep. 525, 39 N. E. 911, as to liability to joint tort-feasors; *Woodruff v. North Bloomfield etc. Min. Co.* 16 Fed. Rep. 31, 8 Sawy. 628, to point that in action for nuisance an injunction where parties are not jointly liable, joint judgment against them shall not be rendered; *Union Mill etc. Co. v. Dangberg*, 81 Fed. 89, and *Pacific Live-Stock Co. v. Hanley*, 98 Fed. 329, discussing right of action against diverse parties jointly for injury to prior appropriation of water; *Morris v. Bean*, 123 Fed. 620, to point that in an action against diverse parties for injury to prior appropriation of water where the evidence shows that the damage was not inflicted by defendants jointly, no damage can be recovered; *Corris v. Bean*, 123 Fed. 619, discussing right to maintain action against various parties appropriating water to injury of prior appropriator; *West Muncie etc. Co. v. Slack*, 164 Ind. 24, 72 N. E. 880, to point that action at law cannot be brought against several tort-feasors among whom there is no concert and unity of action and no common design; *Foster v. Bussey*, 132 Iowa, 44, 109 N. W. 1106, to point that where stock of different people trespass on plaintiff's grain field at different times during the year and the injuries occasioned thereby were distinct and separate, but without proof from which assessment of damages occasioned by stock of

each owner could be made nominal damages only can be given; *Lockwood Co. v. Lawrence*, 77 Me. 307, 52 Am. Rep. 763, holding that several tort-feasors acting independently will be enjoined in one suit; *McBride v. Scott*, 125 Mich. 529, 84 N. W. 1084, to point that several tort-feasors not acting in concert or by unity of design are not liable in joint action for damages; *Miles v. Du Bey*, 15 Mont. 341, 39 Pac. 313, to point that when two or more parties act, each for himself, in producing results injurious to another they cannot be held jointly liable for damages resulting; *Swain v. Tennessee Copper Co.* 111 Tenn. 451, 78 S. W. 97, holding that two corporations engaged in reduction of copper each contributing to pollution of air which are entirely independent of each other with community of interest, concert of action or common design, cannot be joined in action for damages against defendant's adjoining property; *Draper v. Brown*, 115 Wis. 370, 91 N. W. 1003, to point that where right sought to be enforced was to have water level maintained and defendants though acting independent and without common design of parties contributing to injury of that right, they were properly joined as defendants; *Mau v. Stoner*, 15 Wyo. 134, 87 Pac. 440, to point that where defendants acted separate and apart at different times and places, and not in performance of any common design or purpose to injure plaintiff's right, each party will be liable for his own wrong and liable for that wrong only though damage sought was aggregate result of such independent wrongs.

Cited in reference notes in 21 Am. St. Rep. 677, to point that the liability of several persons for creating a nuisance is both several and joint, and the plaintiff may, at his pleasure, sue one or all of the wrong-doers; 118 Am. St. Rep. 873, it is now well settled that if two or more persons who create or maintain a private nuisance act entirely independently of one another, and without any community of interest, concert of action, or common design, each is liable only so far as his acts contribute to the injury; and those injured by the nuisance must proceed in separate actions against the several wrong-doers for the proportion of damage caused by each separately; 10 L.R.A.(N.S.) 169, without concert of action no joint suit can be brought against tort-feasors.

**Tort — Plaintiffs, uniting.** — Cited in *Foreman v. Boyle*, 88 Cal. 293, 26 Pac. 94, to point that two or more mill owners propelled by water of same stream cannot unite in action for damages for injury suffered by nuisance in stream; *Frost v. Alturas Water Co.* 11 Ida. 299, 81 Pac. 997, to point that several appropriators and users of water from the stream cannot join in action against other appropriators and users to their individual injury.

**Variance.** — Cited in *Livesay v. First Nat. Bank*, 36 Colo. 534, 118 Am. St. Rep. 120, 86 Pac. 105, 6 L.R.A.(N.S.) 602, as to variance upon pleadings and proof justifying court in rejecting proof.



**14 Nev. 24-46. HUNTER v. TRUCKEE LODGE.**

**Mechanics' lien law.**—Cited in *State v. Yellow Jacket S. Min. Co.* 14 Nev. 243, in construing mechanics' lien law; affirmed in *Lonkey v. Cook*, 15 Nev. 58, on point mechanics' lien law give direct lien to sub-contractors and material men; cited in *Malter v. Falcon Min. Co.* 18 Nev. 212, 2 Pac. 50, to point mechanics' lien law should be liberally construed; *Maynard v. Ivey*, 21 Nev. 244, 29 Pac. 1691, to point that mechanics' lien laws should receive broad and liberal construction; *Porteous Dec. Co. v. Fee*, 29 Nev. 380, 91 Pac. 136, to point that mechanics' lien can exist only when perfected in statute creating it; *Tonopah Lumber Co. v. Nevada Amusement Co.* 30 Nev. 456, 97 Pac. 639, to point that mechanics' lien laws are to be liberally construed; *McFadden v. Stark*, 58 Ark. 14, 22 S. W. 886, in discussing mechanics' lien law and right of owner of sub-contract thereunder; *Salt Lake Hardware Co. v. Chainman Min. etc. Co.* 128 Fed. 510, to point that mechanic lien law is to be so construed as to carry out intention of legislature; *Prince v. Neal-Millard Co.* 124 Ga. 887, 53 S. E. 762, in discussing mechanics' lien law and rights of parties thereunder; *Hightower v. Bailey*, 108 Ky. 206, 94 Am. St. Rep. 355, 56 S. W. 148, 49 L.R.A. 257, as to liability for labor and material with regard to state of account between owner and contractor; *Laird v. Moonan*, 32 Minn. 362, 20 N. W. 355, to point that under mechanic lien law of state owner must require bond or adjust terms of contract and mode of payment thereunder or risk of additional payment of lien holders; *Henry etc. Co. v. Evans*, 97 Mo. 61, 10 S. W. 873, 3 L.R.A. 336, to point that although Nevada enacted the California mechanics' lien law, the court refuses to follow California instructions; *Merrigan v. English*, 9 Mont. 119, 22 Pac. 456, 5 L.R.A. 839, construing the mechanics' lien law; *Merrigan v. English*, 9 Mont. 119, 22 Pac. 456, 5 L.R.A. 540, as to right to lien of sub-contractor; *Price v. Lush*, 10 Mont. 69, 24 Pac. 750, 9 L.R.A. 469, as to construction of an adopted statute; *Robertson Lumber Co. v. State Bank*, 14 N. D. 516, 105 N. W. 720, construing the mechanics' lien law holding the legislature to have adopted the "Pennsylvania system" as against the "New York system," and protecting subcontractors against contractors; *Smith v. Baker*, 5 Okla. 338, 49 Pac. 65, in discussing the adoption of construction given to statute when statute is adopted by another state; *Elwell v. Morrow*, 28 Utah, 289, 78 Pac. 607, to point that remedial provisions of statute are to be liberally construed applies to proceedings to foreclose mechanics' lien.

Cited in reference note in 20 L.R.A. 564, to point that Nevada adopted mechanics' lien law from California, but gave to it different construction from that given by the courts of California.

**Statutory construction—Adopted statute.**—Cited in *Gould v. Wise*, 18 Nev. 263, 3 Pac. 34, to point that the decision of another state

cannot be presumed to be known to the legislature, antecedent to official publication.

**14 Nev. 46-51. STATE EX REL. HOBART v. RYLAND.**

No citation.

**14 Nev. 51-52. ESCERE v. TORRE.**

Cited in *Allen v. Mayberry*, 14 Nev. 117, to point that where appeal is manifestly taken for delay, judgment must be affirmed with damages.

**14 Nev. 52-53. TOWN OF GOLD HILL v. BRISACHER.**

No citation.

**14 Nev. 53-60. ORR WATER DITCH CO. v. LARCOMBE.**

Interpleader. — Cited in reference notes in 35 Am. Dec. 696, to point that in order to enable a party to file a bill of interpleader he must show, 1. Two or more persons must have preferred a claim against the plaintiff; 2. They must claim the same thing, whether it be a debt or duty; 3. The plaintiff must have no beneficial interest in the thing claimed; 4. It must appear that he cannot determine, without hazard to himself, to which of the defendants the thing of right belongs; 35 Am. Dec. 709, a bill in nature of interpleader is where, in addition to requiring the defendants to interplead as to property, or debt or duty claimed by them from the complainant, some affirmative relief is sought by the bill; 91 Am. St. Rep. 595, to maintain an interpleader it is generally necessary to allege and show that two or more persons have preferred a claim against the plaintiff; that they claim the same thing; that the plaintiff has no beneficial interest in anything claimed; and that he cannot determine without hazard to himself to which of the defendants the money or thing belongs.

**14 Nev. 60-63. PARONI v. ELLISON.**

Cited in *Connell v. Galligher*, 36 Neb. 763, 55 N. W. 233, in discussing whether power of attorney so distinctly described in subject-matter there of that attorney could convey title.

**14 Nev. 63-66. SOLOMON v. FULLER.**

Cited in *Packard v. Kinzie Ave. etc. Co.* 105 Wis. 326, 81 N. W. 489, holding one's stake in entry of judgment as amendable in court where it occurred will be corrected on appeal.

**14 Nev. 66-72. STATE EX REL. BECK v. BOARD OF COM'RS. WASHOE COUNTY.**

Taxation — Raising assessment. — Cited in *State ex rel. Lake v. County Com'rs Washoe*, 14 Nev. 142, to point that if commissioners

have no jurisdiction to raise complainant's assessment their act is void and can be collaterally attacked.

Payment by mistake. — Cited in *State v. Young*, 134 Iowa, 516, 110 N. W. 296, in discussing payment of claim by mistake.

Cited in reference note in 55 Am. St. Rep. 209, to point that claim presented to county supervisors does not constitute in law and are against the county, no action on the part of the board can render the county liable thereon; and any payment on their part may be regarded as unauthorized by law, and render them liable for misappropriation.

14 Nev. 72-77, 33 Am. Rep. 526. *STATE v. CLIFFORD*.

Instruction. — Cited in *State v. Bouton*, 26 Nev. 41, 62 Pac. 596, discussing instruction relative to property recently stolen and found in the possession of the person accused of the theft.

Felonious intent. — Cited in *State v. Thompson*, 101 Pac. (Nev.) 560, to point that if conduct of parties in action, with circumstances, is indicative of felonious intent, and leaves no doubt in mind of jury as to intent, felonious intent is sufficiently established; *People v. Miller*, 4 Utah, 412, 11 Pac. 514, to point that to justify conviction for larceny jury must be satisfied taking was with felonious intent, no subsequent felonious intent will suffice; *People v. Swazey*, 6 Utah, 100, 21 Pac. 408, to point that felonious intent in branding cattle is necessary to commission of crime, and reasonable explanation with no evidence to show falsity, entitles to acquittal of charge.

Cited in reference note in 88 Am. St. Rep. 564, to point that a taking with a felonious intent may be larceny, notwithstanding the publicity of the taking.

See tit. "Larceny," this note.

Larceny. — Cited in *State v. Hayes*, 98 Iowa, 621, 60 Am. St. Rep. 219, 67 N. W. 674, 37 L.R.A. 121, as to the difference between theft of lost goods and theft of other property.

Cited in reference notes in 57 Am. Dec. 275, to point that to constitute larceny, the felonious intent must exist at the time of the taking of the goods; and if there is no such intent then, no subsequent conceived felonious intent will render the defendant guilty of larceny; 34 Am. Rep. 734, as to what constitutes larceny by finder of lost property; 88 Am. St. Rep. 592, apparently, in every jurisdiction other than Tennessee, lost property is the subject of larceny; 88 Am. St. Rep. 593, if the finder knows the owner, or has the immediate means of ascertaining him, or has reason to believe, and does believe, that he will be found, the offense is larceny; 88 Am. St. Rep. 594, it is not necessary that there should be any mark of identification on the lost goods, if the finder really believes the owner can be found; 88 Am. St. Rep. 603, in order to make one guilty of larceny in appropriating lost property which he has found, he must have a felonious intent to steal;

37 L.R.A. 125, felonious intent to appropriate the property, coupled with a reasonable belief that the owner could be found, will render the finder guilty.

See tit. "Felonious intent," this note.

14 Nev. 77-79. **MUSGROVE v. WAITZ.**

No citation.

14 Nev. 79-115, 33 Am. Rep. 530. **STATE v. AH CHUEY.**

Corpus delicti. Cited in *State v. Loveless*, 17 Nev. 427, 30 Pac. 1081; *State v. Cardelli*, 19 Nev. 325, 10 Pac. 437, and in *Re Kelly*, 28 Nev. 498, 83 Pac. 226, to point that corpus delicti may be established by circumstantial evidence.

Cited in reference notes in 68 L.R.A. 78, to point that the fact that the person alleged to have been killed is dead must be shown by direct evidence, but the cause and manner of the death may be shown by circumstantial evidence; 7 L.R.A.(N.S.) 184, in principal case it was held that the identity of a badly charred body as that of the Chinaman alleged to have been killed was sufficiently established to warrant a conviction by testimony that the house where the body was found was used by him as a Chinese washhouse; that the washhouse was being used as usual on the day of the homicide; that some human being therein was killed, and that the house was consumed by fire after the homicide; it further appearing that there were usually but three persons in the house, and that the person in question had never been seen since the destruction of the house, whereas both of the other occupants had been seen and were alive.

Felonious intent. — Cited in *State v. Thompson*, 101 Pac. (Nev.) 560, to point that if conduct of parties in action, with circumstances, is indicative of felonious intent, and leaves no doubt in minds of jury as to intent, felonious intent is sufficiently established.

Compelling defendant to stand up for identification. — Cited in *People v. Goldenson*, 76 Cal. 347, 19 Pac. 170, holding order requiring defendant to stand up for identification was not requiring him to give evidence against himself.

Compelling physical examination. — Cited in *O'Brien v. State*, 125 Ind. 43, 25 N. E. 139, 9 L.R.A. 323, as to power of court to compel defendant to submit to physical examination in criminal trial; *State v. Height*, 117 Iowa, 660, 94 Am. St. Rep. 323, 91 N. W. 938, 59 L.R.A. 442, as only case requiring prisoner to disclose part of person not usually required; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 474, 44 Am. Rep. 666, to point that for purpose of identification, prisoner in criminal proceeding may be compelled to submit to personal examination; *People v. Ecarius*, 124 Mich. 622, 83 N. W. 631, to point that *Stokes v. State*, 5 Bart. (Tenn.) 619, was held not to be good law and defendant was compelled to give testimony against himself; *May v. Northern Pac. Ry.*

Co. 32 Mont. 533, 81 Pac. 331, 70 L.R.A. 116, to point that court in principal case compelled prisoner to bare to view of jury unexposed portion of body upon which were certain tattoo marks; *State v. Atkinson*, 40 S. C. 373, 42 Am. St. Rep. 385, 18 S. E. 1025, as to reception of evidence obtained by compelling defendant to put his foot in foot tracks; *State v. Nordstrom*, 7 Wash. 510, 35 Pac. 384, in discussing point as to whether accused person can be compelled to exhibit portions of body which are usually covered for purpose of securing identification; *Thornton v. State*, 117 Wis. 244, 98 Am. St. Rep. 924, 93 N. W. 1109, as a most extreme case where accused was required to bare arm to disclose certain tattooing.

Cited in reference notes in 49 Am. Rep. 181, to point as to compelling prisoner to furnish evidence of his identity by exposing his person; 68 Am. St. Rep. 252 and 75 Am. St. Rep. 328, defendant was compelled to exhibit his arm to the jury to show certain tattoo marks, by the existence of which the question of his identity was to be determined; 75 Am. St. Rep. 328, the court holding that evidence of physical facts cannot, either upon principle or reason, come within the letter or the spirit of the constitutional prohibition; 94 Am. St. Rep. 339, in criminal case, on a question of personal identity, the court may compel the accused to exhibit his arm, where a witness testifies that he has certain tattoo marks thereon; 69 L.R.A. 38, where, on trial for murder, it was shown that the house where the dead body claimed by the prosecution to be the body of the person alleged to have been killed was found, was used as a Chinese washhouse; that the person alleged to have been killed was the proprietor; that he was assisted in business by two other Chinamen; that these three persons were usually at the house; that the washhouse was being used on the day of the homicide; that some human being therein was killed; that the house was consumed by fire after the homicide occurred; that the body of the deceased was badly charred by the fire; that the person alleged to have been killed had never been seen after the homicide occurred, and that the other occupants of the house had been seen and were alive,—these circumstances were held to tend to establish the fact that the body found in the washhouse was the body of the person alleged to have been killed; 28 L.R.A. 700, in the dissenting opinion in principal case it was said that the intent of the constitutional provision was that the accused, if such should be his wish, should not only have the right to close his mouth, but that he might fold his arms as well; 28 L.R.A. 703, the principal case is the leading case affirming the right, disapproves *State v. Jacobs* (1858) 50 N. C. 259, which is the leading case denying it, the court saying that it is a noticeable fact that in none of the subsequent cases in North Carolina in which that case was cited have the courts sanctioned or in any manner approved of the reasoning upon which the decision was based.

**Evidence — Of codefendant and accomplice.** — Cited in *State v. Gartrell*, 171 Mo. 510, 71 S. W. 1050, in discussing testimony of codefendant

against accused and identification of son of accused jointly indicted for homicide; *State v. Ruck*, 194 Mo. 435, 92 S. W. 712, in discussing error in admitting testimony of accomplice.

**Homicide — Elements, evidence of.** — Cited in *Buel v. State*, 104 Wis. 142, 80 N. W. 82, to point that no distinction is recognized between elements of homicidal offense as to evidence necessary to establish it, or nature and amount of proof required.

14 Nev. 115-117. **ALLEN v. MAYBERRY.**

No citation.

14 Nev. 117-123. **STATE EX REL. AUDE v. KINKEAD.**

Cited in *State v. California Min. Co.* 15 Nev. 258, to point that the fact that power, wherever lodged, may be abused, is no argument against its exercise; cited in *State v. County Com'rs.* 19 Nev. 337, 10 Pac. 903, in passing on power of legislature to increase or diminish number of district judges; *State v. County Com'rs.* 19 Nev. 341, 10 Pac. 906, as to rule for construing constitution.

14 Nev. 123-140. **WASHOE COUNTY v. HUMBOLDT COUNTY.**

Cited in *Sears v. Gallatin County*, 20 Mont. 467, 52 Pac. 205, 40 L.R.A. 407, in passing on liability of county for services rendered by members of sheriff's posse comitatus.

14 Nev. 140-143. **STATE EX REL. LAKE v. COUNTY COM'RS. WASHOE COUNTY.**

**Statutory construction.** — Cited in *State v. Yellow Jacket S. Min. Co.* 14 Nev. 233, construing section 3186 of Compiled Laws; *State v. Carson & C. R. Co.* 29 Nev. 504, 91 Pac. 935, holding section 1098 of Compiled Laws merely directory; *Central Pac. R. Co. v. Standing*, 13 Utah, 492, 45 Pac. 345, construing law 1890, p. 52, holding the word "complaints" as applied to board of equalization, not used in technical sense.

Cited in reference note in 12 L.R.A. 357, to point that a law which directs a particular act to be performed, but which does not imperatively command it, as a condition precedent to anything further, is directory only.

**Taxation — Raising assessments.** — Cited in *State v. Valle*, 122 Mo. 47, 26 S. W. 675, to point that where board of equalization raises assessment without jurisdiction its action is void and there is defense pro tanto to suit.

14 Nev. 143-148. **JEFFREE v. WALSH.**

Cited in *Brown v. Warren*, 16 Nev. 239, as to grant of nonsuit on ground not stated and relied on in motion; *Porter v. Industrial Print-*

ing Co. 26 Mont. 184, 66 Pac. 842, in discussing granting of new trial on account of rulings of court.

**14 Nev. 148-153. BARKER v. McLEOD.**

No citation.

**14 Nev. 153-161. GOSSAGE v. CROWN POINT G. & S. MIN. CO.**

Administration of estates.—Cited in Hubbard v. Urton, 67 Fed. 423, as to right of heirs and next in kin to institute action at law relating to administration of estate; In Re Higgins' Estate, 15 Mont. 486, 39 Pac. 510, 28 L.R.A. 120, as to right of possession of property of an intestate; Clark v. Bundy, 29 Ore. 198, 44 Pac. 285, in discussing the law of administration and statute of limitation.

**14 Nev. 161-166. DICK v. BIRD.**

Evidence—Insufficiency of specifying particulars.—Followed in *Lamance v. Byrnes*, 17 Nev. 201, 30 Pac. 701, on point that statement must specify particular in which evidence is insufficient, or it will be disregarded.

Presumptive right to use water.—Cited in *Union Mill etc. Co. v. Dangberg*, 81 Fed. 92, and *Anderson v. Baseman*, 140 Fed. 26, in discussing prescriptive right to use of water and what raises presumption of such right.

Cited in reference note in 43 Am. Dec. 281, to point that water must be appropriated also to some beneficial purpose to give any right to it, or the appropriation must be made in contemplation of a future beneficial use.

**14 Nev. 167-170. DICK v. CALDWELL.**

Cited in *Neabitt v. Chisholm*, 16 Nev. 41, as to presumption in favor of the judgment.

Prescriptive right to use water.—Cited in *Union Mill etc. Co. v. Dangberg*, 81 Fed. 92, and *Anderson v. Bassman*, 140 Fed. 26, in discussing prescriptive right to use of water and what raises presumption of such right.

Cited in reference notes in 43 Am. Dec. 281, to point that water must be appropriated also to some beneficial purpose to give any right to it, or the appropriation must be made in contemplation of a future beneficial use; 60 Am. St. Rep. 803, in absence of intention to apply water to beneficial use it is not sufficient to appropriation and that without it no diversion long continued will allow to appropriate until evidence is formed to apply it to some beneficial purpose; 30 L.R.A. 475, turning water out of the stream does not give a title to it if it is not used for a beneficial purpose.

**14 Nev. 171-172. GAMMANS v. ROUSSELL.**

No citation.

**14 Nev. 172-175. JONES v. SAN FRANCISCO SULPHUR CO.**

Default judgment — Discretion of court. — Cited in *Ewing v. Jennings*, 15 Nev. 383, in holding trial court did not abuse discretion in refusing motion to set aside judgment and allow answer.

Cited in reference notes in 23 Am. St. Rep. 106, to point that generally courts will not vacate their judgments on account of irregularities unless the application is promptly made, and the irregularity appears to have been prejudicial to the applicant; 60 Am. St. Rep. 655, the tendency of the more recent decisions is to limit the right to vacate a judgment for irregularity to those cases in which it appears that the moving party has been substantially prejudiced by the alleged irregular action.

Statutory construction. — Cited in *Lang Syne Min. Co. v. Ross*, 20 Nev. 137, 19 Am. St. Rep. 337, 18 Pac. 861, construing section 28 of the Civil Practice Act.

**14 Nev. 175-190, 33 Am. Rep. 548. GASTON v. DRAKE.**

Defenses — Unlawful mortgage. — Cited in *Drexler v. Tyrell*, 15 Nev. 131, to point that where the mortgage is unlawful that defense may be set up to prevent foreclosure.

— Immoral action. — Cited in *Sheldon v. Pruessner*, 52 Kan. 590, 35 Pac. 203, 22 L.R.A. 711, to point that court will not lend aid to man who founds his cause upon immoral actions.

— Agreement forbidden by law, etc. — Cited in *Schneider v. Local Union etc.*, 116 La. 281, 114 Am. St. Rep. 558, 40 So. 704, 5 L.R.A.(N.S.) 897, to point that courts will not enforce an agreement forbidden by law or opposed to public policy.

Cited in reference note in 115 Am. St. Rep. 409, to point that where the object of the partnership is the prosecution of an illegal business or one which is contrary to public policy, the partnership agreement is void.

— Agreement to procure office, etc. — Cited in *Basket v. Moss*, 115 N. C. 457, 44 Am. St. Rep. 464, 20 S. E. 733, 48 L.R.A. 843, to point that courts will not enforce contract based on agreement to procure office.

Cited in reference notes in 66 Am. Dec. 510, to point that an agreement between a candidate and another person, prior to an election, to share the salary, fees, and emoluments of an office, in consideration of money advanced by the latter to the former to secure his election, and of the latter's services and use of personal influence to elect the former, is in violation of the policy of election laws, and void; 44 Am. St. Rep. 471, an agreement before election to share the salary and fees



of an office in consideration of the plaintiff's using his influence to elect the defendant to such office is void; 4 L.R.A. 683, any agreement to divide the emoluments of an office is void.

Cited in reference notes in 6 Eng. Rul. Cas. 345, and 6 Eng. Rul. Cas. 346.

**14 Nev. 191-198. FREVERT v. HENRY.**

**Judgment.**—Cited in *Satterlund v. Beal*, 12 N. D. 129, 95 N. W. 521, to point that judgment not supported by pleadings is as fatally defective as if not supported by findings.

**Co-obligor—Payment by rights.**—Cited in *Faires v. Cockrill*, 88 Tex. 436, 31 S. W. 194, 28 L.R.A. 531, as to payment by co-obligor and rights thereunder.

Cited in reference notes in 68 L.R.A. 514, to point that if a debt or judgment is owing by two or more persons jointly, each primarily liable, and one of them pays it, such debt or judgment is, at law, absolutely extinguished; 68 L.R.A. 563, it has been held in some cases that when a note has been paid by one who is merely collaterally interested, as indorser, its negotiability is not destroyed, and the note remains good against the maker; but it is otherwise when payment is made by a consignor upon a joint and several note, although he is in fact only a surety; 68 L.R.A. 575, when two persons sign a promissory note, binding both jointly and severally and one of them pays it, the note is extinguished, and an action upon it may be maintained by the one making payment against the other, notwithstanding he is in fact, and so alleges, only surety for the other. The note is *functus officio*, and the action is upon implied assumpsit for money paid to satisfy it.

Cited in reference note in 4 Eng. Rul. Cas. 548.

**14 Nev. 199-201. GEREMIA v. MAYBERRY.**

No citation.

**14 Nev. 202-209, 33 Am. Rep. 559. STATE EX REL. KEYSER v. HALLOCK.**

**Constitutional amendment—Statute.**—Cited in *State v. Hallock*, 16 Nev. 378, to point that constitutional amendment after adoption of statute is controlling.

**Statute—Repeal by implication, etc.**—Cited in *State v. Blend*, 121 Ind. 519, 16 Am. St. Rep. 415, 23 N. E. 512, to point that repealing clause of unconstitutional statute falls with statute; *Stephens v. Ballou*, 27 Kan. 602, discussing point that unconstitutional provision of a statute cannot have force to repeal by implication or otherwise, any provision of former act; *Black v. Trower*, 79 Va. 128, to point that when valid part of statute is so connected with and dependent upon void part as to not be distinctly separable, the whole must fall.

Cited in reference note in 88 Am. St. Rep. 295, to point that where it is not clear that the legislature intended to repeal a prior law, without regard to the new provisions to be substituted for it, a repealing clause in an unconstitutional statute will be ineffective.

Courts — Removal and reorganization of. — Cited in dis. op. of Snodgrass, J., in *McCully v. State* (The Judge's Cases), 102 Tenn. 653, 53 S. W. 169, 46 L.R.A. 603, as to power to remove and reorganize courts.

Appeal. — Cited in *North Point Consol. Irr. Co. v. Utah, etc. Canal Co.*, 14 Utah, 167, 46 Pac. 827, in discussing right of appeal; *Eastman v. Gurrey*, 14 Utah, 171, 46 Pac. 828, in construing § 9 of Art. VIII of Constitution and discussing right of appeal.

#### 14 Nev. 209-210. STATE v. HASKELL.

Quo warranto. — Cited in *Town of Enterprise v. State*, 29 Fla. 141, 10 So. 743, on quo warranto proceeding where state alleges legal right in plaintiffs in error and no loss or forfeiture of right is shown, information is insufficient; *People v. Clayton*, 4 Utah, 436, 11 Pac. 212, to point that in quo warranto proceeding defendant must establish title to office.

Cited in reference note in 100 Am. Dec. 274, as to abandonment and forfeiture of charter by corporation and that proceedings upon quo warranto and information in nature thereof are regulated by statute and that the state, like any other party relying on a forfeiture or abandonment, must prove its case.

#### 14 Nev. 210-215. STATE v. FRAZER.

Cited in *State v. Johnson*, 16 Nev. 37, holding instruction trenched upon province of jury.

#### 14 Nev. 215-220. QUILLEN v. QUIGLEY.

Cited in reference note in 115 Am. St. Rep. 89, to point that mere forbearance of a creditor to sue upon the principal obligation or debt does not discharge the surety. Or, in other words, the creditor is under no active duty to sue the principal debtor.

#### 14 Nev. 220-262. STATE v. YELLOW JACKET MIN. CO.

Limitation of action. — Cited in *People v. Hubert*, 71 Cal. 73, 12 Pac. 43, discussing limitations of action to enforce assessment for reclamation of swamp and overflow land; distinguished in *District of Columbia v. Washington, etc. R. R. Co.*, 1 Mackey (D. C.) 375, on statutory grounds in construing statute of limitation.

— To recover taxes. — Cited in *City & County of San Francisco v. Luning*, 73 Cal. 613, 15 Pac. 312, and *Los Angeles County v. Ballerino*, 99 Cal. 595, 32 Pac. 582, discussing limitation of action to recover taxes; *City of San Diego v. Higgins*, 115 Cal. 173, 46 Pac. 924, dis-

Discussing limitation of action to recover municipal taxes; *City and County of San Francisco v. Jones*, 20 Fed. 189, 190, cited in discussing statute of limitation in action to recover delinquent taxes; *State v. Certain Lands, etc.*, 40 Minn. 526, 42 N. W. 478, to point that tax is "liability created by statute;" *Board of Com'rs v. Story*, 26 Mont. 521, 69 Pac. 58, discussing limitation of personal action for collection of taxes; distinguished in *Hoover v. Engles*, 63 Nep. 690, 88 N. W. 870, on statutory grounds discussing limitation of action to collection of taxes; *City of Port Townsend v. Eisenbeis*, 28 Wash. 544, 68 Pac. 1048, on statutory grounds discussing limitation of action by municipal corporation to foreclose lien for unpaid taxes.

Cited in reference notes in 42 Am. St. Rep. 655, to point that a tax may be held to be a debt; 101 Am. St. Rep. 186, suits for the recovery of general taxes generally involve the construction of statutes of limitation; 11 L.R.A. 817, a tax is not an obligation of action to recover arising out of contract.

—To recover license fee.—Cited in *State v. Chicago, etc. Ry. Co.*, 132 Wis. 359, 112 N. W. 520, in discussing limitation of action to recover license fee imposed on railroad company.

Obligation to pay tax—Debt or assumpsit.—Cited in *Hadley v. Hadley*, 114 Tenn. 171, 87 S. W. 254, to point that tax imposed on property as such, without reference to ownership, proceedings to enforce payment are against the land.

Cited in reference notes in 42 Am. St. Rep. 656, to point that the imposing of a tax also imposes a duty upon the taxpayer, and it is wholly immaterial to consider whether the tax is a debt in the sense of a money obligation existing by contract. The government has the same right to enforce a duty as a debt, and may enforce it in the same way; 11 L.R.A. 818, the preponderance of authority establishes that either debt or assumpsit may be sustained for the recovery of taxes, as debt lies for a sum of money certain, due by statute.

#### 14 Nev. 262. BUCKLEY v. BUCKLEY.

Cited in reference note in 12 L.R.A. 693, to point that a party has no legal right to cross-examine a witness except as to facts and circumstances connected with the matters stated on the direct examination.

#### 14 Nev. 263. HARRISON v. LOCKWOOD.

Followed in *Earles v. Gilham*, 20 Nev. 47, 14 Pac. 587, on point that statement on motion for new trial must be filed within the statutory time.

#### 14 Nev. 265-288. DAVIS v. COOK.

Managing partner—Authority to sign notes.—Cited in *First Nat. Bank v. Grignon*, 7 Ida. 656, 65 Pac. 368, as to authority of managing

partner to execute and deliver notes as business of firm may require; *Lindle v. Crowley*, 29 Kan. 759, to point that where notes, etc., of trading partnership are executed by managing partner in firm name, they will be presumed to have been given in course of partnership dealings.

14 Nev. 288-293. *STATE v. MALIM*.

Cited in reference note in 98 Am. Dec. 159, to point that the distinction taken by the supreme court of Nevada seems a very proper one. It is there maintained that where a clerk, by authority of his master, collects a bill and fraudulently converts the money the offense of embezzlement is complete, and if afterwards he collects a second bill, and fraudulently converts its proceeds, this constitutes a second offense; and that, though he may commit more than one embezzlement of his employer's money, and if he does, may be separately indicted for each separate offense, yet, if the money from different persons was all collected before any portion of it was converted, then he committed but one offense.

14 Nev. 293-311. *TRUCKEE LODGE v. WOOD*.

*Surety*.—Followed in *Carson Opera House Ass'n v. Miller*, 16 Nev. 337, to point that failure to make payment to contractor according to agreement releases sureties; cited in *Glenn County v. Jones*, 146 Cal. 523, 80 Pac. 697, discussing release of sureties on building contract by paying greater installment than stipulated for; *Gato v. Warrington*, 37 Fla. 548, 19 So. 884, to point that liability of sureties not to be extended by implication beyond term of contract; *Stephens v. Elver*, 101 Wis. 398, 77 N. W. 739, discussing alteration in building contract with release and sureties thereon.

*Appeal—Waiver of objections*.—Cited in *Sweeney v. Hjul*, 23 Nev. 416, 48 Pac. 1037, and *Smith v. Wells Estate Co.*, 29 Nev. 416, 91 Pac. 316, to point that oral argument in supreme court upon merits amounts to waiver of objection when.

*Mortgage for debt of another—Discharge*.—Cited in *Parke etc. Co. v. White River Lumber Co.*, 110 Cal. 665, 43 Pac. 204, discussing discharge of mortgage executed to secure debt of another by change of principal contract.

*Liability for repairs*.—Cited in *Parker v. Brown House Co.*, 117 Ga. 1017, 44 S. E. 800, to point that stipulation in lease regarding payment for alteration and repairs will not release owner of liability to contractor.

*Guaranty—Contract of*.—Cited in *Pioneer Savings etc. Co. v. Freeburg*, 59 Minn. 234, 61 N. W. 26, to point that in contract of guaranty plaintiff must perform strictly or cannot recover against guarantor.

**14 Nev. 311-320. EX PARTE DEIDESHEIMER.**

Cited in *Ex Parte Rickey*, 100 Pac. (Nev.) 141, in construing Stat. 1907, p. 414, penalizing officer of bank who receives deposit knowing bank to be insolvent.

**14 Nev. 320-324. GREELEY v. HOLLAND.**

**Appeal — Record on.** — Cited in *Beck v. Thompson*, 22 Nev. 117, 36 Pac. 564, to point that statement on appeal not part of the record when; *Quinn v. Quinn*, 27 Nev. 176, 74 Pac. 6, to point that court minutes were stricken from record because not embodied in statement on appeal.

**— Presumption on.** — Cited in *Quinn v. Quinn*, 27 Nev. 175, 74 Pac. 6, to point that any fact necessary to support the order is presumed to have been proven in the absence of an affirmative showing to the contrary.

**Waiver — What may be waived.** — Cited in *Kirman v. Johnson*, 30 Nev. 152, 93 Pac. 502, to point that counsel, by failing to object, may waive technical objection but cannot waive objection necessary to give appellate court jurisdiction.

**14 Nev. 324-332. MAHER v. SWIFT.**

**Appeal — What considered on.** — Affirmed in *Moreso v. Swift*, 15 Nev. 220, and *Dennis v. Caughlin*, 22 Nev. 453, 58 Am. St. Rep. 761, 41 Pac. 768, 29 L.R.A. 731, on point that supreme court will consider such questions only as are assigned as error.

**Fraudulent Conveyance.** — Cited in reference note in 14 Am. St. Rep. 743, to point that if the transfer is good between the parties, as, for example, where the transfer is made for the purpose of defrauding creditors, so that the grantor has no power to control a reconveyance, then if the grantee does not reconvey, his act is voluntary, and may be assailed as such by his creditors.

**14 Nev. 332-336. SIAS v. HALLOCK.**

**Constitutional amendment — Controls statute.** — Cited in *State v. Hallock*, 16 Nev. 378, to point that constitutional amendments adopted since the statute controls.

**Claims against state.** — Cited in reference note in 42 L.R.A. 38, to point that where the statute allowing such claims was limited to a class which excludes these presented, they must be disallowed.

**Rewards.** — Cited in *Williams v. West Chicago etc. R. Co.*, 94 Ill. App. 389, discussing what is sufficient compliance with offer of reward to entitle to the money.

Cited in reference notes in 42 L.R.A. 64, to point that statute providing for reward for arrest for specified offenses containing clause "no reward shall be paid except after such conviction" referred to the con-

viction in the state courts. It was further held that no claim could be made for the reward unless the claimant showed that he had made the arrest; 7 L.R.A.(N.S.) 216, a reward for an arrest is not earned by merely giving information which leads to the arrest.

14 Nev. 336-341. **MAYBERRY v. BOWKER.**

Cited in *State v. Boerlin*, 30 Nev. 477, 98 Pac. 404, to point that under Comp. Laws, 3543, mandamus will not lie where there is a plain, speedy, and adequate remedy at law.

14 Nev. 341-347. **IVANCOVICH v. STERN.**

Fraudulent conveyance. — Cited in *Wailes v. Davies*, 158 Fed. 677, discussing when conveyance is fraudulent in favor of creditor and against purchaser paying full consideration.

Cited in reference note in 10 L.R.A.(N.S.) 649, to point that where a debtor was induced to make a bill of sale of his property to a creditor or the false promise of the latter that he would pay off all of the debtor's debts and prevent his property from being sacrificed, and it was held that, if such statements were made for the purpose of misleading and deceiving the debtor, so as to enable the promisor to secure the possession of the property and thereby obtain an unfair advantage, the sale was fraudulent.

14 Nev. 347-350. **STATE v. McCORMICK.**

Affirmed in *State v. Quinn*, 16 Nev. 90, on point that person indicted with assault with intent to kill if guilty of simple assault was acquitted as to offense of higher grade, Belknap, J., dissenting.

14 Nev. 351-362. **BUNTING v. CENTRAL PAC. R. CO.**

Railway crossing — Injury at. — Cited in *Cohen v. Eureka etc. R. Co.*, 14 Nev. 387, and *Bunting v. Central Pac. R. Co.*, 16 Nev. 296, to point that it was for the jury to decide whether persons injured at railroad crossing were guilty of contributory negligence; *Judson v. Central Vermont R. Co.*, 158 N. Y. 606, 53 N. E. 517, discussing care required of traveller in crossing railroad tracks.

Cited in reference notes in 90 Am. Dec. 784, to point that a railway crossing should at all times and under all circumstances be approached with caution; but at an obstructed crossing it is the duty of a traveler to exercise a greater degree of care and caution than is incumbent upon him usually; 90 Am. Dec. 785, in such case he has a right to presume that the usual statutory signal will be given.

Appeal. — Cited in *Bunting v. Central Pac. R. Co.*, 16 Nev. 279, to point first appeal was from judgment for nonsuit.

Master — Liability for injury to servant. — Cited in *Patnode v. Harter*, 20 Nev. 307, 21 Pac. 680, as to liability of master for injury to servant.

**14 Nev. 362-365. STONE v. MARYE.**

Stock of corporation. — Cited in *Gass v. Hampton*, 16 Nev. 189, as to ownership of mining stock and rights on transfer of certificate.

Cited in *Gass v. Hampton*, 16 Nev. 191, to point as to whether owner confers on broker an apparent title to or power of disposition over stock.

Cited in reference note in 43 L.R.A. 749, to point that certificate of stock delivered to trustee, turned over as collateral security and by creditor delivered to third parties with full information of former transaction, who delivered to stock-broker to sell in stock board, the broker having no knowledge of original transaction and owner cannot assert title as against broker, although tendering and demanding return of stock.

**14 Nev. 365-373. EX PARTE SIEBENHAUER.**

Statutory construction. — Cited in *State v. Woodbury*, 17 Nev. 343, 30 Pac. 1008, and *Gruber v. Baker*, 20 Nev. 468, 23 Pac. 862, 9 L.R.A. 306, as to duty of court in construing statute.

Licenses — Constitutional provision as to taxes. — Cited in *Wiggins Ferry Co. v. City of East St. Louis*, 102 Ill. 566, to point constitutional provision in reference to taxation has no application to fees exacted for a license; *City of Chicago v. Wilkie*, 88 Ill. App. 322, in discussing question whether persons having obtained certificates as plumbers can be required to obtain license to conduct business of master plumbers.

Cited in reference notes in 129 Am. St. Rep. 278, to point that statutes imposing license on itinerant vendors are constitutional; that traders of this character are properly signed out for special regulation, and enactments looking toward that end are not open to constitutional objection so long as they bear equally on all persons within the same class and are not unreasonably burdensome; 17 L.R.A.(N.S.) 55, under the power given in a charter to fix and collect a license tax upon solicitors, it was held that an ordinance is not invalid although a state law requires a county license.

**14 Nev. 373-376. BANK OF CALIFORNIA v. WHITE.**

Evidence — Parol to vary, etc., writing. — Cited in *Brenner v. Luth*, 28 Kan. 587, in sustaining rule of court refusing to admit parol testimony to vary writing; *Selser & Brothers' Assigned Estate*, 7 Pa. Co. Ct. 419, to point that parol testimony is not admissible to contradict or vary written instrument does not apply to third persons; *Carmack v. Drum*, 32 Wash. 241, 73 Pac. 378, to point that in controversy with strangers to instrument, parties to same are not estopped to explain or contradict the writing by parol.

**14 Nev. 376-397. COHEN v. EUREKA & P. R. R. CO.**

Cited in *Bunting v. Central Pac. R. Co.*, 16 Nev. 280, as ruling case

at bar; followed in *Bunting v. Central Pac. R. Co.*, 16 Nev. 281, as to effect of negative testimony.

**Railroad crossing**—Cited in *Bunting v. Central P. R. Co.* 16 Nev. 297, right of engineer to assume travelers on or across track will use due care and prudence.

**Judgment**.—Cited in *Hamburg Min. Co. v. Stephenson*, 17 Nev. 457, 30 Pac. 1089, to point that doubts must be resolved in favor of judgment.

**Damages—Verdict, setting aside**.—Cited in reference note in 11 L.R.A. 47, to point that a verdict will not be set aside for excessive damages, unless the amount is so disproportionate to the injury as to evince prejudice or passion on the part of the jury.

**14 Nev. 397-398. FINLAYSON v. MONTGOMERY.**

**Appeal**.—Followed in *Goodhue v. Shedd*, 17 Nev. 141, 30 Pac. 695, on point that where appellant fails to prosecute, judgment will be affirmed; cited in *Lake v. Lake*, 7 Nev. 242, 30 Pac. 882, and *Matthewson v. Boyle*, 20 Nev. 88, 16 Pac. 434, to point that where appellant fails to call the attention of court to point and proceeding of authority upon which he relies, judgment will be affirmed.

**14 Nev. 398-405. McLEOD v. LEE.**

Cited in *Lee v. McLeod*, 15 Nev. 160, to point that history of the two cases is identical; *Lee v. McLeod*, 15 Nev. 163, 164, same case on subsequent appeal; cited in *McLeod v. Lee*, 17 Nev. 110, 28 Pac. 125, in sustaining refusal to give instruction; *McLeod v. Lee*, 17 Nev. 111, as to judgment rendered in principal case; *McLeod v. Lee*, 17 Nev. 113, as to point where dam was erected and allegations in complaint in original case; *McLeod v. Lee*, 17 Nev. 116, to point that court erred in deciding height and character of dam and was adjudicated in principal case; *McLeod v. Lee*, 17 Nev. 120, to point that court erred in ruling part of issue in case on trial had been adjudicated in principal case.

Cited in reference note in 97 Am. Dec. 546, to point that lower court cannot disturb verdict and judgment when they are in accordance with the evidence, and there is no substantial conflict in it upon material issues, and no error has intervened.

**14 Nev. 405-407. SOLEN v. VIRGINIA & T. R. CO.**

Cited in *Solen v. Virginia T. R. Co.* 15 Nev. 316, and *Solen v. Virginia & T. R. Co.*, 15 Nev. 320, to point that interest to be recovered must be asserted in judgment.

**14 Nev. 407-414. STATE v. DAVIS.**

**Deadly weapon—Question for jury when**.—Cited in *State v. Collyer*, :



17 Nev. 288, 30 Pac. 896, to point that if there was any doubt as to whether the knife was a deadly weapon, it was a question for the court and jury to determine.

Cited in reference notes in 21 L.R.A.(N.S.) 499, to point that whether or not a weapon is deadly is a question for the jury when the character of the weapon is doubtful, or when the question depends upon the manner of its use; 21 L.R.A.(N.S.) 504, whether a club or wagon spoke, as used, was a deadly weapon or not, was properly left to the jury.

— Question for court when. — Cited in *State v. Levigne*, 17 Nev. 443, 30 Pac. 1086, as to right of court to declare pistol deadly weapon.

Instruction. — Cited in *State v. Maher*, 25 Nev. 471, 62 Pac. 237, to point that the court may modify instructions so as to relieve them of any possible ambiguity, and make their meaning more certain; followed in *State v. Thompson*, 101 Pac. (Nev.) 563, on the point that party desiring explicit instructions upon any point should prepare the same and ask that they be given; cited in *Acers v. United States*, 164 U. S. 391, 41 L. ed. 484, 17 Sup. Ct. Rep. 92, in sustaining instruction in reference to deadly weapon and its use in the particular instance.

#### 14 Nev. 415-419. BERRYMAN v. STERN.

No citation.

#### 14 Nev. 419-431. DALTON v. DALTON.

Evidence. — Cited in *Langworthy v. Coleman*, 18 Nev. 445, 5 Pac. 68, to point that while deed was best evidence, parol evidence being admitted without objection, it could not be said there was no evidence; *Copper River Min. Co. v. McClellan*, 2 Alaska, 144, to point onus is on party alleging a trust to establish it; *Copper River Min. Co. v. McClellan*, 2 Alaska, 146, discussing when court will adjudge locator of mining claim, who is in peaceable possession under a clear record title, to be a trustee of that title and possession for another; *Morrow v. Matthew*, 10 Ida. 432, 79 Pac. 200, in discussing the evidence required to sustain complaint on an alleged grub-stake contract; *Sing You v. Wong Free Lee*, 16 S. Dak. 388, 92 N. W. 1075, to point that burden is upon moving party to overcome presumptions arising from terms of written contract by testimony, plain and convincing beyond reasonable controversy; *Ewing v. Keith*, 16 Utah, 318, 52 Pac. 6, to point that terms of a written contract to be overcome by parol evidence, the latter must be clear, definite, unequivocal and conclusive; *Chambers v. Emery*, 13 Utah, 394, 45 Pac. 195, to point that where parol testimony fails to overcome the presumption in favor of a written instrument, the latter should be held to express correctly the intention of parties.

Instruction. — Cited in *Southern Pac. Co. v. Hall*, 100 Fed. 768, to point that court did not err in refusing to instruct jury not to

consider evidence which had been admitted without objection and no motion to strike out.

Trust. — Cited in *Ewing v. Keith*, 16 Utah, 316, 52 Pac. 5, to point that law never implies and court never presumes trust, except in case of necessity; *Skeen v. Marriott*, 22 Utah, 91, 61 Pac. 300, to point that declaration of purpose to create a trust or make a gift, being without consideration, will not be upheld as a trust.

**14 Nev. 431-435. FLORAL SPRINGS WATER CO. v. RIVES.**

Mandamus. — Cited in *State v. Murphy*, 19 Neb. 94, 6 Pac. 842, as to mandamus to compel inferior court to proceed; *Nevada Cent. R. Co. v. District Court*, 21 Nev. 411, 32 Pac. 673, to point that where justice has dismissed action, mandamus will not lie to compel him to proceed; *State v. Curler*, 26 Nev. 356, 67 Pac. 1077; *Hardin v. Guthrie*, 26 Nev. 252, 66 Pac. 745, and *State v. Boerlin*, 30 Nev. 477, 98 Pac. 404, to point that mandamus will lie to compel judicial officer to proceed but not to review his action; *State v. Young*, 31 Fla. 600, 34 Am. St. Rep. 41, 12 So. 675, 19 L.R.A. 638, to point that mandamus to proceed will issue where lower tribunal has jurisdiction; *State v. Kansas City etc.*, 97 Mo. 344, 10 S. W. 860, 3 L.R.A. 480, as having apparently overruled *State v. Wright*, 4 Nev. 118, as to reinstatement of appeal wrongfully dismissed on mandamus; *Raleigh v. District Court*, 24 Mont. 314, 81 Am. St. Rep. 437, 61 Pac. 994, as to reinstatement on mandamus of appeal wrongfully dismissed; *Schints v. Morris*, 13 Tex. Civ. 595, 35 S. W. 523, to point that when court mistakingly supposes it has no jurisdiction, mandamus will lie to compel it to proceed with the trial.

Municipal corporations — Right of action against. — Cited in *Vincent v. Lincoln Co.*, 30 Fed. 750, as to right of action against a municipal corporation upon default in obligations; *Vincent v. Lincoln Co.*, 30 Fed. 751, as to the requirements for determining jurisdiction in actions against counties; *County of Lincoln v. Luning*, 133 U. S. 531, 33 L. ed. 767, 10 Sup. Ct. Rep. 364, discussing jurisdictions in suits against counties on default of bonds.

**14 Nev. 435-439. LEVY v. ELLIOTT.**

Cited in *Andrews v. Cook*, 28 Nev. 270, 81 Pac. 304, to point that where justice has dismissed the action, mandamus will not issue to proceed.

**14 Nev. 439-451, 33 Am. Rep. 563. STATE v. DAVIS.**

Challenge. — Cited in *State v. Carrick*, 16 Nev. 128, in sustaining court in disallowing challenge; *State v. Wright*, 45 Kan. 187, 25 Pac. 631, to point that challenges to array must precede those to the polls.

Constitutional law. — Cited in *State v. Board of County Comm'rs*,

17 Nev. 102, 28 Pac. 124, holding "an act concerning crimes and punishment" not unconstitutional because it treats of different crimes.

**Indictment for escape—Defense.**—Cited in reference note in 89 Am. St. Rep. 379, to point that it is no defense to indictment on escape that jail was unhealthy and filthy.

14 Nev. 451-453. **EX PARTE WILLOUGHBY.**

**Habeas corpus.**—Cited in *State v. Baeverstad*, 12 N. D. 534, 97 N. W. 550, to point that on habeas corpus, examination will be made only as to sufficiency of evidence to show substantial ground for exercise of judgment.

**Judicial error.**—Cited in *State v. Huegin*, 110 Wis. 240, 85 N. W. 1069, 62 L.R.A. 737, to point that clear violation of law in doing those things that are within the scope of the power of the officer or body to do is jurisdictional error; *State v. Huegin*, 110 Wis. 231, 85 N. W. 1055, 62 L.R.A. 734, to point that it would be a mistake to adjudicate rights upon the basis of what is merely advisable, losing sight of the necessities of the case.

14 Nev. 453-457. **STATE v. SOULE.**

**Evidence.**—Cited in *State v. McLane*, 15 Nev. 362, as merely deciding that statement of one defendant not being competent against co-defendant, it was error to admit that against defendants generally without limitation; *Kirby v. State*, 44 Fla. 93, 32 So. 840, and *Snowden v. Pleasant Valley Coal Co.*, 16 Utah, 373, 52 Pac. 602, discussing when general objection to evidence is sufficient.







# REPORTS OF CASES

DETERMINED IN THE

# SUPREME COURT

OF THE

# STATE OF NEVADA,

DURING THE YEAR 1880.

REPORTED BY

CHAS. F. BICKNELL, CLERK OF SUPREME COURT

AND

HON. THOMAS P. HAWLEY, ASSOCIATE JUSTICE.

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## Volume 15.

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WITH NOTES ON NEVADA REPORTS.

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HON. ORVILLE R. LEONARD.. } .ASSOCIATE JUSTICES  
HON. THOMAS P. HAWLEY.... }

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## OFFICERS OF THE COURT.

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HON. M. A. MURPHY .....ATTORNEY-GENERAL  
CHAS F. BICKNELL .....CLERK  
LLOYD HILL .....BAILIFF

# THE HISTORY OF THE UNITED STATES

OF

THE UNITED STATES OF AMERICA

AND

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UNITED STATES OF AMERICA

DISTRICT JUDGES OF THE STATE OF  
NEVADA 1880.

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FIRST DISTRICT.....HON. RICHARD RISING.  
SECOND DISTRICT.....HON. S. D. KING.  
THIRD DISTRICT.....HON. W. M. SEAWELL.  
FOURTH DISTRICT.....HON. W. S. BONNIFIELD.  
FIFTH DISTRICT.....HON. D. C. MCKENNEY.  
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grounds specified in the application under consideration, except by the consent of a majority of the members of the board; nor in any case except upon new and regular notice as required by law in case of original application.

8. In voting upon any application the roll of members shall be called by the secretary of the board, in the following order:

First. The Attorney-General.

Second. The Junior Associate Justice of the Supreme Court.

Third. The Senior Associate Justice.

Fourth. The Chief Justice.

Fifth. The Governor.

Each member, when his name is called, shall declare his vote "for" or "against" the remission of the fine or forfeiture, commutation of sentence, pardon, or restoration of citizenship.

9. No document relating to a pending application for pardon or commutation of sentence, or to a prior application which has been denied, shall be withdrawn from the custody of the clerk after filing, unless by consent of the board.

10. Applications for pardon or commutation of sentence must be filed with the clerk at least two days before the regular meeting of the board, at which the application is to be considered.



**RULES**  
**OF**  
**THE SUPREME COURT**  
**OF**  
**THE STATE OF NEVADA.**

---

**RULE I.**

1. Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

2. The Supreme Court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counselors at law. Such committee will consist of the district judge and at least two attorneys resident of the district.

The examination by the committee so appointed shall be conducted and certified according to the following rules:

The applicant shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination.

The examination shall embrace the following subjects:

1. The history of this state and of the United States;
2. The constitutional relations of the state and federal governments;
3. The jurisdiction of the various courts of this State and of the United States;

chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover.

4. No record which fails to conform to these rules shall be received or filed by the clerk of the court.

#### RULE V.

The written transcript in civil causes, together with sufficient funds to pay for the printing of the same, may be transmitted to the clerk of this court. The clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be *prima facie* evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file.

#### RULE VI.

The expense of printing transcripts on appeal in civil causes and pleadings, affidavits, briefs, or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode.

#### RULE VII.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required, or may produce the same duly certified, without such order. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy is produced at the time, must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions, or objections, to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, and must be noted in the written or the printed points of the respondent, and filed at least one day before the argument, or they will not be regarded.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made and the cause shall proceed as in other cases.

RULE X.

1. The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; *provided*, that all civil cases in which the appeal is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

2. When the transcript in a criminal cause is filed, after the calendar is made up, the cause may be placed thereon at any time on motion of the defendant.

3. Causes shall be placed on the calendar in the order in which the transcripts are filed with the clerk.

RULE XI.

1. At least six days before the argument, the appellant shall furnish to the respondent a printed copy of his points and authorities, and within two days thereafter the respondent shall furnish to the appellant a written or printed copy of his points and authorities.

2. On or before the calling of the cause for argument each party shall file with the clerk his printed points and authorities, together with a brief statement of such of the facts as are necessary to explain the points made.

3. The oral argument may, in the discretion of the court, be limited to the printed points and authorities filed, and a failure by either party to file points and authorities under the provisions of this rule, shall be deemed a waiver by such party of the right to orally argue the cause.

4. No more than two counsel on a side will be heard upon the oral argument, except by special permission of the court, but each defendant who has appeared separately in the court below, may be heard through his own counsel.

5. At the argument, the court may order printed briefs to be filed by counsel for the respective parties within such time as may then be fixed.

6. In criminal cases it is left optional with counsel either to file written or printed points and authorities or briefs.

#### RULE XII.

In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper, and in the same style and form (except the numbering of the folios in the margin), as is prescribed for the printing of transcripts.

#### RULE XIII.

Besides the original, there shall be filed ten copies of the transcript, briefs and points and authorities, which copies shall be distributed by the clerk.

#### RULE XIV.

All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

#### RULE XV.

All motions for a rehearing shall be upon petition in writing, and presented within ten days after the final judgment is rendered, or order made by the court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the court be-

low shall be issued until the expiration of the ten days herein provided, and decisions upon the petition, except on special order.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

RULE XVII.

No paper shall be taken from the court room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

RULE XVIII.

No writ of error or certiorari shall be issued, except upon order of the court, upon petition, showing a proper cause for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a supersedeas. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree which is sought to be reviewed, except under special circumstances.

## RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, and additional day's notice will be required for each fifty miles, or fraction of fifty miles, from Carson.

## RULE XXIV.

In all cases where notice of a motion is necessary, unless, for good cause shown, the time is shortened by an order of one of the justices, the notice shall be five days.

**PROCEEDINGS OF THE COURT**

HAD UPON THE

**DEATH OF A. M. HILLHOUSE, ESQ.**

Tuesday, January 4, A. D. 1881.

*Present:* LEONARD, C. J., HAWLEY, J., BELKNAP, J.

George W. Merrill, Esq., presented the following resolutions, adopted by the Bar of Eureka County:

*Whereas:* By a dispensation of Divine Providence, our late brother and associate, the Hon. A. M. Hillhouse, has been suddenly removed from our midst by the inexorable hand of death, and at the time of his decease was a highly respected and honored member of the bar, therefore be it

*Resolved:* That in the death of Hon. A. M. Hillhouse, the legal profession of Nevada has lost one of its ablest and most learned members; one who, during a successful career upon the Pacific coast, has always been distinguished for his intellectual worth, unswerving integrity, upright deportment, and uniform kindness and courtesy in all his intercourse with the world.

*Resolved:* That we deplore deeply his loss, and shall ever cherish his memory as a true friend and brother, to whom we were attached by the strongest ties of friendship and respect.

A. C. Ellis, Esq., on behalf of the bar of the supreme court, presented the following resolutions, and moved their adoption:

*Resolved:* That the members of this bar have learned with

sentiments of deep regret of the death of the late Hon. A. M. Hillhouse, and that we tenderly cherish and commemorate his genius and his manly virtues.

*Resolved:* That by this dispensation of Providence humanity has lost a faithful and charitable friend; the legal profession, an honorable and distinguished man of genius and learning; and that his family and friends have suffered an irreparable loss.

*Resolved:* That we heartily indorse the resolutions of the Eureka Bar, to-day presented to this Hon. Court, touching our late brother, and ask your Honors to cause them to be spread upon the minutes of this court, together with these resolutions, and that a copy thereof be transmitted, under the seal of this court, to the family of the deceased.

T. W. Healy, Esq., addressed the court as follows:

May it please the court: It is with more than the ordinary feelings of sorrow, incident to such mournful occasion, that I now rise to pay my feeble tribute to the memory of departed worth. When one full of years and full of honors passes away, however deep may be our regret, we can still find consolation in the thought that in obedience to the natural law the limit of human life was reached; and we yield with resignation to the inevitable, because though long delayed, the sad event was to have been reasonably expected. But when one is struck down in the full vigor of youth and strength, in the full possession of every mental and physical qualification, ere the prime of manhood has been reached, torn from us rudely as the lightning rends the oak, we can not bow in meek submission to the mighty mandate of death; for the thought is ever uppermost: this taking off should not have been. We can not realize that "the sun has gone down while it is yet day." It seems too much like a great tragedy in which nature was the chief actor.

Although our departed brother, Adelbert Milton Hillhouse, has "gone to that bourne from whence no traveler returns," yet his memory shall long be cherished, and his bright example be a subject for emulation through the coming years. There is no need in this instance to invoke the ancient and honored maxim: "*Nil nisi mortuus bonum*," for the most



truthful portrayal of his nature and character, would, to those who did not know him, seem the glowing language of eulogy.

It is hardly necessary to state to this august tribunal before which his legal lore has so often been displayed, or to this assembled bar with which he has so often coped in forensic encounters, that his reputation as a lawyer was, in this state, second to none. His mind was at once clear and vigorous, analytical and logical. He possessed an intellectual grasp which could hold captive the greatest legal principles, and could with equal facility reduce the simple elements to the complex, or the complex to the simple. Although industrious, he was no mere case lawyer; but always sought decisions on principles, and always endeavored to perform his share in elevating law to the dignity of an exact science.

I had the good fortune to have been associated with him in some cases, and know that he had burned his "midnight oil" in ample preparation. Possessed of a great love of the good and the beautiful, he loved poetry and oratory, and especially delighted in the legal orations of Curran, Erskine, Plunkett, Webster, Wirt, and Pinckney, who were always his ideals of great advocates. He often deeply regretted that his early opportunities prevented him from acquiring an extended knowledge of the classics; and this regret was often expressed, for his great nature scorned to decry the culture he did not possess, or the attainments he could not emulate.

With a reputation co-extensive with the Pacific slope, he still retained that ever true and ever constant concomitant of greatness—the modesty of genius.

His nature was grand and noble, and his great heart embraced humanity. He dearly loved his family and friends. With the modesty of a maiden he possessed the valor of a hero. Magnanimous as he was brave, he shunned quarrels where another of smaller nature would have pressed them, in the vain endeavor to escape an impugnement of his courage. With a refined nature, liberal and enlightened ideas, he was always ready to excuse the shortcomings of humanity. Like a worthy citizen of a republic, he was a true

gentleman—natural—totally free from art in address and manner, and easy of access to all. No lawyer, no matter how limited his reputation, learning, or talents, ever felt dwarfed in his presence; nor did any worthy human being, no matter how humble his station in life, ever meet with a rebuff at his hands.

Is it any wonder, while such a high character was admired and respected, that the possessor of it should be loved!

Is it any wonder that one of the great political parties should have chosen him for its leader in this state, and by its recorded expression, declared him worthy of a seat in the senate of the United States!

Is it any wonder that many even outside of that great party, earnestly hoped that he might have, at no distant day, occupied that high place in the councils of the republic!

The true chivalry of his character is proved by the noble tribute to his wife, penned by his own hand, while in the full vigor of health, in most solemn of legal instruments—his last will and testament—wherein, in touching and simple eloquence, he bequeathed to her sole care his children and his property; for to her, it reads, "I owe all that I am, all that I have, and all that I expect to be."

What a grateful acknowledgment amidst the glamour of ambitious dreams of professional and political preferment! With such development of excellence at forty years, what might not have been expected at maturer age!

Each one within the sound of my voice is less happy to-day, because of the absence of our departed brother. These walls that have so often echoed his words seem sad and somber.

No more shall we behold his manly form, his noble face, his kindly beaming eye, his genial smile, nor feel our hands again within his friendly grasp. He has gone from us, and "the places that have known him shall know him no more!" Our brother was and is not!

Who shall write his epitaph?

Were it not presumption on my part, I would essay the task. And as all the qualities of his mind were in subordination to his feelings, I would propose this fitting though

inadequate expression of the sentiment: "*Here lies one whose intellect was never cultivated at the expense of his heart.*"

And though he is now laid down to his long rest, though his eyes are closed and his voice is hushed in death, yet we will cherish his memory, and preserve the legacy he has left us—his example—so that we may be loved while living, and when dead, be remembered with affection and regard.

I second the motion for the adoption of the resolutions.

The response of the court was delivered by Leonard, C. J., as follows:

The death of Mr. Hillhouse, in whose honor and memory these resolutions and remarks have been presented, is regarded by the members of this court, as well as by the bar of the state, and especially of Eureka County, where he lived and was best known, as an event over which the legal fraternity and the state at large have great reason to mourn. Death is so common among all classes and conditions of men, that it ought not to be a surprise at any time; but it is so, and so it will be. In hovel and palace, it is everywhere and at all times an unwelcome visitor, and it is anomalous if the message that conveys the sad intelligence does not startle and sadden some heart. When the news came that our deceased brother, in the prime of robust manhood, in the midst of success well earned, and honors fairly achieved, surrounded by a devoted family and faithful friends, had been stricken with a disease which it was believed would prove fatal, the hearts of the people were filled with grief; but when the message was conveyed that, with him, this life had yielded to the inevitable, the fact was received as a public calamity, and many a friend suffered as is possible only in the presence of a personal bereavement.

The members of this bench had long known Mr. Hillhouse, and knowledge of his ability and habits as a lawyer, and his character as a man, enables us to respond most earnestly to the generous and truthful sentiments of the bar and the public as expressed upon this occasion.

He was frequently in attendance here, and never failed to assist the court by his learning, or to endear himself more and more to each member by courtesy of manner, which marked him as a man both generous and cultivated.

He was an excellent example of the possibilities, or, rather, the probabilities, of an earnest, honest, studious life.

His years were few; but he lived long, because he accomplished much.

His memory will be cherished by all; but by the brethren of the bar especially, as one who always honored the profession by his conduct and ability as a lawyer, and his integrity as a man.

As a mark of respect to the memory of our deceased brother, it is ordered that these proceedings be entered of record here, and be published with the reports; and that the court shall now adjourn.

## REPORTS OF CASES

# SUPREME COURT

## STATE OF NEVADA,

JANUARY TERM, 1880.

[No. 1002.]

### THE STATE OF NEVADA, RESPONDENT, *v.* AH SAM, APPELLANT.

**OPIMUM ACT—CONSTITUTIONALITY OF.**—The "Opium Act" (Stat. 1879, 121) embraces but one subject, and its title is not too restrictive to cover the provisions of section 6.

**TITLE OF ACT—HOW CONSTRUED.**—The constitutional provision, that each law shall embrace but one subject, which shall be briefly expressed in the title, is mandatory, but should be liberally construed.

**RESORT—MEANING OF.**—The word "resort," as used in the opium act, means to go once, or more, to a place kept for opium-smoking.

**PLACE OF RESORT.**—A room where all the apparatus for opium-smoking is found, and a number of persons, white men and Chinamen, are present, is a place of resort within the meaning of those words, as used in the statute.

**APPEAL from the District Court of the Fourth Judicial District, Humboldt County.**

The facts appear in the opinion.

*L. J. Maddux and S. Grass, for Appellant.*

I. The constitutional provision which declares that every law shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed

NEVADA v. AH SAM.  
Argument for Respondent.

in the title, is mandatory. (Cooley's Con. Lim., 74, 78, 148, 150; *People v. Lawrence*, 36 Barb. 177; *State v. Silver*, 9 Nev. 227.)

II. An act containing subjects not expressed in its title is unconstitutional and void. (*Prothro v. Orr*, 12 Ga. 36; *Robinson v. Bank of Darien*, 18 Id. 65; *People v. Cleeen*, 32 Ill. 65; *Foley v. State*, 9 Ind. 363; *Igoe v. State*, 14 Id. 239; *Fishkill v. R. and P. Road Co.*, 22 Barb. 164; *People v. Commissioners*, 53 Id. 70; Cooley's Con. Lim., ch. 6, 148, et seq.; 1 Kent's Com. 461.)

III. If a provision of a statute is unconstitutional, it can be stricken out, if it does not modify or restrict the effect of the other provisions. (*Robinson v. Bidwell*, 22 Cal. 379; *Mills v. Sargent*, 36 Id. 379; *In re Jas. De Vaucene*, 31 How. Pr. 289; *Nelson v. People*, 33 Ill. 390.)

IV. The act embraces two or more subjects, viz: 1. The regulation and disposal of opium. 2. The prohibition of the keeping of places of resort for the purpose of smoking opium, or otherwise using that drug. 3. Makes it a criminal offense for any one to resort to any house kept for the purposes forbidden by the act, for the purpose of smoking opium, or indulging in the use of opium, or any preparation containing opium. (Cooley's Con. Lim., ch. 6, 155; *State v. Silver*, 9 Nev. 227; *Winona R. R. Co. v. Waldron*, 11 Minn. 515; *Deegan v. Morrow*, 31 N. J. L. 136; 1 Kent's Com. 461.)

**M. A. Murphy, Attorney-General, for Respondent:**

I. The law embraces but one subject and matter properly connected therewith. The subject is to prevent the sale and use of opium; the manner in which it is to be prevented, or the punishment inflicted for a violation of the law, need not be expressed in the title. (*San Antonio v. Lane*, 32 Tex. 405; *People v. Lawrence*, 41 N. Y. 137; *Ottawa v. People*, 48 Ill. 233; *Brewster v. City of Syracuse*, 19 N. Y. 116; *Sun Mut. Ins. Co. v. Mayor et al.*, 8 Id. 241; *Tuttle v. Strout*, 7 Minn. 468.)

II. The degree of particularity with which the title of an act is to express its subject, is not defined in the constitu-

tion, and rests in the discretion of the legislature. (*Brewster v. City of Syracuse*, *supra*; *Nuendorff v. Duryea*, 69 N. Y. 557; *People v. Briggs*, 50 Id. 553.)

III. If the title does not mislead or effect a surprise, it will be good. (*People v. McCallum*, 1 Neb. 182; *Commonwealth v. Green*, 58 Penn. 226; *State v. Judge of Davis Co.* 2 Iowa, 280.) An act to suppress murder, lynching, and assault and batteries, deals but with one subject. (*Gunter v. Dale Co.*, 44 Ala. 639; *Farley v. Dowe*, 45 Ala. 324; *Ex parte Upshaw*, Id. 234; *Bridgeford v. Hall*, 18 La. Ann. 211.)

IV. The general purpose of the constitutional provision is accomplished when a law has but one general object, which is fairly indicated by its title. (*Cooley's Con. Lim.*, sec. 144; *Humboldt v. Com'rs Churchill Co.*, 6 Nev. 30; *People v. Mahaney*, 13 Mich. 495; *Morford v. Ungar*, 8 Iowa, 82; *Bright v. McCullough*, 27 Ind. 223; *Mayor v. State*, 30 Md. 112; *Davis v. State*, 7 Id. 159; *Keller v. State*, 11 Id. 531; *Parkinson v. State*, 14 Id. 184; *State v. Town of Union*, 33 N. J. 351; *Sun Ins. Co. v. Mayor*, 8 N. Y. 252; *Whiting v. Mt. Pleasant*, 11 Iowa, 482; *Battle v. Howard*, 13 Tex. 345; *State v. Davis*, 14 Nev. 439.)

By the Court, BEATTY, C. J.:

The appellant was convicted of violating section 6 of "An act amendatory and supplemental of an act to regulate the sale or disposal of opium and to prohibit the keeping of places of resort for smoking or otherwise using that drug," etc. (Stats. 1879, 121.)

The following is the material portion of said section: "Section 6. It shall not be lawful for any person to resort to any house, room, or apartment, or other place kept for any of the purposes forbidden by this act, for the purpose of indulging in the use of opium or any preparation containing opium, by smoking or otherwise."

We are asked to reverse the judgment of the district court, on the ground that it was error to overrule the defendant's demurrer to the indictment, whereby it was objected: 1. That the whole of said act is unconstitutional and void, for the reason that it embraces more than one

Opinion of the Court—Beatty, C. J.

subject; and, 2. That even if the whole act is not void, for the reason stated, section 6 thereof, at least, must fall, because its provisions are not within the terms of the title.

The clause of our constitution, upon which these objections are founded reads as follows: "Each law enacted by the legislature shall embrace but one subject, and matter, properly connected therewith, which subject shall be briefly expressed in the title," (Art. 4, sec. 17.) Provisions similar to these in the constitutions of the other states have generally been held to be mandatory (*Cooley's Con. Lim.*, 150), and such is the view of this court. (*State v. Silver*, 9 Nev. 227.)

The appellant is correct, therefore, in assuming that any act passed in disregard of the letter and spirit of these provisions is *pro tanto* void. If two incongruous subjects are embraced in the same act, the whole act is void, and even when but one subject is embraced in an act, yet if its title has been unnecessarily made so restrictive as not to cover the whole subject, such parts of the act, as are not included by the title must fail.

Does the act under which the appellant was convicted embrace more than one subject, or is its title too restrictive to cover the provisions of section 6?

Clearly it does not embrace more than one subject, and if its title had been, "An act for the suppression of opium dens," we think no one would have been found to question its constitutionality. The following is an epitome of its different provisions: It prohibits the sale of opium, except when prescribed by licensed physicians, and in that case allows only druggists and apothecaries to sell it; prohibits the keeping of places of resort for smoking; prohibits the leasing of houses for such purposes; subjects the interest of the owner or lessor of premises leased with knowledge that they are intended to be used for opium-smoking to a lien for any fine or costs recovered against the occupant, and, finally, by section 6, prohibits all persons from resorting to places kept for the forbidden purpose.

From this statement it is apparent that the legislature, in



passing the act in question, had but one object in view, viz.: the suppression of the places commonly known as opium dens, and nothing is contained in the law that is not clearly conducive to that end. The sale of opium is restricted, as far as it can be consistent with its proper use as a remedial agent, in order to prevent its improper use as a means of intoxication, and such restriction of its sale has an obvious tendency to break up the establishments at which the law is aimed. Of the same tendency are the provisions of section 6, the effect of which is to drive away the patrons and diminish the profits of such establishments. The other provisions of the act are even more directly adapted to the end in view. There is nothing, therefore, in the body of the law to sustain the first objection above stated. The second objection, however, which relates to the title of the act, has a much greater show of reason to support it.

This does not profess in explicit terms to aim at the suppression of opium dens by every legitimate means, but merely to prohibit the keeping of such places, and, upon strict rules of interpretation, it would be difficult to maintain that the latter expression is as broad as the former, or that it will cover anything besides provisions for punishing the keepers of the interdicted resorts. But in dealing with this particular objection to parts of statutes, which, as a whole, embrace but one subject of legislation, the courts of the different states have adopted an exceedingly liberal rule of construction in favor of their validity. The decisions on the point are very numerous, but it would be unnecessary and unprofitable to attempt a review of them; for in scarcely a single instance is an attempt made to lay down any rule or principle more definite than is to be gathered from the remark of Judge Cooley (Con. Litt. 146), that "there has been a general disposition to construe the constitutional provision liberally, rather than to embarrass legislation by a construction, whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted."

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Opinion of the Court—Beatty, C. J.

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The "beneficial purposes" designed to be accomplished by the provision in question are said to have been the prevention of "surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked, and carelessly and unintentionally adopted," and to fairly apprise the public of the subjects of legislation under consideration by their representatives, in order that they might have an opportunity of being heard thereon by petition, or otherwise. (Cooley's Con. Lim. 142, 143.) It is not inconsistent with these purposes to give some slight enlargement to the literal meaning of the title of a law, and there are numerous precedents that will justify us in saying that the title of this act, "to prohibit the keeping of places of resort," etc., is substantially equivalent to "for the suppression of places of resort," etc. (Cooley's Con. Lim. 141-150, and notes.)

We conclude that the objections to the constitutionality of the law, under which the appellant was indicted, are unfounded, and that the district court did not err in overruling his demurrer.

The appellant also contends that the district judge erred in instructing the jury to the effect, that going once to a place kept for opium-smoking, for the purpose of smoking, is an infraction of the law. What the statute forbids all persons to do is to "resort" to such places, and it is argued that resort means, not to go merely once, but to go and go again—in other words, to make a practice of going. The etymology of the word resort lends some support to this argument, but the definitions given in the lexicons show that whatever may have been its original meaning it no longer means anything more in the connection in which it is employed in the statute than to go once.

It is also claimed that the evidence was insufficient to show that the place where appellant was arrested was a place of resort such as the statute prohibits. But upon this point we think the case was very clearly made out. The evidence showed that the room in which the appellant was arrested

Argument for Appellant.

contained all the apparatus for opium-smoking, and a number of persons—white men and Chinamen—besides the appellant, were found there in various stages of the sort of intoxication produced by the use of opium.

The judgment appealed from is affirmed.

[No. 994.]

THE STATE OF NEVADA, RESPONDENT, v. M. MARKS,  
APPELLANT.

**CRIMINAL LAW—DISQUALIFICATION OF JUROR—WHEN NOT GROUND FOR NEW TRIAL.**—The fact that, after a verdict of guilty has been rendered, the accused ascertains for the first time that before the jury was impaneled a juror had formed and expressed an opinion as to his guilt, is not a ground for a new trial.

**IDEM—ASSAULT WITH INTENT TO KILL—INSTRUCTION.**—The court instructed the jury that "an assault with intent to kill, is an unlawful attempt, coupled with a present ability, to kill another person under such circumstances as would constitute an unlawful killing had the death of the person assaulted actually resulted:" *Held*, correct.

**IDEM—INTENTION—BURDEN OF SHOWING JUSTIFICATION.**—The court instructed the jury, "that, if they find that the defendant, M. Marks, did assault the person named in the indictment, to wit, N. S. Gallagher, with a deadly weapon, in such a manner as was calculated to produce the death of said N. S. Gallagher, the law presumes that such was defendant's intention, and throws upon him the burden of showing facts in mitigation, justification, or excuse:" *Held*, not error.

**IDEM.**—The court instructed the jury "that, where an act in itself indifferent becomes criminal if done with a particular intent, then the intent must be proved and found; but when the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and, in failure thereof, the law implies a criminal intent unless the proof on the part of the prosecution sufficiently manifests that the accused was justified or excused in committing the assault:" *Held*, not error.

APPEAL from the District Court of the Fifth Judicial District, Lander County.

The facts appear in the opinion.

B. M. Clarke, for Appellant.

I. The Court erred in refusing to grant a new trial on account of the bias of the juror Watson.

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Opinion of the Court—Leonard, J.

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II. The court erred in its instructions to the jury.

In this case, the gist of the offense is, the intent unlawfully to kill. The unlawful intent is a material criminal fact, which, like every other fact, must be proved. The law lays the burden upon the State to prove the defendant guilty: that is, to prove every fact necessary to constitute the crime charged—every essential fact stated in the indictment. None of these facts can be presumed; and concerning them all, severally and collectively, the burden never shifts upon the defendant. (1 Lead. Crim. Cas. 316, 317, 318; 97 U. S. 297.)

*M. A. Murphy*, Attorney-General, for Respondent:

I. There was no error in refusing a new trial on the ground of the incompetency of the juror Watson. The court has no power to grant a new trial for such a reason, because it is not one of the grounds upon which a new trial can be granted. (Cr. Pr. Act; Comp. L., sec. 2053; *People v. Fair*, 43 Cal. 137; *People v. Mortimer*, 46 Cal. 114.)

II. Intention is manifest by the circumstances connected with the perpetration of the offense. (Comp. L., sec. 2308.) When the act is proved to have been done by the accused, if it be an act in itself unlawful. The law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption. (3 Green on Ev., sec. 13, *et seq.*; *State v. McGinnis*, 6 Nev. 109; Stephens Cr. Law, 304, 305; *Com. v. York*, 9 Metc. 103, 121-123; *People v. Harris*, 29 Cal. 681.

By the Court, LEONARD, J.:

Appellant was convicted of assault with intent to kill one N. S. Gallagher. He appeals from an order overruling his motion for a new trial, and from the judgment. William Watson, one of the jurors who tried the cause, when questioned as to his qualifications to act as a juror, answered that he had not expressed an unqualified opinion as to the defendant's guilt or innocence. One of the grounds upon which a new trial was asked is: "The misconduct of Wil-

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Opinion of the Court—Leonard, J.

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William Watson, one of the jurors in said case, which misconduct prevented the defendant from having a fair trial, in this: that said William Watson, on or about the twenty-fifth day of July last" (about the time of the assault and before the trial), "in the presence of James S. Trask, did say that the defendant should be hung, whether Gallagher died or not; that said Watson was not an impartial juror." One of the grounds stated in the statute upon which the court may grant a new trial in a criminal case is: "When the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case." The misconduct referred to in the statute is that only which occurs after the jury has been impaneled and sworn to try the cause. At the hearing of the motion for a new trial, appellant presented an affidavit of said Trask, to the effect that, on the day of the assault, Watson said to affiant that "Marks, the defendant, ought to be taken out and hung; that he did not care whether Gallagher died or not, Marks ought to be hung, anyway."

The first question presented is, whether the court erred in refusing to grant a new trial upon the ground stated. It may be admitted that a challenge for implied bias would have been sustained had the alleged expression of opinion been admitted by Watson, or had it been otherwise satisfactorily proved before the juror was sworn; but it by no means follows from that fact, under our statute, that the court erred in refusing to grant a new trial upon proof, after verdict, of the incompetency of the juror, although neither the defendant nor his counsel knew the facts alleged in the affidavit; at the time the jury was impaneled. Many cases may be found in the reports of our sister states where exceptions to the competency of jurors were made after verdict, for the purpose of obtaining new trials, and they show that the opinions of courts have been anything but harmonious. But we are unable to find a case where it has been held error to overrule such exceptions, under a statute like ours, which, in substance, expressly

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Opinion of the Court—Leonard, J.

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forbids the granting of a new trial upon the ground here urged.

Section 420 of the Criminal Practice Act (Stat. 1869, 67), provides that, "the court in which the trial is had upon the issue of fact, has power to grant a new trial where a verdict has been rendered against the defendant, upon his application, in the following cases only:" \* \* \* The ground urged, now under consideration, is not among the cases stated.

Section 334 of the same statute (Stat. 1861, 469) provides, that a challenge to an individual juror "must be taken when the juror appears, and before he is sworn, but the court may, for good cause, permit it to be taken after the juror is sworn, and before the jury is completed." The evident design of the legislature in enacting these statutes was to cut off the exception now made, after verdict.

The constitution secures to an accused person the right to be tried by an impartial jury, and the legislature has no right or power to deprive him of such right; but it can regulate its administration by determining and declaring, in a reasonable way, when and how a juror's partiality shall be ascertained. It is not, and can not be, denied that the regulations prescribed by the legislature for the impaneling of trial jurors in criminal cases are just to the accused, and that they are well calculated to secure to him a trial by a fair and impartial jury. Under a similar statute, the point now urged was decided against appellant, in *The People v. Fair*, 43 Cal. 146, and *People v. Martimer*, 46 Id. 120.

Besides, if, under the statute, appellant could obtain a new trial by means of an exception to the competency of a juror, made after verdict, it was incumbent upon him to show, by affidavit or otherwise, that the objection was unknown to him or his counsel at the time the jury was impaneled. (*Parks v. The State*, and *Eastman v. Wight*, 4 Ohio St. 234, 160.)

Again, although, upon the hearing of the motion for a new trial, the state did not offer any affidavit or proof contradicting the affidavits of Trask, still the record shows that the juror Watson, upon his *voir dire*, testified that he had

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Opinion of the Court—Leonard, J.

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not expressed any unqualified opinion as to the guilt or innocence of the defendant. Under such circumstances, had the court been permitted to grant a new trial for the reason urged, we could not say it abused its discretion in deciding in favor of the credibility of the juror, instead of the witness. (*Heath's case*, 1 Rob. (Va.) 742; *Jones' case*, 1 Leigh, 614.)

The court instructed the jury in part as follows: "An assault with intent to kill is an unlawful attempt, coupled with a present ability, to kill another person under such circumstances as would constitute an unlawful killing, had the death of the person assaulted actually resulted. \* \* \* If you believe from the evidence, beyond a reasonable doubt, that the defendant, M. Marks, did make an assault upon the person of N. S. Gallagher, at the time and place named in the indictment, and under such circumstances that, had the said Gallagher died from the effects of the assault, the offense would have been manslaughter, then you should find the defendant guilty as charged in the indictment."

The instruction was correct. (*State v. O'Connor*, 11 Nev. 423.)

Appellant also objects to the following instruction: "The jury are instructed that, if they find that the defendant, M. Marks, did assault the person named in the indictment, to wit, N. S. Gallagher, with a deadly weapon, in such a manner as was calculated to produce the death of said N. S. Gallagher, the law presumes that such was defendant's intention, and throws upon him the burden of showing facts in mitigation, justification, or excuse."

It is claimed that this instruction placed the burden of showing mitigation, justification, or excuse upon defendant, "without regard to whether the evidence on the part of the prosecution, did or did not, sufficiently establish that defendant was justified in committing the assault." The statute (Sec. 33, Stat. 1861, 61) provides: "The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof on the part of the

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Opinion of the Court—Leonard, J.

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prosecution sufficiently manifests that the crime committed only amounts to manslaughter; or that the accused was justified or excused in committing the homicide."

In other words, the killing being proved, the burden of proving the crime to be manslaughter instead of murder, devolves upon the accused, *unless* the proof, on the part of the state, sufficiently manifests that, the crime committed only amounts to manslaughter; and, second, the killing being proved, the burden of proving circumstances that justify or excuse the homicide, and consequently acquit and discharge the defendant, devolves upon him, *unless* the proof on the part of the prosecution sufficiently manifests that he was justified or excused in committing the homicide. It is plain that, if the state's proof sufficiently shows that the homicide amounts to manslaughter only; or if it shows that the defendant was justified or excused, then the burden of proving circumstances of mitigation in the first case, or that excuse or justify in the last, do not devolve upon him.

But let us see whether, from the entire charge, the jury could have understood the instructions as they are construed by counsel for appellant. It is stated in this court, that where, from the entire charge, it clearly appears that, the jury could not have been misled by the language objected to, the judgment will not be disturbed. (*State v. Donovan*, 10 Nev. 36; *State v. Raymond*, 11 Id. 98.)

The jury were instructed that, it was the intent to kill that constituted the gist of the offense, and the intent to kill must be proved; that the law in the first instance presumed the intent to kill to be proved when a person used a deadly weapon upon the person of another in a manner likely to produce death, *unless the facts shown on the trial of the case were sufficient to justify, mitigate, or excuse the act.*

The word "mitigate" should not have been used, but its use was favorable to defendant.

The court instructed further, that where an act, in itself indifferent, becomes criminal if done with a particular intent, then the intent must be proved and found; but when the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and, in failure thereof, the law



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Points decided.

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implies a criminal intent *unless the proof on the part of the prosecution sufficiently manifests that the accused was justified or excused in committing the assault*; that the defendant was presumed to be innocent until his guilt was proved; and if, upon a consideration of *all the circumstances and all the evidence*, there was a reasonable doubt of his guilt, the jury should give him the benefit of such doubt.

We are satisfied, from the whole charge, that the jury could not have understood the court to instruct them that the burden of proving circumstances of mitigation, justification, or excuse, was upon the defendant, notwithstanding such circumstances may have been sufficiently shown by the state. But, in truth, the court would not have erred if it had wholly omitted to instruct the jury that the defendant was entitled to the benefit of any evidence given on the part of the State tending to prove justification or excuse; because there was not a particle of evidence on the part of the state having such a tendency. On the contrary, the state's evidence proved a stabbing without a shadow of excuse or justification, and with scarcely a pretext of provocation.

The judgment and order appealed from are affirmed.

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[No. 993.]

**R. SADLER, RESPONDENT, v. THE BOARD OF COUNTY COMMISSIONERS OF EUREKA COUNTY, APPELLANT.**

**COUNTY COMMISSIONERS—MODE OF EXERCISING POWERS.**—County commissioners can only exercise such powers as are especially granted, or as may be necessarily incidental for the purpose of carrying such powers into effect; and when the law prescribes the mode which they must pursue, in the exercise of these powers, it excludes all other modes of procedure.

**ITEM—CONTRACTS—PUBLIC BUILDINGS.**—Under the statute of this state, the commissioners, after letting the principal contract, have the power, without further advertisement, to contract for any alterations or changes in the original plans and specifications; provided the same, in the aggregate, does not amount to the sum of five hundred dollars; but if further changes are ordered to be made, the commissioners must advertise for doing such work, and provide for letting the same to the lowest bidder.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

*Hillhouse & Cole*, for Appellant:

The board of county commissioners had the power to make the orders mentioned and set out in the return to the writ of certiorari, and did not exceed the jurisdiction conferred by law upon the board. (Vol. 2, Comp. L., secs. 3077, 3105; Stats. of Nev. 1879, 45; Vol. 2, Dill. Munic. Corp., secs. 371, 373, 388; 54 Miss. 240.

*Thomas Wren*, for Respondent:

If the commissioners have any authority to modify or alter a contract for the erection of public buildings, it can only be exercised by advertising for proposals and letting the contract, to make the alterations to the lowest responsible bidder. (2 Comp. L. 3070, 3077; *Lehigh Co. v. Kleckner*, 5 W. & S. 181.

By the Court, HAWLEY, J.:

By the provisions of the act approved February 24, 1879, the county commissioners of Eureka county were specially "authorized and empowered to erect a court-house of suitable size and dimensions for the county of Eureka, in the town of Eureka, on the site now occupied for court-house purposes by the said county of Eureka; *provided* that the cost of constructing and furnishing the same, the contract to be let to the lowest responsible bidder, shall in no event exceed the sum of fifty-three thousand dollars." (Stat. 1879, 45.) After giving the notice required by law, a contract for building the court-house according to certain plans and specifications was awarded to the lowest bidder, to wit: to A. Boungard, for the sum of twenty-two thousand dollars. This contract was executed on the twenty-fourth of May, 1879, and on the twenty-sixth an order was made, approving the bond of said Boungard, given in the penal sum of thirty thousand dollars. Thereafter, to wit, on the ninth

day of June, 1879, the commissioners "ordered that a contract be entered into with A. Boungard to dig an additional depth, to wit, the depth of at least eleven feet, or until white sand be reached, for a foundation of the new court-house, and to build a stone wall therein, sufficient to meet the walls already contracted for, and that on the approval of said work by the board, that said Boungard be paid the sum of four hundred and ninety dollars."

On the sixteenth of June, the commissioners "ordered that the inside walls on the east side of the sheriff's room and room adjoining such cross wall between the sheriff's and the adjoining room, be made two feet wide instead of sixteen inches, to receive brick walls and joists; the foundation of said walls to be sunk to the white sand; said work to cost not to exceed five hundred dollars."

On the twenty-first of June, four separate orders were made for other changes and alterations on the original contract, and on the thirtieth of June two other orders of like import (one of which was afterwards rescinded). Each of said orders is conditioned that the cost of the work specified shall not exceed five hundred dollars.

Did the commissioners, under the provisions of the statute, have the power to make the orders entered on the sixteenth, twenty-first, and thirtieth of June, without previous advertisement, as to the letting of such contracts?

The statute provides that "the board of commissioners shall have power and jurisdiction in their respective counties \* \* \* to cause to be erected and furnished a court-house, jail, and such other public buildings as may be necessary, and to keep the same in repair; *provided*, that the contract for building the court-house, jail, and other buildings be let out after at least thirty days previous public notice \* \* \* to the lowest bidder who will give good and sufficient security for the completion of any contract which he may make respecting the same. But no bid shall be accepted which the board may deem too high." (2 Comp. L. 3077.)

By a supplementary act, it is provided, that "in letting all contracts of any and every kind, character, and descrip-

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Opinion of the Court—Hawley, J.

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tion whatever, where the contract in the aggregate amounts to five hundred dollars or more, the county commissioners shall advertise such contract or contracts to be let, stating the nature and character thereof, and when plans and specifications are to constitute part of such contract, it shall be stated in the notice where the same may be seen—in some newspaper published in their county for the period of thirty days; in case the contract be for constructing any public building, then the advertisement shall be in that paper published in the county which is nearest the selected location for such building." \* \* \* (2 Comp. L. 3105.)

It is apparent upon the face of said orders that the commissioners exceeded their jurisdiction in declaring that the cost of said work should not exceed five hundred dollars, instead of should not amount to five hundred dollars.

The judgment of the district court could be sustained upon this technical ground. But upon a careful consideration of the various provisions of the statute relating to the duties of county commissioners, we are of opinion that the action of the court below in annulling all the orders of the board made subsequent to the ninth of June ought to be sustained upon the merits.

The powers of the commissioners and the mode of exercising them, being derived from the statute, must necessarily depend upon its true construction.

The restrictive provisions of the statute were evidently inserted for the protection and benefit of the public, and were intended to guard against favoritism, extravagance, or corruption in the letting of contracts for any public work. When the commissioners act under such authority, they must strictly follow all the conditions under which the authority is given.

The law is well settled that county commissioners can only exercise such powers as are especially granted, or as may be necessarily incidental for the purpose of carrying such powers into effect; and when the law prescribes the mode which they must pursue, in the exercise of these powers, it excludes all other modes of procedure.

Under the terms of the statute, the commissioners, after

letting the principal contract, had the power, without any further advertisement, to contract (with the contractor) for any alterations or changes in the original plans and specifications; *provided* the same in the aggregate did not amount to the sum of five hundred dollars. The statute does not contemplate that any other changes should be made, and as no change could be made without the consent of the original contractor, unless he forfeits or abandons his contract, without rendering the county liable for damages, it is, to say the least, very doubtful whether the commissioners have any authority to make any other contract or further change in the plan and specifications. That question, however, is not directly involved in this case, and need not be decided.

If the power exists to make a contract for any other changes or alterations than those already specified, it could only be exercised by advertising for such work and letting the same to the lowest bidder.

The commissioners can not do indirectly what they are directly prohibited from doing. Under the plea of necessity for a change in the original plan and specifications, they can not ignore the provision of the statute requiring contracts to be let to the lowest bidder.

If the power attempted to be exercised by the commissioners was to receive judicial sanction, it would strip the public of the very protection which the legislature intended to give by the restrictions which it imposed.

The commissioners might, in any case, agree in advance with some favorite contractor, that if he would put in a bid for a sum much less than he knew the work could be done for, they would allow him sufficient for changes and alterations in the plan and specifications to fully remunerate him for his work, thereby defrauding the rights of honest competing bidders, as well as depriving the public of the protection given by the statute.

Take the present case as an example: The commissioners might, if they were so disposed, under some plausible pretext, have so changed the plan and specifications as to have increased the original contract price of twenty-two thousand

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Opinion of the Court—Hawley, J.

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*Seely & Woodburn*, for Respondent:

The sole trader's act makes the wife the exclusive owner of all the money, credits, and property invested in the business in which she is engaged; it gives her dominion over her acquisitions against all but her own creditors, and they can be made liable only for the debts of the husband when the business is managed or superintended by him. The act does not prohibit the husband from acting for his wife in relation to her business, and if he does act for her, it is no reason for subjecting her property to satisfy the claims of the creditors of her husband. (*Guttman v. Scannell*, 7 Cal. 456.) A manager or superintendent is one who directs, controls, and carries on the business, and not one who acts in a subordinate capacity.

By the Court, HAWLEY, J.:

Plaintiff is the wife of Charles Youngworth, and as a sole trader, is engaged in keeping a restaurant in Virginia City. She brought this suit to recover certain personal property which had been levied upon by the defendant as the property of her husband. For a number of years prior to the time she became a sole trader, her husband carried on the same business, and during that time she assisted him by remaining behind the counter, in his place of business, to receive money from customers and to pay bills, while he superintended the kitchen, attended to and waited upon customers, and did the marketing for the restaurant. She had no money of her own when she commenced business as a sole trader. The property in question was bought by her and paid for out of the profits of the business.

The testimony of plaintiff tended to show that since she became a sole trader she managed the entire business, and that her husband acted in a subordinate capacity, under her directions, as an assistant. The testimony introduced upon the part of the defendant tended to show that the business was conducted and carried on in the same manner after as before she became a sole trader; that she and her husband respectively performed the same duties.

The jury found a verdict in favor of plaintiff. Defendant appeals from an order of the court refusing to grant him a new trial.

Did the court err in its construction of the sole trader's act in giving and refusing certain instructions?

This act (1 Comp. L. 223) was evidently passed for the protection of married woman. It enables a married woman, upon complying with certain provisions therein named, to engage in business "in her own name and on her own account," and protects her earnings, and the property acquired by her energy, skill, and industry, from being taken for the payment of her husband's debts. She is authorized to conduct and carry on business as a *feme-sole* and becomes "responsible for the maintenance of her children." The law was designed only to protect the wife against an improvident and worthless husband. The business in which she engages can not be carried on "for the purpose of defrauding" any creditor of her husband. Its benevolent provisions can not be used as a cloak to hide, or cover up, any such fraudulent intent or purpose. It gives to the wife unusual rights and privileges; and demands of her good faith and honesty of purpose.

In the passage of the act the legislature recognized the fact that, owing to the intimate relations existing between husband and wife, it was necessary to insert provisions against its being used in fraud of the rights of the husband's creditors. It is questionable to my mind whether the safeguards provided for in the act are sufficient to accomplish the purpose intended. If there was a provision in the law prohibiting the employment of the husband by the wife, in any capacity, it would be a substantial check against fraud. It would remove not only the opportunity, but temptation to do wrong. It is, however, the duty of courts to deal with and declare the law, both in letter and spirit, as passed by the legislature. There is no provision in the law which prohibits the wife from employing her husband, in a subordinate capacity, in whatever business she may be engaged. If she employs him, it would be a circumstance tending to establish fraud, but would not amount to conclusive evi-

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Opinion of the Court—Hawley, J.

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dence of its existence. (*Guttman v. Scannell*, 7 Cal. 459.) But there is a provision against her carrying on any business in her own name, "when the same is managed or superintended by her husband." The words "managed" and "superintended," as used in the statute, are synonymous. The husband can not direct, conduct, or control the business in which the wife is engaged, or *any part of it*. The following instruction, given by the court, in so far as it declares that the statute applies only to the general business, is erroneous:

"In order to justify you in finding that the plaintiff's business was managed or superintended by her husband, you must believe from the testimony, that the *general business* was so managed or superintended by him; that he at times managed any *separate branch* of the business, will not constitute him manager or superintendent within the meaning of the sole trader act."

If the wife allows the husband to exercise his own judgment and discretion, and to direct, conduct, and control the business, or any *separate branch* of it, she brings herself within the prohibition of the statute, and must suffer the consequences.

The court also erred in refusing to give the following instruction, asked by defendant's counsel: "If you find from the evidence, that plaintiff became a sole trader with the consent of her husband, and with the understanding between them that the husband should give his time and attention to the business, and that this arrangement was made for the purpose of delaying or defrauding the creditors of the husband, then your verdict will be for the defendant."

This instruction was correct. It was material to the issues raised by the testimony, and ought to have been given. The errors already noticed are sufficient to warrant a reversal of this case.

There are other and perhaps more important questions presented by this appeal, which may or may not arise upon another trial of this case. The testimony in the record before us is silent as to the employment of plaintiff's husband in any capacity. The fact whether he was employed at fixed



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Points decided.

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wages or an agreed salary, whether he received a reasonable compensation for his labor, or rendered his services gratuitously, would be material in enabling the jury to determine whether or not the transaction was sincere and *bona fide*, or only a colorable device to cheat, wrong, and defraud the creditors of the husband.

If it should appear that the husband intermingled his skill, industry, and energy with the labor of his wife, without receiving, or without any agreement that he should receive, any compensation for his time and attention, then the profits arising from said business, and the property paid for with such funds, would be community property (1 Comp. L. 152), and would be liable for the husband's debts.

If the business in which the wife was engaged was managed and carried on in the same manner, after she was authorized to do business as a sole trader, as it was before that time, by her husband, she could not claim the property as against his creditors.

But if, on the other hand, it should appear that the wife, in good faith, commenced the business and carried it on in her own name, and on her own account; that she employed her husband at a reasonable compensation; that she did not allow him to manage or control the business; that the transaction was *bona fide*, and not intended to defraud, delay, or hinder any creditor or creditors of her husband, then the property and all the profits arising from the business in which she was engaged would belong to her, and could not be levied upon or taken in payment of her husband's debts.

The order appealed from is reversed, and the cause remanded for a new trial.

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[No. 1001.]

THE STATE OF NEVADA, RESPONDENT, v. CHARLES  
WESLEY HYMER, APPELLANT.

TESTIMONY—MOTION TO STRIKE OUT.—If a motion is made to strike out all the testimony of a witness, when any portion thereof is admissible, the motion should be denied.

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## Statement of Facts.

**INSTRUCTION RELATING TO MURDER.**—*Held*, that the court did not err in instructing the jury as to the distinction between murder in the first and murder in the second degree. (See instruction in statement of case.)

**INSTRUCTION—CREDIBILITY OF DEFENDANT AS WITNESS.**—*Held*, that the court did not err in instructing the jury relative to the weight and effect to be given to defendant's evidence. (See instruction in statement of case.)

**RELEVANT TESTIMONY—ADMISSIBILITY OF THREATS.**—A witness testified that about three hours before the killing, the defendant made the remark, while treating a crowd in a bar-room, "It is the first time I have been drunk since I have been in town; I got drunk just to kill two or three s—s of b—s in this town to-night; and I'll do it, too." *Held*, admissible as tending to show that he had the deceased in his mind at the time he uttered the threats. (Beatty, C. J., and Leonard, J.)

**APPEAL** from the District Court of the Fourth Judicial District, Humboldt County.

The defendant was convicted of murder in the first degree and sentenced to be hanged.

The instruction relating to murder referred to in the opinion of the court reads as follows: "In dividing murder into two degrees, the legislature intended to assign to the first, as deserving of greater punishment, all murder of a cruel and aggravated character, and to the second, all other kinds of murder which are murder at common law, and to establish a test by which the degree of every case of murder may be readily ascertained. That test may be thus stated: Is the killing willful (that is to say, intentional), deliberate, and premeditated? If it is, the case falls within the first, and if not, within the second degree. There are certain kinds of murder which carry with them conclusive evidence of premeditation. These the legislature has enumerated in the statute, and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder of the first degree. These cases are of two classes. First, where the killing is perpetrated by means of poison, etc. Here the means used is held to be conclusive evidence of premeditation. The second is where the killing is done in the perpetration or attempt to perpetrate some one of the felonies enumerated in the statute. Here the occasion is made conclu-

## Statement of Facts.

sive evidence of premeditation. When the case comes within either of these classes, the test question, 'Is the killing willful, deliberate, and premeditated?' is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. Hence, so far as these two cases are concerned, all difficulty as to the question of degree is removed by the statute. But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty and aggravation with those enumerated, and which, owing to the different and countless forms which murder assumes, it is impossible to describe in the statute. In this class the legislature leaves the jury to determine, from all the evidence before them, the degree of the crime, but prescribes for the government, of their deliberations the same test which has been used by itself in determining the degree of the other two classes, to wit: the deliberate and pre-conceived intent to kill. It is only in the latter class of cases, that any difficulty is experienced in drawing the distinction between murder of the first and murder of the second degree, and this difficulty is more apparent than real. The unlawful killing must be accompanied with a deliberate, and clear intent to take life, in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing."

Instruction number five, referred to in the opinion of the court, reads as follows: "The defendant has offered himself as a witness on his own behalf in this trial, and in consider-

tion "to strike out all the testimony of the witness" was properly overruled.

2. The court did not err in instructing the jury as to the test or distinction between murder in the first and murder in the second degree. The instruction complained of is the same as was given in *The State v. Harris*, 12 Nev. 414. This court there said, "that it contains no substantial error."

3. The court did not err in giving respondent's instruction number five, relative to the weight and effect to be given to defendant's evidence.

This instruction was copied from *The People v. Cronin*, 34 Cal. 195, 196. We concur in the opinion, expressed by the court in that case, that the instruction "was in all respects legal and proper."

There is nothing in the instruction "charging the jury in regard to matters of fact," as claimed by appellant.

4. The other grounds upon which appellant moved for a new trial are equally untenable, and, as they are not relied upon by appellant's counsel, need not be specifically noticed.

The judgment and order overruling defendant's motion for a new trial are affirmed, and the district court is directed to fix a day for carrying its sentence into execution.

BEATTY, C. J., concurring:

In addition to the reasons stated by Justice Hawley, I think the ruling of the district judge, on the motion to strike out the testimony of the witness Collins, is sustainable on the ground that the particular testimony complained of was material and relevant. It was to the effect that about three hours before the killing, the defendant, while treating a crowd in a bar-room, made these remarks: "It is the first time I have been drunk since I have been in town; I got drunk just to kill two or three s—s of b—s in this town to-night, and I'll do it, too."

"It was for the jury to determine, from all the circumstances, whether this was mere idle vamping or a correct expression of the defendant's state of mind. If it was the

latter, and there was any circumstance from which they might infer that the deceased was one of the persons intended, it should express malice. The bill of exceptions contains but little of the testimony, but from that little, and the instructions given to the jury at the request of the defendant, it sufficiently appears that he provoked the difficulty with the deceased, and that the defense was, that he had in good faith endeavored to retire from the contest before firing the fatal shot. The fact, thus appearing, that within three hours, or thereabouts, after threatening that he would kill two or three persons in that town that night, he killed the deceased in a difficulty which he himself provoked, is certainly some evidence tending to show that he had the deceased in his mind at the time he uttered the threats.

Precisely the same sort of general indefinite threats—threats against “two or three men”—that were proved in this case, were proved in the case of *The State v. Barfield*, 7 Ired. 303, for the purpose of showing express malice; and the defendant was convicted of murder. The judgment, it is true, was reversed, but not because the evidence was deemed irrelevant or immaterial, for the court held on the contrary that it was material, if *from it and other circumstances* the jury inferred that the deceased was one of the persons threatened (p. 306). The truth was, however, that all the circumstances proved in that case tended very strongly to show that the threats which were made more than a month before the homicide, had no reference to the deceased; and the state’s attorney expressly admitted in the trial that the deceased was not one of the persons intended. The court, notwithstanding this admission, instructed the jury that the evidence in regard to the threats might be considered in determining the question of malice. This instruction, not the admission of the testimony, was held to be error. The decision, in fact, both by expression and implication, recognizes a doctrine that seems to me entirely reasonable—that in order to render threats material to the issue in prosecution for murder, it is not essential that the deceased should be actually named in

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Opinion of the Court—Hawley, J.,

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[No. 1005.]

OLIVER LONKEY AND E. R. SMITH, APPELLANTS, v.  
FRANK COOK ET AL., RESPONDENTS.

MECHANICS' LIEN LAW—PAYMENTS TO CONTRACTOR—RIGHTS OF SUB-CONTRACTORS.—In construing the mechanics' lien law (Stat. 1875, 122): *Held*, that the legislature intended to give sub-contractors and material men direct liens upon the premises for the value of their labor and materials, regardless of payments on the principal contract made prior to the time within which the law required a notice of their claim to be recorded. (*Hunter v. Truckee Lodge*, 14 Nev. 24, affirmed.)

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The district court, as conclusions of law, found that the defendants Cook and Miller were justly indebted to plaintiffs in the sum of two thousand seven hundred and eighty-four dollars and sixteen cents, and to other lien claimants in the sum of one hundred and sixty-three dollars and ninety-eight cents, and that the defendant, the Carson Opera House Association, was, at the time this suit was commenced, and at the time the several claims of lien were made, and now is, indebted to defendants Cook and Miller in the sum of one thousand four hundred and seven dollars and seventy-three cents. The court further found that the plaintiffs and the other claimants had each a valid lien against the Carson Opera House building, but not to the full extent of their several claims, but *pro rata* only, and to the extent of the sum of money due from the Opera House Association to Cook and Miller, the contractors.

*Lewis & Deal*, for Appellants.

*R. M. Clarke*, for Respondents.

By the Court, HAWLEY, J.:

A majority of the members of this court, in *Hunter v. Truckee Lodge*, I. O. O. F. (14 Nev. 25), after a thorough consideration of the question involved in this case, in construing the mechanics' lien law of this State, decided that the legislature "intended to give sub-contractors and ma-

## Points decided.

terial men direct liens upon the premises for the value of their labor and materials, regardless of payments on the principal contract made prior to the time within which the law requires a notice of their claim to be recorded."

From this opinion it follows that appellants had a valid lien against the premises described in the complaint for the full amount of the indebtedness proved at the trial.

The judgment and decree appealed from, in so far as the court refused to allow a lien for any greater sum than was owing by the Carson Opera House Association to Cook and Miller, the contractors, are reversed, and the district court is hereby directed to enter a judgment and decree in favor of appellants for the full amount of their claim as proved at the trial.

[No. 1013.]

W. T. BURNS ET AL., APPELLANTS, v. W. A. RODEFER  
ET AL., RESPONDENTS.

**BILL OF EXCEPTIONS—ORDER CONTINUING MATTERS IN COURT.**—Held, that the general order of the court continuing "all matters in court not disposed of until the next term," did not extend the time for settling and signing a bill of exceptions.

**BILL OF EXCEPTIONS—WHEN MUST BE SETTLED AND SIGNED.**—Under the statute (Civ. Prac. Act., sec. 190, *et seq.*), a bill of exceptions, in order to be available on motion for a new trial, or on appeal from the judgment, in a civil case, must be reduced to writing and settled by the judge, at or before the conclusion of the trial.

**TERM—ADJOURNMENT OF TERM.**—The bill of exceptions can not be reduced to writing and settled after the adjournment of the term at which the judgment is rendered, if there is no order of the court made at such term extending the time therefor.

**NONSUIT—WHEN GRANTED.**—A nonsuit can only be granted upon the grounds stated in the statute and in the manner therein provided.

**APPEAL** from the District Court of the Fourth Judicial District, Humboldt County. The facts are stated in the opinion.

*Bonnifield and Grass*, for Appellants.

*Geo. G. Berry and R. M. Clarke*, for Respondents.

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Opinion of the Court—Leonard, J.

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By the Court, LEONARD, J.:

The judgment contained in the judgment roll recites that, this case came on for trial on the seventh day of April, 1879, at the February term. A jury of twelve persons was impaneled and sworn to try the cause, and witnesses for the plaintiffs were sworn and examined. Thereafter, on motion, all the evidence offered and admitted for plaintiffs was struck out. The jury were then instructed by the court, when they retired to consider their verdict, and subsequently found a verdict for the defendants. Thereupon the following judgment was entered: "Wherefore, by virtue of the law, and by reason of the premises, it is ordered, adjudged, and decreed, by the court, that the plaintiffs take nothing by their action, and go hence, without day, and that defendants recover from the plaintiffs their costs and disbursements incurred and expended in this action, amounting to the sum of nine hundred and seventy-one dollars and seventy-five cents.

"Judgment rendered April 12, 1879."

No statement on motion for a new trial, or on appeal, was filed; but on the sixth day of January, 1880, and after several terms of the district court had passed, a so-called bill of exceptions was presented to the judge by appellants, to be settled and signed. Respondents objected to its settlement at that time, on the ground, that it was presented "too late;" and declined to propose amendments thereto. No order was ever made by the court or judge thereof extending the time for presenting or settling a bill of exceptions, but at the February and June terms of said court for 1879, it was ordered that, "all matters in court not disposed of, be, and the same are, continued till next term."

The judge appended to the so-called bill of exceptions, the following certificate: "I hereby certify that, all the exceptions that are settled herein were taken at the trial of said cause; and at the time the same were taken, the exceptions and the points of the exceptions were noted by the judge; and that all of said exceptions and the points of the exceptions were taken down by the clerk of said court, under



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Opinion of the Court—Leonard, J.

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the direction of the judge thereof; and that all the evidence that was given upon the said trial, and said exceptions and points thereof, were taken down by a reporter duly appointed and sworn to report the evidence and proceedings in said case; and that said reporter transcribed said evidence and notes of exceptions and points thereof, to writing, and such writing is now on file in the said clerk's office, and reference is made by the judge to his said notes and to the minutes so made by the clerk, and to the writing so transcribed by said reporter, in settling and signing this bill of exceptions. I further certify that the foregoing bill of exceptions is correct; that the same is settled, allowed, and signed by the judge of said court, this twenty-fourth day of January, 1880."

This appeal was taken from the judgment, on the day last mentioned in the certificate above set out.

In proper time, and upon legal notice, respondents moved this court to strike out the bill of exceptions contained in the transcript, on the ground that the same was settled and signed by the judge who tried the cause, after the adjournment of the term at which the same was tried, and no order of court was made extending the time to sign and settle said bill of exceptions.

We think the motion to strike out must be granted.

It is plain that the general order continuing "all matters in court not disposed of until the next term," did not extend the time for settling and signing the bill of exceptions, and that it would not have had such effect, if it had been made at and before the end of every term, between the rendition of judgment and the twenty-fourth day of January, 1880. With the same propriety it could be claimed that, such an order would extend the time from term to term, for moving to set aside judgments by default, in cases where the defendants were personally served with summons, although the court's jurisdiction was not saved by any proper proceedings instituted during the term at which the judgments were rendered. The majority of the court are of opinion that, under the statute (Civ. Prac. Act, sec. 190, *et seq.*), a bill of exceptions, in order to be available on motion

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Opinion of the Court—Leonard, J.

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for a new trial, or on appeal from the judgment, in a civil case, must be reduced to writing and settled by the judge, at or before the conclusion of the trial, and that if it is not thus reduced to writing and settled "at the time," it can not be brought before this court for review, except by a statement settled in the mode provided in section 197; and we are unanimously of opinion that it can not be reduced to writing and settled after the adjournment of the term in which the judgment is rendered, if there is no order of the court made at such term, extending the time therefor. Such a proceeding is against the evident intent of the legislature; it is not sustained by authority, and to uphold it, if that were possible under the statute, would be to encourage loose practice, which would lead to uncertainty, if nothing worse. In a majority of cases, it is not only necessary to state the points of exception, but also so much of the evidence as is necessary to explain them. When that is the case, it is especially important that, the whole be correctly stated, and so written down in permanent form; which can never be done as well as at the time, when all parties are present, and the facts are fresh in the mind. The judge, or clerk, or counsel may misunderstand or misstate the points of exception; hence the statutory provision that, "when delivered in writing, or written down by the clerk, it shall be made conformable to the truth, or be at the time corrected until it is so made conformable." The case of *Lobdell v. Hall*, 3 Nev. 523, is not in conflict with our opinion. The language of courts must be considered in connection with the facts of the case wherein it is used. In the case referred to the court said: "If there is an entire failure to make any note of an exception taken, either by the judge or his clerk, and the term of court expires at which the case was tried and judgment rendered, we do not see by what authority the judge could afterwards settle or make a bill of exceptions showing the facts."

Upon the facts the court was not obliged to go further or say more, in order to sustain its conclusion. But there is nothing in the opinion giving encouragement to the claim of appellants here. The so-called bill of exceptions not

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having been settled and signed, and thus made a part of the record within the time provided by law, the motion to strike it out is granted. We have before us, then, the judgment roll only.

If the court erred in striking out plaintiff's evidence, as it is claimed, still we have no knowledge that such is the case. It might have been admitted against the objections of defendants as incompetent and irrelevant, and it may have been struck out afterwards for the best of reasons. It is enough to say that, there is nothing before us, showing error, and every presumption is in favor of the court's action. It appears that the court instructed the jury, but we can not know the nature of the instructions, or that they were objected to by plaintiffs.

It is said that, at most, the court should have granted a nonsuit.

The plaintiffs might have asked for a nonsuit, after their evidence was struck out (Civil Pr. Act, sec. 151; *Hancock Ditch Co. v. Bradford*, 13 Cal. 637; *Ord v. Chester*, 18 Cal. 77); and the court might have granted one, also, upon motion of the defendants. But it does not appear from the judgment roll that, either party asked for a nonsuit, or that either objected to a submission of the case to the jury. A nonsuit cannot be granted except upon grounds stated in the statute and as therein provided. It could not have been granted under the *fifth* subdivision of section 151, except upon motion of the defendants. It could not have been ordered under the *fourth*, because plaintiffs did not abandon their case, or under the *third*, because they appeared, or under the *second*, because defendants did not give their written consent.

It is, therefore, difficult to perceive what other course could have been pursued, but to submit the case to the jury. Besides, had the case been withdrawn from the jury, the same result must have followed; the same judgment would have been entered, for upon the pleadings, the defendants were entitled to the judgment rendered.

The judgment is affirmed.

## Argument for Appellants.

[1006.]

## THE STATE OF NEVADA, RESPONDENT, v. JAMES FOLEY AND GEORGE TRACY, APPELLANTS.

**PARDON—EFFECT OF.**—A full and unconditional pardon of an offense removes all disabilities resulting from the conviction thereof.

**IDEM—APPLICATION FOR PARDON—NOTICE OF INTENTION.**—No notice of intention to apply for a pardon is required by the law of California when the term of imprisonment is completed.

**PARDON—AFTER EXPIRATION OF TERM.**—A pardon may be granted after the prisoner has suffered the entire punishment to which he has been condemned.

**IDEM—ONLY APPLIES TO OFFENSES IT RECITES.**—Where a prisoner has been convicted of two distinct felonies and a pardon is granted reciting only one of the offenses: *Held*, that the pardon did not apply to any offense except the one which it recites.

**INCOMPETENCY OF WITNESS—INFAMOUS CRIME IN ANOTHER STATE.**—A person convicted of an infamous offense in the courts of another state is rendered incompetent to testify as a witness in a criminal proceeding in this state.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

*R. H. Taylor*, for Appellants:

I. In order to render a pardon valid, it must express with accuracy the crime intended to be forgiven. (4 Black. Com. 400; 2 Hawk. P. C. 533; *State v. Leak*, 5 Ind. 350; *State v. McIntire*, 1 Jones (N. C.) L. 1.)

And the effect of a pardon is to protect from punishment the criminal for the offense pardoned, but for no other. (*State v. Richardson*, 18 Ala. 111; *Perkins v. Stevens*, 24 Pick. 278.)

Here there were two convictions for two separate felonies, only one of which was included in the attempted pardon.

II. A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. (*United States v. Wilson*, 7 Pet. 160.)

III. The constitution of California empowers the gover-

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nor of that state to pardon only "in accordance with law." (1 Hittell's Code, p. 51, sec. 13, Art. V.; *State v. Dunning*, 9 Ind. 22.) The governor has by law no power to pardon after the term of imprisonment has elapsed. (2 Hittell's Code, pp. 14417, 14421, 14422; *State v. McIntire*, 1 Jones (N. C.) L. 1.)

IV. Restoration to citizenship does not restore the qualification of a party to be a witness. (*People v. Bowen*, 43 Cal. 439; *Blanc v. Rogers*, 49 Id. 15.)

**M. A. Murphy, Attorney-General, for Respondent:**

I. The Governor of the State of California has the power to grant pardons and restore citizenship. (Const. Cal., sec. 13, Art. V.; Hittell's Codes, sec. 14417; Stat. of Cal. 1867-8, 111.)

II. The effect of a pardon, although granted after the convict had suffered the entire punishment awarded against him, was to remove the common law disability of incompetency to testify as a witness. (*State v. Blaisdell*, 33 N. H. 388; 1 Greenl. on Ev., sec. 377; 2 Wheeler Crim. Cases 454, 459; *People v. Pease*, 3 Johns. Cases, 333.)

III. The effect of a pardon is to acquit the offender of all the penalties annexed to the conviction, and to give him needed credit and capacity. (*People v. Pease*, 3 Johns. Cases, 333; *Wood v. Fitzgerald*, 3 Oregon, 568; *In re Deming*, 10 Johns. 232; *State v. Baptiste*, 26 La. An. (Rehearing) 136; *Ex parte Hunt*, 5 Eng. (Ark.) 284; 1 Greenl. on Ev., sec. 377.)

IV. A pardon restores the competency of a person who has been restored, whether he has been restored to citizenship or not. (*Warborough v. The State*, 41 Ala. 405.)

V. The question of the validity of this pardon, for reasons not appearing upon the face of the pardon, can not be raised by the defendants in this action. (*Hester v. The Commonwealth*, 85 Pa. St. 154.)

**By the Court, BEATTY, C. J.:**

At the trial of this case in the district court, the state called, among other witnesses, one Charles F. Roper. The Nev. Vol. XV.—5.

defendants, objected to the competency of this witness on the ground that he was a convicted felon, and to support their objection, offered, together with his own admissions, duly authenticated records of the courts of California, from which it appeared that he had been convicted in that state of two distinct offenses—grand larceny in Butte county, in 1873, and burglary in the second degree in Alameda county, in 1877, and thereupon sentenced to imprisonment in the State Prison. No objection was made to this evidence; and it seems to have been conceded at the trial, as it has been in the argument here, that it was sufficient to disqualify the witness unless his competency was restored by a pardon, of which the following is a copy:

“State of California, Executive Department: Whereas, at the April term, A. D. 1877, of the county court, held in and for the county of Alameda, in said state, Charles Anderson” (which Roper admitted to have been his then *alias*) “was tried and convicted of the crime of burglary, second degree, and sentenced to undergo an imprisonment in the state prison for the term of two years;

“And, whereas, the said Charles Anderson was discharged from the prison on the fifth day of January, A. D. 1879, without being pardoned;

“And, whereas, the testimony of the said Charles Anderson is represented to be necessary to the ends of justice in cases now pending in the courts of justice of the State of Nevada;

“And, whereas, an unpardoned felon is not permitted by the laws of said state to testify in the courts of justice thereof;

“Now, therefore, by virtue of the authority in me vested by the constitution and laws of this state, I, William Irwin, Governor of the State of California, do hereby pardon the said Charles Anderson, and order that he be restored to citizenship. Witness my hand and the great seal, etc.”

To the admission of this paper counsel for defendants objected upon various grounds to be more particularly noticed hereafter. But the court overruled the objections; and pre-

ing of the opinion, as we infer, that the pardon was sufficient to restore the competency of the witness, permitted him to testify to material facts against the defendants, who were thereupon convicted of the crime of burglary, and sentenced to the state prison.

Having appealed from the judgment, they assign, as errors, the ruling of the district judge in favor of the competency of the witness Ropen.

Assuming, for the present, as has been done throughout the argument, that a person convicted of an infamous offense in the courts of another state is thereby rendered incompetent to testify as a witness in a criminal proceeding in this state, we are satisfied that the district judge erred, not in overruling the objections to the admission in evidence of the pardon above granted, but in holding that its effect was to remove the consequence, not only of the conviction and judgment which it recites, but also the effects of another and distinct conviction and sentence to which it makes no sort of reference.

The specific objections to the admission of the pardon in evidence were, in substance:

1. That a pardon has no effect beyond relieving its object from the punishment expressly imposed by the sentence of the court, and consequently that it does not restore his competency as a witness.
2. That said supposed pardon was void, because it did not appear from any of its recitals that the notice of intention to apply for it, required by the laws of California, had been given.
3. That it was void because it appeared to have been granted after the expiration of the convict's term of imprisonment.

These objections were properly overruled.

As to the first, the authorities are uniform to the effect that a full and unconditional pardon of an offense removes all disabilities resulting from conviction thereof. The cases cited by appellants in support of this objection, so far as they are in point, are against them.

In *State v. Richardson*, 18 Ala. 109, it was held that a

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person condemned to fine and imprisonment, and released by the pardoning power from the imprisonment, is not thereby discharged of the fine. In other words, it was held in that case that, by the express terms of the pardon in question, it was the intention of the executive to remit a part only of the penalties that had been imposed.

In *Perkins v. Stevens*, 24 Pick. 277, the same thing was decided. The court say, p. 278: "The conviction of the witness rendered him incompetent. *A general pardon would unquestionably restore his competency.*" But they show that the pardon relied on was not, and was not intended to be, a general pardon. The form adopted by the executive of Massachusetts in pardoning an offense was: "We grant unto him, the said A. B., a full pardon of his said offense, and restore him to the rights and privileges which he forfeited by the conviction aforesaid," but in the case then before the court the executive had merely, during the execution of the sentence upon the witness, remitted to him "*the residue of the punishment he was sentenced to endure.*" The question in that case indeed was not the intention of the Executive, but rather as to his authority to limit the effect of the pardon, and this was the point principally discussed, the conclusion of the court being, that the power to pardon "necessarily includes the lesser power of remission and commutation. If the whole offense may be pardoned, *a fortiori*, a part of the punishment may be remitted, or the sentence commuted. If an absolute pardon may be granted, of course a conditional one may be."

In *People v. Bowen*, 43 Cal. 439, and *Blanc v. Rogers*, 49 Id. 15, a similar question was involved and similar views were expressed. In the first case (p. 442) the court say: "The governor might have pardoned Davis had he seen fit—he was not the less the subject of the executive power in that respect because he had already suffered the punishment adjudged for his crime. (2 Wheeler C. C. 451). *Had he done so there is no doubt that his competency as a witness would have been thereby restored.*" But they held that he had not done so—that he had neither pardoned nor intended to par-



don the witness, but had attempted the impossible feat of restoring his competency without pardoning the offense.

From this view of the cases cited by appellants, it will be seen that they are in perfect harmony with all the authorities as to the proposition that the effect of a full pardon "is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and not so much to restore his former, as to give him a new *credit and capacity*." (4 Black. Com. 402; see, also, 1 Greenl. Ev., sec. 377; *People v. Pease*, 3 Johns. Cas. 333; *Wood v. Fitzgerald*, 3 Or. 568; *In re Deming*, 10 Johns. 232; *State v. Baptiste*, 26 La. An. 136; *Ex parte Hunt*, 5 Eng. (Ark.) 284; *Hester v. Commonwealth*, 85 Pa. St. 154; 2 Hawk. P. C. 547, and cases there cited; 1 Phill. Ev. 21; 1 Gilb. Ev. 259.)

As to the second point. No notice of intention to apply for a pardon is required by the law of California. "When the term of imprisonment of the applicant is within ten days of its expiration" (2 Hitt. Codes, sec. 14423); and *a fortiori*, we should say, no notice would be required when the term of imprisonment was completed. If so, there was no necessity that the pardon should recite the fact of notice given and proved, or that it should be established by proof *aliunde*.

As to the third ground of objection: It is well settled that a pardon may be granted after the convict has suffered the entire punishment to which he has been condemned, and that the effect, in such case, is to restore his competency as a witness. (See *People v. Bowen*, *supra*; 2 Wheel. Crim. Cas. 459; *State v. Blaisdel*, 33 N. H. 388; 1 Greenl. Ev., sec. 377.)

And there is good reason why this should be so. There have undoubtedly been cases—at least it is easy to suppose a case—in which the convict has been proved innocent after the completion of the punishment prescribed by his sentence. It would be a reproach to the law to suppose that under such circumstances nothing short of an act of the legislature (if even that would be available under our constitution or the constitution of California) could restore him

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to his unjustly forfeited privileges. And if the power to pardon after the completion of the punishment ought to exist and does exist, it is certain that there is no limit to its exercise except the discretion of the person in whom the unrestricted power is vested. The only restrictions upon the power of the Governor of California to grant pardons are, that it does not extend to the crime of treason or to cases of impeachment, and that it can only be exercised after conviction, and subject to such regulations as may be prescribed by law *relative to the manner of applying for pardons*. (Const., Art. V., sec. 13.) Hence it follows that not only under the California decisions, but under all the decisions, the power to grant the pardon under consideration is unquestionable.

It was therefore properly admitted in evidence, because it supplied part of the proof necessary to restore the competency of the witness.

But it was not, by itself, sufficient for that purpose. The witness had been convicted of two distinct felonies, and as long as either judgment remained unreversed and the offense unpardoned, he was incompetent to testify.

Now, this pardon, notwithstanding its manifest object was to make Roper a competent witness in the courts of this state, can not be held to apply to any offense except the one which it recites. Under the California decisions, above referred to (*People v. Bowen*, and *Blanc v. Rogers*), the "order that be restored to citizenship" must be disregarded. If Roper was pardoned, those words were superfluous; if he was not pardoned, they were nugatory. The effect of the pardon must therefore be determined by reference to the preceding clause—"do hereby pardon the said Charles Anderson"—considered in connection with the preamble by which it is introduced. So considered, it must be held under the settled rule of construction applying to acts of this kind, that the Governor of California intended to pardon the offense recited, and no other, and that, so far as the pardon may, in general terms, comprehend offenses not specified, it is void.

This was the common law rule applied to pardons granted

by the kings of England whose power in this respect was certainly more ample than that of the Governor of California. They could grant pardons before as well as after conviction, and before as well as after indictment. But although it was never asserted in terms that they had no power to pardon a man of all felonies in general without describing any one particular felony, the rule of constructing pardons had the practical effect of denying the existence of any such power. For whenever it could be reasonably intended that the king, when he granted a pardon, was not fully apprised both of the heinousness of the crime, and also how far the party stood convicted thereof upon record, the pardon was held void, as being gained by imposition upon the king. "And upon this ground it hath been holden that if one be indicted by these words: 'that he had slain a man for having sued him in the king's court,' and the king make him a charter of all manner of felonies; this charter shall not be allowed because it shall be intended that the king was not acquainted with the heinousness of the crime, but deceived in his grant." (Hawkins' Pl. Crown, c. 37, sec. 8, p. 533.)

On the same principle it was held that a pardon of a particular offense after attainder, or conviction by verdict, was void unless it recited the attainder or the indictment and conviction. (Id. 534.)

"Also it hath been questioned whether the pardon of one who is barely indicted of felony be good, if it do not mention the indictment. But this hath been adjudged to be helped by the words '*sine indicatus sine non.*'" (Id. 534.)

The same author (pp. 534-5) denies the efficacy in his time (1716) of a general pardon "of all felonies" as a plea in bar to an indictment found after the granting of such pardon. But however this may be, it seems to be clear from the numerous cases and precedents cited by him, that a pardon was of no avail after conviction unless it recited the indictment and conviction. And if this was the common law rule it is still the rule, for it has not been changed by the legislature, and the reasons upon which it stands are as strong now as they ever were. There is as strong a presumption to-day as there ever was, that although the

executive might think a man worthy of being restored to civil rights who had committed one offense against the law, he would not think so if he knew that he was an habitual offender. (See further upon this point, 4 Black Com. 400; *State v. Leak*, 5 Ind. 359; 1 Chitty Cr. Law, 770; *State v. McIntire*, 1 Jones Law (N. C.), 1.)

If it be claimed that the pardon of a later offense necessarily carries with it the pardon of earlier offenses of the same character, the contrary has been held in *Hawkins v State*, 1 Porter (Ala.), 475, and in *State v. M'Carty*, 1 Bay (S. C.), 334.

It follows that Roper was never pardoned of the offense of grand larceny for which he was sent to the California state prison from Butte county, in 1873, and if that judgment had the effect of rendering him incompetent to testify in our courts, the appellants must be granted a new trial.

But does a conviction in one state disqualify the convict from testifying in another state? It was conceded in the argument, and we have thus far assumed, that it does. The question, however, is vital to the case, and we should not feel justified in deciding it in the affirmative, merely because counsel has admitted that it must be so decided. Mr. Greenleaf (1 Ev., sec. 376) declares that the weight of modern opinion is the other way, and Mr. Bishop (1 Crim. Law, sec. 976) takes the same view. There is but one case, however, which supports this declaration (*Commonwealth v. Green*, 17 Mass. 539), while there are at least two well reasoned and more recent decisions directly to the contrary. The first of these (*State v. Chandler*, 3 Hawks, 393) was decided very shortly after the Massachusetts case, and apparently without any knowledge of the grounds of that decision; but in the other case (*Chase v. Blodgett*, 10 N. H. 22) the grounds of the decision in *Commonwealth v. Green* are thoroughly reviewed, and the argument, in our opinion, completely overthrown. There is a reference in the digest to a case in 42 N. Y. Superior Court Reports, where the point seems to have been held as it was in Massachusetts. We have been unable to procure that volume, but we presume it adds nothing to the reasoning of the court in *Com-*

*monwealth v. Green.* This case we have given a very attentive consideration without being at all convinced by it. The court adduces a number of reasons in support of its conclusions, but rests upon no one of them as a conclusive ground of decision.

The argument to which most weight seems to be attached is, that a state will not enforce the penalty of a crime committed beyond its jurisdiction, and the denial to a convict of the right to testify, they say, is a part of his punishment. This argument is very satisfactorily met and entirely refuted in both the North Carolina and New Hampshire cases above referred to. They say, in effect, that the ground upon which a convict is held incompetent to testify is, that there is no presumption that he will speak the truth; he is excluded, not for the purpose of punishing him, but for the protection of the party against whom he offers to testify; if it thereby results incidentally that he is subjected to humiliation and disgrace, this is an inconvenience which it is entirely within the power of the state to impose, and of which he has no more right to complain, than an atheist had to complain of the discredit which the laws of many countries formerly attached to his oath. Without further comment on these cases, we content ourselves with saying that, in our opinion, the weight of authority and the soundest reasons support the doctrine that a person convicted of an infamous crime in another state is thereby rendered incompetent to testify in our courts.

It may be that the tendency of enlightened opinion and of recent legislation in other states and countries is against the rule which absolutely excludes the testimony of a convict; it may be that it is an unwise and impolitic rule, but it is unquestionably the law of this state. Not only is the common law unaltered by statute in this particular, but in civil practice it is expressly reaffirmed. (Comp. L. 1441.) This shows that the legislature approves the policy of the common law rule, and we can not hold that it is less essential in criminal than in civil cases; we feel bound, on the contrary, to maintain it as strictly in one class of cases as in the other.

## Points decided.

The common law rule, in substance is, that when it has been shown by evidence which imports verity, that a man has been adjudged guilty of an infamous crime he is no longer worthy of belief, and no man's life or liberty or property is to be affected by his oath. In England, the country from which we have received the common law, it is true that a foreign conviction did not disqualify a person from testifying, but the reason of this was, that the record of his conviction was not conclusive evidence of the fact in an English court. Under the constitution and laws of the United States, however, the public acts and records of each state, when properly authenticated, are entitled to full faith and credit in the courts of every other state. The appellants, therefore, proved conclusively that Roper had been sentenced to the state prison of California for a crime (grand larceny) which, at common law and under our statute, was, and is a felony, and the presumption is, in the absence of all proof, that grand larceny means in California what it meant at common law and what it means under our statute. If the laws of California include under the name of grand larceny, offenses which, under our law, are not deemed infamous, the fact is susceptible of proof, but, until such proof is offered, the presumption is to the contrary, and Roper must be held upon the case before us to have been proved incompetent to testify.

The judgment of the district court is therefore reversed, and the cause remanded for a new trial.

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[No. 1009.]

THE STATE OF NEVADA, RESPONDENT, v. JOHN T. PRITCHARD, APPELLANT.

JUROR—INCOMPETENCY OF—CONSCIENTIOUS SCRUPLES.—A juror who states that in a case where the punishment is death he would not find the defendant guilty upon circumstantial evidence, is an incompetent juror. IDEM—ALLOWANCE OF CHALLENGE NOT SUBJECT TO REVIEW.—The allowing of challenges by the court for implied bias is not subject to review. (*State v. Larion*, 11 Nev. 314, affirmed.)

INSTRUCTIONS MUST BE CONSTRUED AS A WHOLE.—In determining whether

## Statement of Facts.

an instruction is erroneous, the whole charge relating to the same subject must be taken together and considered as an entirety.

**EVIDENCE—MURDER IN THE FIRST DEGREE.**—*Held*, that the evidence in this case is sufficient to support a verdict of murder in the first degree.

**CHALLENGE TO JURORS—WHEN MUST BE TAKEN.**—The bill of exceptions shows that C. O. Appleburg and eleven other jurors were examined and passed by both parties, for cause, and were in the box when inquiry was made of counsel for appellant whether he had any peremptory challenges; that appellant then refused to exercise his right, and thereafter passed his challenge several times, and did so after notice from the court that, in so passing his challenge, he would be considered as having accepted all the jurors then in the box. The state interposed several challenges, and as often as a juror was challenged another name was drawn, thus keeping the panel full. When the state ceased challenging, no challenge had been taken by appellant, and he then challenged Appleburg: *Held*, that the court erred in disallowing this challenge. (Hawley, J., dissenting.)

**ISSUE—WAIVER.**—*Held*, that the facts stated in the bill of exceptions did not constitute a waiver on the part of the defendant to interpose a challenge to the juror Appleburg at any time before the jury was sworn. (Hawley, J., dissenting.)

### APPEAL from the District Court of the Second Judicial District, Ormsby County.

The defendant was indicted, tried, and convicted, of the crime of murder in the first degree for the killing of Humphrey Symons, a policeman, in Gold Hill.

The evidence on the part of the state showed that the defendant and a woman, with whom he was living, and called his wife, resided on the divide between Gold Hill and Virginia City, in a portion of the house owned by Mrs. Casey. On the twenty-first day of July, 1879, the day of the homicide, the defendant and his wife were quarreling, and during the quarrel a pistol shot was fired. Mrs. Casey became alarmed, went out of her portion of the house, crossed the street, and called on Humphrey Symons and begged him to stop the quarrel. Symons, at Mrs. Casey's request, went into the room occupied by Pritchard and his wife. As he entered the door he had his cane in his right hand and pipe in his left. In less than half a minute after he entered the room two pistol shots were fired in quick succession, and soon thereafter a third shot was heard. About five or ten min-

## Statement of Facts.

utes after the third shot was fired the defendant came out on the porch with a revolver in his right hand, and kept talking to a number of persons in the street. One witness heard him say "that he would shoot the last one; that if anybody \* \* \* come in there to see Symons he would shoot the last one that came in." Another witness testified that when defendant came out on the porch he said, "he had shot him and he would do more." Another witness testified that defendant said: "I have killed one; I've got more for the rest of you." Upon a *post-mortem* examination of the body of the deceased three pistol shot wounds were found in his head: one entered the right cheek under the right eye and passed downwards and inwards and through the upper jaw; another ball entered the left cheek a little under and to the outside of the left eye and passed backwards, coursing along the base of the skull until it reached the back side of the left ear; the third ball entered about two and a half inches behind the right ear, passed downward and forward between the two layers of skull, forcing a large fragment of skull into the brain. The two latter wounds were mortal. There were powder marks on the face of the deceased, which indicated that the pistol when fired must have been in close proximity to the face.

When parties went into the house Symons was still alive, but unable to talk. The only words he spoke, were: "Shoot him, shoot him." His body was examined for weapons, and a pistol was found in his hip pocket. Every chamber was loaded. It was an English Bull Dog pistol, five shooter (very similar to the one found on defendant). The whole center of the floor where the body lay was covered with blood, and marks of his hands, and the prints of his fingers, where he tried to get up. There was blood all over the place.

Shortly after the shooting, Mr. Folsom, marshal of Gold Hill, entered the room for the purpose of arresting the defendant, and told him that he was the marshal; at the same moment the defendant raised up from a lounge, and drew a pistol from his right hip pocket. The marshal shot at him but did not know whether he hit him or not, and as his



## Argument for Appellant.

pistol refused to go off a second time he retreated, arrested Mrs. Pritchard, and upon his return he met defendant in charge of Mr. Donovan. Defendant was arrested by Mr. Donovan, constable of Gold Hill, who found a pistol upon him with four empty chambers, and one charged. The defendant was shot in his right arm. About one hour after the arrest of defendant, and while he was in charge of the officers, he said that "he would shoot anybody that came into his house to arrest him;" that "he shot Symons, and would shoot any one that came into his house;" that if the marshal had not shot him in the arm he "would have killed three or four more of the s—s of b—s." The next day after the shooting, Dr. Kirby, the county physician, said to defendant: "Look here, Pritchard, it is rumored abroad that you didn't do the shooting." And he said: "I shot the s—n of a b—h, and don't deny it; if I hadn't been shot myself, three or four others would have got it." When in the county jail of Ormsby county, some ten or twelve days after the trial, the defendant, in explaining how the difficulty occurred, stated to Mr. Powers, deputy sheriff, that the officer was called in by the lady who owned the house which he rented, that the officer came into the house and said: "Good morning, Mr. Pritchard, you may consider yourself under arrest." That he said: "What for?" That the officer said: "Disturbing the peace." He said: "Have you got a warrant?" The officer said: "You will get one when you get to Gold Hill." He then said: "I want a warrant before I go." That the officer came in with his left hand on the lapel of his coat and his cane hanging on his arm, and his gun in his right hand; that he (Pritchard) refused to go, and the officer shot him in the arm. The testimony on the part of the state as to the character of the firearms, all tended to show that the defendant was shot by Mr. Folsom.

*R. H. Taylor, for Appellant:*

I. The court erred in allowing the challenge on the part of the state, to the juror Evan David, for implied bias. (1 Comp. L. 503; Crim. Pr. Act, secs. 840, 842.)

## Argument for Respondent.

II. The court erred in disallowing the peremptory challenge on the part of the defendant, to the juror C. O. Appleburg. It was the only peremptory challenge taken by defendant. He was entitled to ten peremptory challenges. (Crim. Pr. Act, sec. 336.) He was entitled to challenge Appleburg peremptorily at any time after his appearance in the jury box, and before he was sworn to try the cause. (Crim. Pr. Act, secs. 334, 354.)

III. The court erred in giving to the jury the instruction asked for by the state. It is opposed to the letter and the reasonable construction of the statute. (Act concerning Crimes and Punishments, 1 Comp. L. 560; sec. 17; Id. p. 561, secs. 19, 20; *Robbins v. The State*, 3 Ohio St. 131; *People v. Potter*, 5 Mich. 5; *People v. Scott*, 6 Id. 293; *Milton v. The State*, 6 Neb. 138.)

IV. The testimony does not show *prima facie* that defendant is guilty of murder in the first degree. (*State v. Turner, Wright* (Ohio), 28.)

M. A. Murphy, Attorney-General, for Respondent:

I. There was no error committed by the court in sustaining the challenge to the juror Evan David. (Comp. L., sec. 1964.)

II. The action of the lower court in allowing a challenge to a juror for implied bias is not subject to review by this court. (Comp. L., sec. 2046; *People v. Murphy*, 45 Cal. 137; *People v. Colson*, 49 Id. 679; *State v. Larkin*, 11 Nev. 325.)

III. The court may of its own motion, for any good reason, excuse a qualified juror from sitting on the panel in a criminal case. (2 Gra. & Wat. on New Trials, 192; *State v. Kelly*, 1 Nev. 224; *State v. Lawry*, 4 Id. 166; *People v. Arceo*, 32 Cal. 44; *Stewart v. The State*, 1 Ohio St. 66; *United States v. Cornell*, 2 Mason, 91; *State v. Larkin*, 11 Nev. 326; *Waller v. State*, 40 Ala. 325.)

IV. The court properly overruled defendant's peremptory challenge to the juror Appleburg. They were notified by the court that if they had any challenges to make they must make them, and defendant declined to exercise his

right when so requested. *State v. Potter*, 18 Conn. 166; *State v. Roderigas*, 7 Nev. 328; *State v. Cameron*, 2 Chand. Wis. 178; *Corn v. Rodgers*, 7 Met. Mass. 500.)

V. There was no error in the giving of the instruction asked for by the prosecution. It states the law correctly. (*The State v. Harris*, 12 Nev. 414; *People v. Nichol*, 34 Cal. 214; *People v. Williams*, 43 Id. 344.)

By the Court, LEONARD, J.:

Appellant was convicted of murder of the first degree.

1. The evidence in the case was to a great extent, circumstantial. A juror, Evan David, stated that in a case where the punishment was death, he would not find the defendant guilty upon circumstantial evidence. Whereupon the court sustained a challenge for implied bias, and the juror was excluded. He was plainly incompetent under the ninth subdivision of section 340, of the Criminal Practice Act. The state was entitled to a jury of impartial men, who would render their verdict according to the evidence, whether circumstantial or direct and positive. Besides, the action of the court in allowing challenges for implied bias, is not made the subject of an exception. (*State v. Larkin*, 11 Nev. 325; *People v. Murphy*, 45 Cal. 137; *People v. Colson*, 49 Id. 679; *People v. Atherton*, 51 Id. 495.)

2. The court instructed the jury, that "there need be no appreciable space of time between the intention and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing."

That was only a part of the instructions given. In addition, the court properly defined murder of the first and second degrees, and manslaughter, as well as justifiable and excusable homicide. The instruction complained of, if given alone, could not be upheld, but, in connection with the others, it is correct, as was held in *State v. Harris*, 12

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Nev. 416. (See, also, *People v. Nichol*, 34 Cal. 214; *People v. Williams*, 43 Id. 344.)

3. After careful examination we are convinced that the evidence is sufficient to support a verdict of murder in the first degree.

4. The bill of exceptions shows, that C. O. Appleburg and eleven other jurors were examined and passed by both parties, for cause, and were in the box, when inquiry was made of counsel for appellant, whether he had any peremptory challenges; that appellant then refused to exercise his right, and thereafter passed his challenge several times, and did so after notice from the court, that, in so passing his challenge, he would be considered as having accepted all the jurors then in the box. The state interposed several challenges, and as often as a juror was challenged, another name was drawn, thus keeping the panel full. When the state ceased challenging, no challenge had been taken by appellant, and he then challenged Appleburg. His challenge was disallowed, an exception taken, and the jury was then sworn to try the cause. The number of challenges taken by the state does not appear.

It is strenuously urged by counsel for appellant, that until his challenges were exhausted, his right was to challenge, peremptorily, any juror who had not been sworn to try the cause. We do not understand counsel for the state to deny, that appellant would have had the right to interpose a challenge to Appleburg, or any other juror, before he was sworn, if the court had not notified him, that "if he passed his challenge, he would be considered as having accepted all the jurors then in the box."

It has always been the policy of the law to permit the defendant in a capital case, the longest time possible, in which to exercise his peremptory challenge; that is, until the juror is sworn. The statute makes no provision as to the time when such challenge shall be interposed, only that it shall be taken before the juror is sworn; and the court may, for good cause, permit it, as well as a challenge for cause, to be taken after he is sworn. (Crim. Pr. Act, secs. 332, 334.) We have no doubt, as was said in Anderson's case

(4 Nev. 275), that the Criminal Practice Act contemplates the swearing of jurors before the panel is completed. It is fairest, however, to postpone the administration of the oath as late as possible, which certainly may be done, if no objection is made. But if the court delays swearing the jury until after it is completed, it is just and reasonable for the defendant to alternate with the state in taking his challenges; and the statute does not prohibit such practice. Compliance with a rule requiring him to do so, may be enforced, as we shall see, but if we are not mistaken, that can be accomplished in one way only; that is, by swearing such jurors as are not challenged by the state, and which the defendant then refuses to challenge. But this subject will be considered hereafter. We only wish to say at this time, that appellant would, without doubt, have had the right to challenge Appleburg when he did, if he had not been notified as above stated. (*People v. Reynolds*, 16 Cal. 132; *People v. Kohle*, 4 Id. 199; *People v. Rodriguez*, 10 Id. 59; *People v. Jenks*, 24 Id. 12; *People v. Johnson*, 47 Id. 122; *Hendrick's Case*, 5 Leigh, 715; *Hunter v. Parsons*, 22 Mich. 101; *Johns v. People*, 25 Id. 503; *Hooker v. State*, 4 Ohio, 350; *Mulny v. State*, 7 Blackf. 593; *Morris v. State*, 7 Id. 607; *Williams v. State*, 3 Kelly (Ga.), 459; opinion of chief justice in *State v. Cameron*, 2 Chandler (Wis.), 181; *State v. Squires*, 2 Nev. 232.) It remains to consider whether the court's notice cut off the right appellant would otherwise have had.

In the *State v. Anderson*, 4 Nev. 274, the court required both parties to make their peremptory challenges to the twelve jurors then in the box, all of whom had been examined and passed for cause. The district attorney interposed no challenge, and the defendant but four. The eight remaining jurors were then sworn to try the cause, and the court ordered that thereafter, in filling the panel, each juror called should be finally passed on by the exercise or waiver of the peremptory challenge. After eleven jurors had been sworn to try the cause, and the defendant had exhausted nine of his peremptory challenges, he asked leave to challenge one of the eleven jurors then sworn. That privilege was refused, and this court sustained the refusal.

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upon the ground, that under our statute, the court had the right to have jurors sworn before the panel was completed, and that *after they were sworn*, a peremptory challenge to *such*, was not a matter of right. The court said the case of *The People v. Jenks*, 24 Cal. 11, was not in conflict with the rule stated, and added: "There, there was an offer made to challenge one of the jurors *before* he was sworn to try the cause;" thus intimating, at least, that if the juror in Anderson's case, had not been sworn at the time he was challenged, a disallowance of the challenge would have been error; for, as we shall see, it was so held in Jenks' case. We are not disposed to extend the rule stated and upheld in Anderson's case.

Jurors may be sworn before the jury is completed, if such a course is deemed necessary by the court, and after that, such jurors can not be challenged unless good cause is shown. But we shall see that a court can not by any rule or order deprive a prisoner of the right to challenge a juror peremptorily before he is sworn; and that being so, we fail to perceive how it can do so, indirectly, by notifying him that a failure to challenge at a time stated, but before the juror is sworn, will be considered an acceptance. Many of the cases hereafter referred to, hold that appellant had the right to *retract* his acceptance or election of Appleburg, even though his silence was tantamount to either; but that point we do not decide, our opinion being that it amounted to neither. The law provides that, before a juror is called, the defendant shall be informed that, if he intends to challenge an individual juror, he must do so when the juror appears and before he is sworn. (Sec. 332.) The plain meaning, of that language is, that he may have until the juror is sworn to challenge peremptorily; because sections 352 and 353 provide that, all challenges for *cause* shall be taken immediately after the juror is called, first by the defendant, then by the state, and that all *such* challenges shall be exhausted by each party before the other begins. It follows, of course, that if either party fails to exercise any challenge *for cause*, at the time stated, he waives his right; because his time to do so is expressly limited. But it is not

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so in relation to the peremptory challenge, for as to that, section 354 provides: "If all the challenges on both sides be disallowed (that is, all challenges for cause), either party may still take a peremptory challenge, unless the peremptory challenges be exhausted;" and there is no limit set, within which the challenges last named shall be taken, except that they shall be interposed before the jury is sworn. And if, for any reason, the court delays the swearing of the jury until it is fully impaneled, the time for challenging peremptorily is thereby extended, and its only limitation still is, until the jury is sworn. Had the court, in Anderson's case, ordered that in filling the panel, each juror thereafter called should be finally passed upon by the exercise or waiver of peremptory challenges; but had not caused them to be sworn after defendant's failure to challenge as ordered, a subsequent disallowance of challenges to such as were not sworn, would have been error. In other words, the order made would have been ineffectual, if, before the challenge, it had not been supplemented with an oath to the juror to try the cause. And if the court has not power by an order alone, to abridge the time given by statute, how can it do so by a notice to the defendant, that his failure to challenge before the expiration of the statutory limit will be considered an acceptance of jurors not challenged?

Our opinion is, that if, as a question of law, appellant's failure to challenge Appleburg at the time stated was not an acceptance of him, or a waiver of the right to challenge at any time before he was sworn, then the court was not justified in so considering it, or in notifying appellant that it would be so considered, or in being misled, if appellant did not so consider it. The court had a right to come to a legal conclusion upon the effect of appellant's conduct, and that effect followed with or without notice. But notice of a conclusion not sustained by the law, fell still-born. It did not affect appellant's rights, and it was not incumbent upon him to express any dissent therefrom, take exception thereto, or in any way yield his rights by reason thereof. There was nothing to except to. (Crim. Pr. Act, sec. 421.) At most, it was merely information given in advance, that the court

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would construe defendant's failure to challenge at the time stated, as an acceptance, although the law's limit to the exercise of the privilege was different and more favorable to him.

Within the lawful period he could claim his privilege, the same as though the useless notice had not been given; and when the challenge was disallowed, an exception at that time is all that was necessary. A defendant may, oftentimes, waive a privilege by failing to exercise it within the time allowed by law; but he waives nothing, by inaction merely, so long as that time remains; because neither the court nor the state ought to conclude therefrom, that he intends to waive his right, and consequently neither should be misled or deceived thereby. If our statute provided that, in case a defendant desires instructions to the jury, he shall present them to the court at any time *before the close of the argument on both sides*, it would hardly be claimed, upon a plea of waiver or otherwise, that he would be barred from so doing, although no exception was taken, simply because of a notification by the court, that unless he hands them in *before* the argument, he will be considered as not desiring instructions. The court would have no right to so inform him, or to so consider the effect of a failure to present them at the time stated; and a refusal to give proper instructions presented at any time before the close of the argument, would be error.

Suppose a defendant in a civil case, where he has ten days to answer, under the statute, immediately upon being served with summons, gives the plaintiff written notice of his appearance, under section 499 of the Civil Practice Act. The court is in session, and the notice is served in court.

Plaintiff's attorney asks the court to order the defendant to answer in *five* days. Defendant waives notice of the motion, and thereupon the court not only informs him that, if he fails to answer within five days, it will be considered that he does not wish to answer, and that judgment by default will be taken against him, but also orders him to answer within five days. Neither the defendant nor his attorneys pays any attention to the information volunteered by



the court, or to the order. Default is entered at the end of five days, and judgment taken. On the tenth day an answer is filed, when defendant moves the court to set aside the default and vacate the judgment, without making any showing, except the facts above stated, and that he has a good defense at law to the action. The court refuses the motion, on the ground that the defendant waived his right to answer by failing to do so in *five* days, and orders the answer struck from the files of the court. The defendant excepts, and the court signs and seals a bill of exceptions showing all the facts stated. The action of the court in that case would be so plainly error, that no attorney having regard for his reputation, could be induced to make an argument in its support. But why was not the refusal complained of here, equally erroneous, it being true that the time for challenging Appleburg, as fixed by statute, had not expired when the challenge was interposed?

In the case supposed, no exception to the court's information or to its order would have been necessary, for in the face of the statute the court had no right or power to give the one or make the other, and they went for naught. So it was in this case. If the statute allowed the court, *in its discretion*, to permit a defendant in a criminal case to pass his peremptory challenge or not, and by an order alone to abridge the time for challenging, then silence by him when notified, as appellant was in this case, might, with more reason, be deemed a waiver or acceptance, and the court, with greater reason, to have so considered it. But as the statute now is, an expression of dissent by appellant's counsel would have been purely gratuitous on his part. He was not bound to speak or lose a plainly declared right. It is true, upon the authority of Anderson's case, that the court could have had such jurors sworn before the panel was completed as were not challenged by either party; and it may be said if appellant had not by his silence apparently acquiesced in the court's construction of the effect of his failure to challenge, that the jurors passed by both parties *might have been sworn*, and thus the privilege of challenging Appleburg cut off. It is begging the question to say

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that, inasmuch as the court *might have cut off* a valuable privilege, in a legal way, therefore it could do the same thing by a method that is not allowed. We do not know, however, nor have we any reason to think, that the court would not have postponed swearing the jury until it was completed, even though appellant's counsel had stated that he did not agree with the court in its conclusions, and should claim the right to challenge any juror until he was sworn. There was no intimation of an intention to pursue a different course if appellant did not challenge at the time stated; and appellant's counsel might well have concluded that, the court only intended to notify him of what it considered the *legal* effect of passing his challenges. Before it can be claimed that appellant ought to be deprived of a statutory right of the highest importance, because he misled the court, two facts at least should plainly appear: First, that he had some reason to think his conduct was misleading; and, second, that the court was, in fact, misled, and thereby induced to pursue a course in impaneling the jury which otherwise, it would not have pursued. Because, *prima facie*, the disallowance of a peremptory challenge by the defendant in a criminal case, before such challenges are exhausted, and before the juror is sworn, is error; and if there is nothing in the record justifying the court's action it must be so declared. It ought, also, to appear that appellant's conduct would have been detrimental to the interests of the state, if his challenge had not been disallowed. But for the purposes of this case, let that fact be presumed, if the other two above stated are shown. In the first place, by his silence, appellant can not be said to have acquiesced in anything not contained in the court's notice, which was, that in passing his challenge he would be considered as having accepted the jurors then in the box, among whom was Appleburg.

If we are correct in the conclusions before stated, the court had no right to be misled in that regard; that is, with or without appellant's silence, it should not have considered that, passing the challenge was an acceptance or waiver, which barred an exercise of the right at any time before the

juror was sworn, or that appellant ought to so consider it. Nor had appellant reason to think the court would change the method of impaneling before pursued, if he did not then interpose his challenges or accept the jurors then in the box; for, as before stated, there was no intimation of such intention, and apparently there was no cause for it, because it appears that there were eleven jurors who had been summoned in the case, who had not been called or examined at the time the panel was completed. Under such circumstances, it should not be held that appellant ought to have thought the court *would* pursue a different method, simply because it *might* do so. Had he avowed his intention to challenge any juror he saw fit, until such juror was sworn, still, the court might not have changed its method, and if it had not, appellant could have challenged Appleburg.

In the second place, if the court was, in fact, misled, it was in misapprehending the legal effect of passing the challenge, merely, after notice; and, as before stated, there is nothing in the record tending to show that a different course would or ought to have been pursued in impaneling the jury, had appellant announced his intention to claim his right, as to any juror, until he was sworn. Finally, when he passed his challenge after notice, it may be that he did not intend to object to any juror then in the box. It may be, that his mind was changed by something that occurred after the court's notice and immediately before Appleburg was challenged. If so, he was in no manner blamable, and silence, after an ineffectual notice, should not, and can not, be considered as a waiver of the right of challenge or an acceptance of jurors then in the box. (*Lindsley v. The People*, 6 Parker's Cr. R. 237.)

In support of the action of the court below, we are referred to four authorities, and after a somewhat extended research, are unable to add to the list.

The first, and most important, is *The State v. Potter*, 18 Conn. 175. The statute then in force in that State gave a defendant indicted for murder the right to challenge peremptorily. "twenty of the jurors summoned and impaneled

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for said trial, and no more, without showing sufficient reasons." (*State v. Potter, supra*; Gen. Stats. Conn. Revis., 1866, p. 288, sec. 238.)

We quote from the opinion:

"Again, it is said the prisoner has been deprived of a right to a peremptory challenge, which he was entitled to. It is not denied that time and opportunity were given to the prisoner to challenge a juror, but it is claimed that he had not all the time the law allows him. Dickerman, a salesman, had been examined, and there was no cause of challenge known against him. The court then told the counsel, if they intended a peremptory challenge they must make it at that time. They had, then, a reasonable opportunity to make their challenge; but they claim they may make it at their own time, provided it is done before the jurors are sworn. The statute, it is said, gives them power to challenge peremptorily twenty jurors summoned and impaneled, and much criticism has been had upon the word 'impaneled.' It is claimed that it means the jury sworn to try the cause, and that, until sworn, they are not impaneled. That they form a jury, when thus impaneled, is true, but that they are not impaneled until sworn is not true. On the other hand, we learn from high authority that a jury are said to be impaneled when the sheriff has entered their names into a panel, a little piece of parchment. (Co. Litt. 158, b.) \* \* \* And we can hardly open a book upon the subject but it speaks of the panel returned by the sheriff. (4 M. & Sel. 467.)"

It is not necessary for us to give our opinion of the meaning of the word "impaneled," as used in the statute referred to. It is enough to know the meaning given to it in *Potter's* case, as it was indefinitely used in that particular statute; which was, that a jury might be said to be impaneled when their names were entered by the sheriff in his return of jurors summoned. In other words, that the statute itself did not prescribe the time when a peremptory challenge might or should be taken. After arriving at that conclusion, it was very properly held that, the statute did not, in terms, or by rational implication, prohibit the court from fixing

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the time when the defendant should interpose his challenges, especially as in so doing he was given all rights accorded by the common law practice. We quote further: "But it is said the clerk informs the prisoner that if he would challenge them, or any of them, before they are sworn, he shall be heard. This is certainly the form. We understand it to mean that his challenges must be made before the jurors are sworn; but we do not suppose that the prisoner is, therefore, to direct at what time before they are sworn this shall be done. He is called upon then to make his challenges, and when he has had a fair opportunity to do this, he has had the privileges the statute confers upon him. He has the right to plead, to examine witnesses, to be heard by counsel; but the court direct the time when he shall plead, when his witnesses shall be heard, and the order in which his counsel shall speak. \* \* \* The order of time and manner of proceeding on all such subjects must, of course, be under the direction of the court, *unless the statute prescribes otherwise.*" We might fully agree with the above, in view of the Connecticut statute and the court's construction of the same. Because it does not appear from the opinion, or from an examination of the statute, that under the law of that state, it was the court's duty to have the clerk inform the prisoner, "that if he would challenge the jurors, or any of them before they were sworn, he should be heard." If that was so, and informing the prisoner as stated, was merely a matter of practice, there was nothing in the statute to hinder the court directing also, at what time before the jury were sworn, the challenge should be taken.

Potter's case was decided upon the Connecticut statute, as this case must be upon ours. The natural meaning of ours has already been given, and courts should not, by judicial legislation, give it any other.

The *State v. Roderigas*, 7 Nev. 328, is not in conflict with our opinion as before expressed. The intention of the court was to affirm the decision in Anderson's case, and nothing more. In both cases, the juror had been sworn *before* the challenge was taken.

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In the *State v. Cameron*, 2 Chand. (Wis.) 178, it appears that before the jury had been sworn, but after they had been accepted by both parties, the defendant, whose challenges had not been exhausted, asked leave to challenge a juror preemptorily, but his request was refused. A majority of the court thought the ruling was correct and said: "The cases cited by the counsel for the prosecution show, that in two of the states, the practice is not to allow a defendant in a criminal prosecution to challenge a juror preemptorily after he had been accepted; while in Massachusetts it appears that the privilege must be exercised before the juror is examined. (*Commonwealth v. Rogers*, 7 Met. 500.) An examination of the authorities shows, that the practice is different in different states, and has not been uniform in the same courts."

The opinion was rendered in 1850, and no reference is made to the statute. \* \* \* The Revised Statutes of 1858 (p. 993, sec. 4) show that certain preemptory challenges are allowed, but there is no direction or intimation as to when they shall or may be taken. We presume such was the case at the time of the decision in question. If so, it does not necessarily militate against our view.

The chief justice, however, dissented from the opinion of the majority, and held that the right of preemptory challenge existed until the actual swearing of the juror. (p. 181.)

*Commonwealth v. Rogers* is the last case cited by the counsel for the state. The court held, that under the Revised Statutes "the right of preemptory challenge, if exercised at all, must be exercised in the first instance, before the juror should be interrogated as to his bias or opinions." Sec. 3 of ch. 137 (see Mass. Rev. Stats. 1836) provided that, "Every person indicted for any offense shall, when the jury is impaneled for his trial, be entitled to the same challenges that are by law allowed to defendants in civil cases. And sec. 27, ch. 95, regulating trials in civil actions, provided: "The court shall, on motion of either party in any suit, examine on oath any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion. \* \* \* ;

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and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause." Under those statutes the court held as before stated; evidently upon the ground that if an indifferent juror was placed upon the jury, "for the trial of that cause," it was not intended that he should be challenged off.

We conceive that upon the state's own authorities, its position is poorly sustained; but, as briefly as possible, let us examine those taking an opposite view. In *People v. Kohle*, 4 Cal. 199, after twelve jurors had been called and accepted, the prisoner having ten peremptory challenges, offered to challenge one; but his offer was refused and the jurors were sworn. It was held that the court erred. The statute referred to in the opinion, as well as in all other cases in that court, to which we shall refer, was the same as ours. *Kohle's* case was decided in 1854—seven years before our Criminal Practice Act was copied from the California statute. In *People v. Rodriguez*, 10 Cal. 59, decided in 1858, the court said: "Had the eleven jurors been sworn against the objection of defendant, and then his challenge refused, the question would have presented another aspect. The right to challenge the juror before he is sworn is expressly secured by the statute and settled by the decision of this court in the case of the *People v. Kohle*."

In *People v. Reynolds*, it was held that, "jurors may be sworn as they are accepted, or the administration of the oath may be delayed until the panel is completed." (But see *People v. Scoggins*, 37 Cal. 676, and *People v. Russell*, 46 Id. 122.) "Either mode may be adopted, and in either case the defendant must exercise his right of peremptory challenge before the jury is sworn."

In *Jenks' case*, 24 Id. 12, after five jurors had been impaneled, the court informed the defendant "that he must exhaust all his challenges to the jury before accepting them, and that he would not be permitted to challenge afterward, without assigning a sufficient reason therefor." Defendant excepted to the rule. He afterward examined the remaining seven for cause, and passed them to the district attorney,

who expressed himself satisfied with the jury. The court then ordered them to be sworn, when defendant challenged one of the seven last examined, without assigning any reason therefor, except his "statutory right." His challenge was disallowed and the jurors were sworn to try the cause. The supreme court held the disallowance of the challenge "clearly erroneous," saying, that "the plain and express provision of the statute can not be contravened by any arbitrary rule of the court. \* \* \* Facts touching the competency of the juror might come to the knowledge of the defendant or his counsel *after their acceptance* and before the administration of the oath, not known to them at the time he was accepted, which might materially affect their judgment upon the question of challenge. In such an event the defendant is not bound to disclose these facts to the court or jury."

In *People v. Ah You*, 47 Cal. 121, twelve jurors were sworn to answer questions. After they had answered, several peremptory challenges were interposed, *and the remainder were accepted*. Others were then called to fill the panel, and after they had been examined for cause, the defendant peremptorily challenged Davis, *who had been accepted* when the first list of jurors was called. The challenge was disallowed, the court holding that it could not be interposed without cause shown. The supreme court held that, the defendant could take his challenge at any time before the juror was sworn. *Hendrick's case*, 5 Leigh, 710, shows that, D. Hudson was called as a juror and *elected* by the prisoner. The court refused thereafter, but before he was sworn, to permit the defendant to challenge him peremptorily. On appeal the court said: "But we think the court below erred in refusing to permit the prisoner to *retract his election* of the juror D. Hudson, and to challenge him peremptorily. Some circumstances are stated to show the reason of this decision, which it is not necessary to advert to; for this court is unanimously of opinion that the right of a prisoner to challenge any juror peremptorily is *absolute* at any time before the juror is sworn, and that *no circumstances can bring that right within the discretion of the court*, so long



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as it is confined to the number of peremptory challenges allowed by law." And for that error the judgment was reversed. (See, also, other cases first cited in this opinion.)

We are of opinion, upon reason and authority, that the court erred in disallowing the challenge in question, and that thereby appellant was deprived of a material right.

The judgment and order overruling appellant's motion for a new trial are reversed, and the cause remanded.

HAWLEY, J., dissenting.

I am of opinion that the record affirmatively shows that the defendant waived his right to interpose a peremptory challenge to the juror Appleburg.

The rule is universal that a party, either in a civil or criminal action, may waive any statutory right, unless the observance of it is imperatively required.

As a general rule counsel can not consent by their presence and by their silence to any action of the court, and afterwards avail themselves of an objection thereto, which could, and should, have been made at the time.

These principles are elementary and, if applicable, conclude the defendant from complaining of the action of the court in this case.

Are they applicable? I am of opinion that they are. Why not?

It must be admitted that the court had the right, under the authority of *The State v. Anderson*, 4 Nev. 265, to have sworn the juror, in the first instance, when counsel refused to interpose any peremptory challenge, and if it had done so the defendant would thereby have been deprived of the opportunity to interpose a peremptory challenge at any time thereafter, except within the discretion of the court. Now, this being true, what magic can be found in the language of the statute that wipes out the refusal of counsel to assert their rights when clearly and distinctly informed by the court that if they are not asserted they will be considered as waived?

Under the provisions of the statute a defendant in a criminal action is entitled to a certain number of peremptory

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challenges. This right can not be abridged by any rule of court. It is, however, always optional with the defendant to avail himself of this right or not. It is a personal privilege given to him by favor of the legislature, and may be waived or asserted by him according to his judgment, caprice or pleasure. (*State v. McGleadr*, 11 Nev. 53.) The defendant has not put himself in a position to complain of the action of the court. He was not denied the right to exercise his statutory privilege. The opportunity was given him to interpose his peremptory challenge at the proper time, and he refused to avail himself of it or to take any exception whatever to the action of the court.

The supreme court of this state, in *The State v. Roderigas*, held that the district court did not err "in compelling the defendant to accept or challenge peremptorily each juror, as it was found there was no ground to challenge him for cause." The court said: "This exact point was decided against the defendant in the case of *The State v. Anderson*, 4 Nev. 265, and we are not now disposed to question the correctness of the views there expressed." (7 Nev. 335.)

If these decisions are correct, and they are so considered by a majority of the members of this court, it necessarily follows, in my opinion, that either the state or the defendant may, upon the trial, demand that the jurors be sworn whenever it appears that there is no ground of challenge for cause, and the respective parties refuse to interpose a peremptory challenge; and that the prevailing practice in this state of not swearing the jury until the panel is complete, is clearly erroneous, and can not, in any case, be sustained, unless it affirmatively appears that both parties expressly waived their statutory right, or by their presence and by their silence consented to such a mode of impaneling the jury.

It cannot, in my opinion, consistently be claimed that the statute authorizes two or more separate and distinct modes of impaneling a jury, although there are expressions used in *The State v. Anderson*, which would seem to imply that the courts were authorized to pursue a different practice from the one stated.

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The error, therefore, which the court committed in the present case was in not impaneling the jury in the mode adopted in *The State v. Anderson*. But how can defendant, upon the state of facts set out in the record, complain that this error was or could possibly be prejudicial to him? He did not ask that the jurors should be so sworn. He did not object to the mode adopted by the court. Did he not, by his silence, waive his statutory right to have the jury sworn at any particular time?

The statute of this state does not provide that the respective parties shall alternate in taking their peremptory challenges; yet it is the common and proper practice so to do. Suppose that counsel for the defendant should be capricious and refuse to consent to this method of challenging, could not the court, following the rule established in *The State v. Anderson*, enforce this practice by swearing the jurors whenever the defendant refuses to exercise his right of challenge? It certainly could.

Was the practice adopted by the court in this case more prejudicial against the defendant? Certainly not. But even if it was, does it not necessarily follow, under the well-established principles of law, that the defendant could not avail himself of the error without showing that he objected at the time? Can he by his silence consent to such a practice, and afterwards complain? Can he waive his challenge and afterwards demand, as an absolute right, that it should be restored to him? Is it not thereafter exclusively within the discretion of the court to allow him this privilege or not?

If a party waives his right to interpose a peremptory challenge, he must abide by his waiver. He should not afterwards be permitted to resume his challenge. If he keeps his objections back, at a time when he ought to make them known, for an improper reason, or from motives of mere caprice, the discretionary power of the courts to declare his right of challenge waived ought not to be denied. (*Patton v. Ash*, 7 Serg. & R. 123; *McFadden v. The Commonwealth*, 23 Pa. St. 17; *Commonwealth v. Dougherty*, 8 Phil. 440.)

The law is well settled that if a prisoner or his counsel know of any cause of challenge against a juror, and fail to

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take it when the juror is examined upon his *voire dire*, he can not avail himself of the defect afterwards. (*State v. Anderson*, 4 Nev. 265; *State v. Rigg*, 10 Id. 284; *State v. Borowsky*, 11 Id. 127; *People v. Stonecifer*, 6 Cal. 405; *State v. Fisher*, 2 Nott & McC. 264; *Brown v. State*, 52 Ala. 345; *Keener v. State*, 18 Ga. 215; *Croy v. State*, 32 Ind. 384; *Gardiner v. The People*, 6 Parker Cr. R. 195.)

Under the provisions of the statute an alien is exempt from jury duty. If objection is made upon that ground the alien is excluded; but if no objection is made, the acceptance of the juror, as in the cases above cited, is deemed a waiver of the statutory right of exclusion. (*Hollingsworth v. Duane*, 4 Dal. 330; *Wallace*, Ct. Ct. 147; *State v. Quarrel*, 2 Bay. (S. C.) 150; *State v. Vogel*, 22 Wis. 471; *Turner v. Hahn*, 1 Col. 28.)

The same rule applies where the juror is incompetent by reason of his age. (*Williams v. The State*, 37 Miss. 407.)

These authorities (and numerous others might be cited) all show that the general practice of the court requires every litigant in criminal as well as civil causes to take advantage of his rights at the proper time, and if he fails to do so, his neglect will be considered as a waiver.

If the rule, as declared in *The State v. Roderigas*, is correct, then, it seems to me, the defendant in this case certainly waived his right to interpose a peremptory challenge to the juror Appleburg at the proper time for its exercise; and in my opinion it was thereafter within the discretion of the court to refuse or allow him to exercise such challenge.

This discretion may be reviewed by this court. I am, however, unwilling to say that the court abused its discretion in this case, although, in my judgment, the better practice would be, especially in capital cases, to exercise this discretion in defendant's favor unless it clearly appears that his request is unreasonable or merely capricious.

The other points presented in the record have all been settled adversely to appellant by previous decisions of this court.

In my opinion the judgment of the district court ought to be affirmed.

BEATTY, C. J., concurring:

I concur in the conclusion of Justice Leonard, that the district court erred in denying the challenge to the juror Appleburg.

The cases cited by Justice Hawley undoubtedly prove all that he claims for them, viz.: "That the general practice of the courts requires every litigant, in criminal as well as civil causes, to take advantage of his rights at the proper time, and if he fails to do so his neglect will be considered as a waiver."

This proposition, however, is far from being conclusive of the case. If it had been, no argument or citation of authorities was needed to establish it; for it has been the postulate of every argument addressed to the court by counsel for the respective parties, and I understand Justice Leonard to concede throughout his opinion, as unreservedly as I concede myself, that the failure of a party to assert his privilege at the *proper time* is a waiver.

The argument, therefore, which results in a conclusion that has been treated as self-evident from the beginning to the end of the case appears to me to have been wasted.

No one has denied that a defendant in a criminal action can, and does, waive a peremptory challenge by failing to interpose it at the proper time, but there is a serious question as to what is the proper time. The appellant claims that the law gave him the absolute right to challenge peremptorily at any time before the juror was sworn, while counsel for the state contend that the right to make such challenges can be lost at any time by acceptance of the juror, either express or implied, and can not thereafter be reclaimed, no matter how long the court may delay swearing him. It is here that the whole controversy hinges, and it is merely clouding and obscuring the question before the court to pile up authorities to prove what has never been doubted, i. e., that objections to jurors for alienage, non-age, etc., are waived if not taken in time. The point, and the only point to be determined in this case, is the time allowed by our law to the defendant in a criminal action for

Opinion of Beatty, C. J., concurring.

situation of the defendant would have been the same in either case.

But this is far from being true. For, in the first place, if the jurors had been sworn as they were passed, not only would the defendant have lost the right to challenge Appleburg, but the state would have lost its right to challenge any of the others; whereas, by the course pursued, the right of the state to challenge any of the jurors in the box remained unaffected while that of the defendant was absolutely cut off.

In the second place, the swearing of the jurors passed would have made it the imperative duty of the court to keep them together, in custody of a sworn officer, from that time till the end of the trial. (Comp. L. 2004.)

The same act which, under the statute, cuts off further opportunity to challenge jurors gives to the defendant the absolute right to require that they shall be kept together and beyond the reach of any improper influence. And this right is deemed so important that a failure to keep the jurors in such custody is *prima facie* cause for a new trial, and casts upon the state the burden of proving that no prejudice did or could have ensued. (*State v. Harris*, 12 Nev. 422.)

It thus appears that under the practice prescribed by the statute, and which the court could have followed if it had chosen to do so, the right of each party to challenge would have been cut off at the same time, while here it was not, and, what is of still more importance, the defendant would have had secured to him a means of protection which is, and was designed to be, strictly correlative to the loss of the further right of challenge. For these reasons I maintain that the practice prescribed by the statute does not authorize such proceedings as were had in this case, and I concur in the order of reversal.

## Argument for Appellant.

[No. 996.]

## BROPHY MINING COMPANY, RESPONDENT, v. BROPHY AND DALE GOLD AND SILVER MINING COMPANY, APPELLANT.

**EQUITY—EFFECT OF RE-CONVEYANCE OF TITLE.**—S. held a deed of mining ground as a mortgage to secure an existing indebtedness; he conveyed the premises to P., and after two or more transfers of the title the property was redeeded to S.: *Held*, that when the title returned to S., the same equities attached to it in his hands as existed at the time he made the conveyance to P.

**QUITCLAIM DEED—SUFFICIENT TO CONVEY LEGAL TITLE—BONA FIDE PURCHASER.**—A quitclaim deed conveys whatever interest the grantor has in the property at the time the conveyance is made, and, although it is intended as a mortgage, it will, if absolute in form, vest the legal title in the grantee and is sufficient to protect the rights of an innocent purchaser for value.

**DEED—BONA FIDE PURCHASER—NOT AFFECTED BY ANY LATENT EQUITY WITHOUT NOTICE.**—The *bona fide* purchaser of a legal title is not affected by any latent equity of which he has no notice, actual or constructive.

**PAYMENT OF PURCHASE MONEY—WHAT CONSTITUTES—BEFORE RECEIVING NOTICE.**—A mining claim was purchased for one thousand dollars in coin, and fifteen thousand shares of stock in a corporation thereafter to be formed. The money was paid; but only a portion of the certificates for shares of stock were delivered to the grantor before the purchaser received notice of the equities of plaintiff: *Held*, that the purchase money was paid before notice.

**POSSESSION—NOT NOTICE OF UNRECORDED DEFEASANCE.**—The open and notorious possession by a grantor, after sale and conveyance of property, is not sufficient to impart notice, to a subsequent purchaser for value, of any unrecorded defeasance. (Hawley, J.)

**DEED—POSSESSION NOT OPEN AND NOTORIOUS.**—Upon the evidence: *Held* that the possession of original grantor was not open, notorious, and exclusive; nor in any manner inconsistent with his deed. (Leonard, J., and Beatty, C. J.)

APPEAL from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

Kirkpatrick & Stephens, and R. H. Taylor, for Appellant:

I AS to what constitutes a *bona fide* purchaser, counsel cite the following authorities: (2 Story Eq. Jur., secs. 1392, 1502; 2 Lead. Cas. Eq. 86, 43, 63, 73, 80, 82; *Union Canal Co. v. Young*, 1 Whart. 432; *Jackson v. Summerville*,

## Argument for Appellant.

13 Pa. St. 359; Story Eq. Pl., sec. 604a; 3 Serg. & R. 422-432; 32 Mass. 87.)

II. The money must be wholly paid before notice. (Bump on Fraud. Con. 477; Wade on Notice, secs. 60, 93; Willard's Eq. Jur. 256, 609; 1 Perry on Trusts, secs. 220-1; *Blanchard v. Tyler*, 12 Mich. 339; *Palmer v. Williams*, 24 Mich. 329.)

III. The onus of proving payment is on the purchaser. (*Lloyd v. Lynch*, 28 Pa. St. 419; *Bolton v. Johns*, 5 Id. 151; *Dresser v. Missouri and Iowa R. R. Co.*, 93 U. S. 92.)

IV. Upon the reconveyance of the estate to Sullivan, the original equities re-attached to it in his hands. "His conscience stands bound by the violation of his trust and meditated fraud." (Wade on the Law of Notice, secs. 61, 62, 63, 243; *Allison v. Hagan*, 12 Nev. 55; 1 Story's Eq. Jur., secs. 261, 409, 410; *Troy Bank v. Wilcox*, 24 Wis. 671, 676; *Armstrong v. Campbell*, 3 Yerg. 201; *Church v. Church*, 25 Pa. St. 278; 2 Lead. Cas. in Eq., pt. 1, p. 40.)

V. Tagliabue having acquired his title by a quitclaim deed can not be regarded as a *bona fide* purchaser for value without notice. (*May v. Le Claire*, 11 Wall. 232; *Oliver v. Piatt*, 3 How. 410; 11 Id. 322; 3 Story C. C. 365; 39 Tex. 67; 42 Me. 517; 20 Mo. 81.)

VI. A grantee in a quitclaim deed is not a purchaser without notice of equities affecting his grantor. (*Stoffel v. Schroeder*, 62 Mo. 147; 39 Tex. 273; *Marshall v. Roberts*, 18 Minn. 405; Wade on Laws of Notice, sec. 204; 2 Lead. Cas. in Eq., pt. 1, p. 72; *Graff v. Middleton*, 43 Cal. 343-4; *Carpentier v. Williamson*, 25 Id. 154; *Downer v. Smith*, 24 Id. 123; 21 Ala. 125; *Rogers v. Burchard*, 34 Tex. 441.)

VII. As between Sullivan and Brophy no title passed by the mortgage deed. (Civ. Pr. Act, sec. 262.)

VIII. In *Jackson v. Lodge*, 36 Cal. 28, this provision was held applicable to a mortgage in the form of a deed absolute. It is true that the doctrine of that case was subsequently modified in *Hughes v. Davis*, 40 Id. 117, but that modification has not been adopted by this court. (*Hyman v. Kelly*, 1 Nev. 179.) In the recent case of *Pierce v. Traver*, 13 Id. 526, this court impliedly assents to the doctrine that



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title does not pass by an absolute deed intended as a mortgage.

IX. Neither Tagliabue nor plaintiff were *bona fide* purchasers, because they did not receive their conveyances nor pay any part of the purchase price before notice of the rights and equities of Brophy and his vendees.

It is a fact admitted by the pleadings that the defendant and its grantors, from the first of January, 1879, and ever since, have been in possession of the premises, holding them adversely to the plaintiff. This possession was of itself notice, or evidence of notice, and Tagliabue and the plaintiff were bound thereby. (*Daubenspeck v. Platt*, 22 Cal. 330; *Pell v. McElroy*, 36 Id. 268; *Talbert v. Singleton*, 42 Id. 395.)

X. In addition to such presumptive notice, Tagliabue and the plaintiff had actual notice of the equities of the defendant, while a greater part of the purchase price agreed to be paid to Sullivan still remained in their hands.

In no conceivable view of the case can the plaintiff be held entitled to the protection of a *bona fide* purchaser.

*Seeley & Woodburn, for Respondents:*

I. The record nowhere shows that Tagliabue had any manner of notice that the deed from Brophy to Sullivan was intended as a mortgage prior to the filing of the answer of the defendant.

II. It is well settled that the plea of purchase for a valuable consideration without notice bars both a legal and equitable claim, it being contrary to equity and good conscience to dispute the title of one who honestly and *bona fide* has paid his money for the purchase of an estate.

III. When a deed intended as a security is recorded, the defeasance not being recorded, a purchaser for value from the grantee without notice of the defeasance will hold an absolute title against the grantor and his grantees. (*Thos. on Mort.* 156; *Mills v. Comstock*, 5 Johns. Ch. 214; *Whittick v. Kane*, 1 Paige, 202; *Cole v. Bolard*, 22 Pa. St. 431.)

IV. A court of equity will declare a deed absolute on its face, given as security for a debt, a mortgage, and allow

the grantor to redeem both as against the original grantees and parties who purchase from him with knowledge. (*Kuhn v. Rumpp*, 46 Cal. 299; *Leahigh v. White*, 8 Nev. 150.) The converse of the principle laid down in the two cases just before mentioned must necessarily be true.

V. Questions as to the effect of parol agreements upon deeds absolute in their terms can only arise between the parties or purchasers with notice. (Wash. on Real Prop. vol. 2, p. 61.) This being the law, it follows that the plaintiff being from the proof a purchaser without notice, no right of redemption can exist against it, and the deed under which it holds can not be converted into a mortgage by parol testimony.

VI. A deed, absolute upon its face, although intended as a mortgage, conveys the legal title. (*Hughes v. Davis*, 40 Cal. 117; *Espinosa v. Gregory*, 40 Id. 58.)

VII. The deed from Sullivan could not possess the character of a mortgage unless Tagliabue had full knowledge of the agreement between Brophy and Sullivan, and purchased with intent to defeat the right of the grantor. (15 Vt. 755.) Continued possession by the grantor of land, after the making of his deed, will not be notice of a defeasance held by him which is not recorded. (*Kunkle v. Wolfersberger*, 6 Watts. 126; *Newhall v. Pierce*, 5 Pick. 450; *Hennesy v. Andrews*, 6 Cush. 170; *Crassen v. Swoveland*, 22 Ind. 434.)

By the Court, HAWLEY, J.:

This is an action of ejectment.

Both parties deraign title to the mining claim in controversy from one William Brophy. The material facts are as follows:

On the fifteenth day of September, 1874, Brophy being then the owner and in possession of the mining ground, executed and delivered to M. C. Sullivan a quitclaim deed for said premises.

This deed, though absolute in form, was intended as a mortgage to secure an existing indebtedness, then due and owing from said Brophy to said Sullivan, and to secure said

Sullivan for any future indebtedness that might thereafter accrue to him from said Brophy.

Sullivan, on the thirtieth day of September, 1878, conveyed the premises to Thomas B. Pheby. On the fifteenth day of November, 1878, Pheby conveyed the same to Henry Rosener. On the twentieth day of March, 1879, Rosener conveyed the premises to Sullivan. On the same day, March 20, Sullivan conveyed the premises to F. Tagliabue. At the time of the execution of the last-mentioned deed it was agreed between Sullivan and Tagliabue that a corporation should be formed by said Tagliabue, to which the title and interest of said Sullivan should be transferred; that in consideration of such transfer Sullivan was to receive one thousand dollars in coin, and fifteen thousand shares of the stock of said corporation, to be delivered at stated periods thereafter. Tagliabue conveyed the premises to the corporation, and it was organized in pursuance of said agreement. The capital stock was divided into one hundred thousand shares of the par value of one hundred dollars per share. Tagliabue subscribed for ninety-nine thousand six hundred shares, and upon its organization became, and still is, the president and one of the directors thereof.

One thousand dollars was paid by Tagliabue to Sullivan at the time of the execution of the deed. One thousand shares of stock was delivered to Sullivan on the first day of April; four thousand on the fifteenth or twentieth of May; five thousand on the twenty-seventh of June, 1879, and five thousand remained in the hands of the company to the credit of Sullivan at the time of the trial.

On the thirty-first day of March, 1879, William Brophy conveyed the same premises to one J. H. Lieman, and the said Lieman on the twelfth day of April, 1879, conveyed the same to the corporation, defendant and appellant, in this action.

The deeds executed by the respective parties were all quit-claim deeds.

The complaint alleges that the defendants wrongfully entered upon said premises on the first day of January, 1879. On the nineteenth day of August, 1878, M. C. Sullivan

brought suit in the district court of Storey county to have the deed from Brophy to him adjudged to be a mortgage, and to have the same foreclosed.

This suit, on the eighth day of October, 1878, was, on motion of Sullivan, and before it was brought to issue, dismissed.

The court, in addition to the facts already stated, found "that the plaintiff at the time of the commencement of this action was and now is the owner in fee of the premises in dispute and entitled to the possession thereof; that at the time of the commencement of this action defendant was wrongfully in possession of said premises, unlawfully holding them adversely to the plaintiff."

And as conclusions of law the court "found that plaintiff is entitled to judgment in its favor, and against defendant, for the possession of the premises and for costs of the suit."

As applicable to the equity branch thereof, the court, among other facts, found "that said Tagliabue was a *bona fide* purchaser of said premises, for value and without notice of any of the equities mentioned in defendant's answer at the time of said purchase; that he had paid the entire purchase money, and received his conveyance before notice of any of said equities; that said Tagliabue on or about the twenty-fourth day of March, 1879, by deed, conveyed to said plaintiff said premises; that said plaintiff took said conveyance in the capacity of a *bona fide* purchaser for value and without notice of defendant's claimed equities.

As conclusion of law the court found: "That plaintiff is owner in fee of said premises, holding the premises as a *bona fide* purchaser, for value, without notice of any equities in favor of defendant; that defendant is entitled to no relief, and judgment and decrees are ordered accordingly."

1. Is respondent a *bona fide* purchaser?

Has it shown that the purchase was made in good faith, for a valuable consideration; that the purchase price was wholly paid, and that the conveyance of the legal title was received before notice of the equities of appellants?

In the consideration of these questions it is only necessary to determine the effect of the transaction as between

Sullivan and Tagliabue. When the title returned to Sullivan the same equities attached to it in his hands as existed at the time he made the conveyance to Pheby. (1 Story Eq. Jur., sec. 410; Wade on Law of Notice, secs. 63, 243; *Kennedy v. Daly*, 1 Sch. & Lef. 379; *Troy City Bank v. Wilcox*, 24 Wis. 671; *Church v. Church*, 25 Pa. St. 278.)

If Tagliabue is bound by the equities of appellant, then respondent is bound. The knowledge of each is identical.

Was Tagliabue a *bona fide* purchaser?

Appellant claims that inasmuch as Sullivan could not have maintained an action of ejectment against Brophy, or his vendees, to recover possession of the premises, it follows that Tagliabue, claiming from Sullivan under a quitclaim deed, can not maintain such an action.

This position, under the facts of this case, is not tenable.

A quitclaim deed is sufficient to convey whatever interest the grantor had in the property at the time the conveyance was made. As between Sullivan and Brophy the deed executed by Brophy to Sullivan was a mortgage, but being absolute in form it vested the legal title to the property in Sullivan. (*Hughes v. Davis*, 40 Cal. 117.) Hence it follows that the deed executed by Sullivan was sufficient to convey the legal title to Tagliabue.

The mere fact that this conveyance was a quitclaim deed does not deprive Tagliabue of the character of a *bona fide* purchaser. (*Chapman v. Sims*, 53 Miss. 154; *Wilson v. Western N. C. L. Co.*, 77 N. C. 445; *Flagg v. Mann et al.*, 2 Sumn. 562.) If Tagliabue took this conveyance in good faith, and paid a valuable consideration therefor, without notice of the facts relied upon to convert the deed from Brophy to Sullivan into a mortgage, he acquired the title to the premises. (*Conner v. Chase*, 15 Vt. 775; *Whitlick v. Kane*, 1 Paige Ch. 208; *Stoddard v. Rotton*, 5 Bos. 378.)

The court in *Connor v. Chase*, in discussing this question, said:

"If the deed from the orator to Chase could have been treated as a mortgage between them, at the time it was executed, it would not have that character as to subsequent purchasers under Chase, nor would they be affected by any

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agreement between the orator and Chase, \* \* \* unless the purchasers had full knowledge of the character and nature of the contract and agreement between the parties, and purchased fraudulently, and with the intent thereby to defeat the right of the grantor, the orator in this bill. Under our recording system, a purchaser of one who has the legal title and possession, is not to be affected by the disputes and claims between the legal owner and the claimant in equity, when no suit is pending between them."

When a conveyance, absolute upon its face, is intended as a mortgage, the purchaser from the grantee, with notice of the facts, stands in the place of the equitable mortgagee. But where a deed intended as security is recorded, the defeasance not being recorded, a purchaser for value from the grantee, without notice of the defeasance, will hold an absolute title as against the grantor and his grantees. It is an absolute deed, as regards third persons, and a *bona fide* purchaser will take the land discharged of the equity of redemption of the mortgagor. (Thomas on Mortgages, 156; *Mills v. Comstock*, 5 Johns. Ch. 214.)

The truth is, as stated by Mr. Washburn in his work on real property, that "questions as to the effect of parol agreements, or separate instruments upon deeds absolute in their terms, can only arise between the parties or purchasers with notice." (1 Wash. R. P. 496.)

The decisions are uniform that the *bona fide* purchaser of a legal title is not affected by any latent equity founded either on a trust, incumbrance, or otherwise, of which he has no notice, actual or constructive. (*Hogarty v. Lynch*, 6 Bos. 138; *Hogan v. Jaques*, 19 N. J. Eq. 124; *Gray v. Coan*, 40 Iowa, 327; *Hull v. Swarthout*, 29 Mich. 249; *Carter v. Allen*, 21 Grat. 249; *Bassett v. Nosworthy*, 2 Eq. Lead. Cas. pt. 1, p. 32 *et seq.*, and authorities there cited.)

2. Was the purchase money paid before notice? The evidence, in my opinion, shows that it was.

The property was purchased by Tagliabue for one thousand dollars, which was paid at the time of the execution and delivery of the deed. This was the real consideration of the property purchased.

It is true that it was further agreed that a corporation should be formed, and that certificates for fifteen thousand shares of stock representing three-twentieths of the mine should be thereafter delivered to Sullivan. When the corporation was organized these shares were placed to his credit; but, as before stated, all of the certificates were not delivered to Sullivan prior to Tagliabue's receiving notice of appellant's equities. Under the agreement Tagliabue was only entitled to shares of stock representing seventeen-twentieths of the mine. For this he paid the full consideration at the time of his purchase. He had parted with every thing of value to him before receiving any notice. Neither he nor the corporation had any interest in, or claim to, the shares of stock agreed to be delivered to Sullivan.

Under these circumstances it seems to me that it can not consistently be claimed that the purchase money was not wholly paid before notice.

8. Was the possession of Brophy sufficient to put Tagliabue upon inquiry as to Brophy's equitable rights?

This is the most important question presented in this case.

As a general rule the authorities declare that open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record, at the time of a purchase from and conveyance by such vendor out of possession, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all legal and equitable rights in the premises of such party in possession and in subordination to these rights; and this presumption is only to be overcome or rebutted by clear and explicit proof on the part of such purchaser, or those claiming under him, of diligent, unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights in the premises in behalf of the party in possession.

It does not clearly appear that Tagliabue had actual notice of Brophy's possession at the time he purchased the property, and if the rule above stated is applicable to the

facts in this case, it is, in my opinion, very doubtful whether Brophy's possession is shown to be of such an open and notorious character as to impart constructive notice.

From the views I entertain of this case it may be admitted that the pleadings and proofs show that Tagliabue had notice of the fact that Brophy was in possession of the property on the first day of January, 1879, and that he continued in the possession thereof up to and at the time of the delivery of the deed from Sullivan to Tagliabue.

This presents the question whether the fact of the possession of real estate or mining property, by a vendor thereof, after transfer of his legal title thereto by deed, is sufficient to put a subsequent vendee of the same premises, while so in the possession of the original vendor, upon inquiry as the equitable rights of such original vendor, and subject such subsequent purchaser to the same rules as when a stranger to the title of his vendor, as of record, is in possession. Upon this point the authorities are conflicting. Section 26 of the act concerning conveyances in this state provides that every conveyance of real estate, "which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded." (1 Comp. L. 254.)

In California, under the provisions of this act, the supreme court decided that it was the intention of the act to protect the purchaser of the legal title against latent equities, and to abolish the presumption of notice arising from possession. (*Mesick v. Sunderland*, 6 Cal. 297.)

In *Daubenspeck v. Platt*, 22 Cal. 388, the court, without any reference to the statute or to the previous decisions, in a case where property was conveyed by a deed absolute upon its face and a defeasance in the form of an agreement to reconvey the property upon the payment of a stipulated sum of money within a certain time, and where the deed was recorded, but the defeasance was not recorded, declared that the possession of the mortgagor was sufficient to put



subsequent purchasers upon inquiry and to charge them with the rights of the mortgagor.

In *Pell v. McElroy*, 36 Cal. 268, the court discuss this question at length, and arrive at the conclusion that the continued possession of a vendor after his formal conveyance of the legal title is a fact in conflict with the legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to put a purchaser upon inquiry, and subject him to the general rule heretofore announced in case of the party in possession being a stranger to the title as of record. As a reason given for this conclusion, the court say: "An absolute deed divests the grantor not only of his legal title, but right of possession; and when such grantor is found in the exclusive possession of the granted premises long after the delivery of his deed, here is a fact antagonistic to the fact and legal effect of the deed; and we can not appreciate the justice, sound reasoning, or policy of a rule which would authorize a subsequent purchaser, while such fact of possession continues to give controlling prominence to the fact and legal effect of the deed, in utter disregard of the other notorious prominent antagonistic fact of exclusive possession in the original grantor. He can not be regarded as a *purchaser in good faith* who negligently or willfully closes his eyes to visible, pertinent facts, indicating adverse interest in or incumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case."

There are other authorities which maintain this to be the correct doctrine.

I am, however, of opinion, that the continued possession of the land by Brophy after he had conveyed the legal title to Sullivan, would not be notice of any defeasance held by him which was not recorded.

In Massachusetts, under a statute similar to that of California and of this state, the supreme court have frequently decided that the open and notorious possession by the

grantor will not be sufficient to impart notice to the purchaser of any unrecorded defeasance. (*Pomeroy v. Stevens*, 11 Met. 244; *Hennessy v. Andrews*, 6 Cush. 171; *Mara v. Pierce*, 9 Gray, 306; *Parker v. Osgood*, 3 Allen, 487; *Dooley v. Wolcott*, 4 Id. 407; *Lamb v. Pierce*, 113 Mass. 73.)

In Indiana, under a similar statute, the decisions are to the same effect. In discussing this question, the court, in *Crassen v. Swoveland*, said: "But it is claimed that as it was found that Swoveland was in possession of the land at the time that Whitney purchased it, this was constructive notice. As a general proposition, the doctrine that possession of real estate is constructive notice to all the world of the rights of the parties in possession is conceded. But the doctrine has no application to the case before us. \* \* \* Our statute on the subject of registry \* \* \* requires actual notice to defeat a purchaser where the defeasance has not been duly recorded. Possession has never been held anything more than constructive notice. Such constructive notice does not come within the statute. This is in accordance with the authorities. Says an elementary writer: 'Nor will the continued possession by the grantor of land, after the making of his deed, be notice of a defeasance held by him which is not recorded.' 1 Wash. on Real Prop., p. 495, sec. 22." (22 Ind. 434.)

Hilliard, in his work on vendors, says: "In case of an unrecorded prior conveyance, it has been sometimes held, that the possession of the grantee is of itself constructive notice, equivalent to that derived from registration. But the prevailing doctrine is now otherwise. Thus, it is said, 'the doctrine in the English law of constructive notice of the title of the lessee or party in the possession, is not favored in the American courts.' So, Judge Story says: 'The American courts seem indisposed to give effect to this doctrine of constructive notice from possession, even in its most limited form. The English cases admonish courts of equity in this country, where the registration of deeds, as matters of title, is universally provided for, not to enlarge the doctrine of constructive notice, or to follow all English cases on this subject, except with a cautious attention to a

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Opinion of Leonard, J., concurring.

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just application to the circumstances of our country, and to the structure of our laws.' " (Hilliard on Vendors, 411; *Scott v. Gallagher*, 14 Serg. & R. 333.)

Story says, in speaking of the Registry Acts, that: "The object of all acts of this sort is to secure subsequent purchasers and mortgagees against prior secret conveyances and incumbrances." (1 Story Eq. Jur., sec. 397.)

In *Van Keuren v. C. R. R. Co.*, the court, without reference to any statute, after announcing the general rule that possession of land is notice to a purchaser of the possessory title, say: "But this rule does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed.

"So far as the purchaser is concerned, the vendor's deed is conclusive upon that subject; having declared, by his conveyance, that he makes no reservation, he is estopped from setting up any secret arrangement by which his grant is impaired.

"The well-settled rule applies to this case, that a party is estopped from impeaching or contradicting his own deed, or denying that he granted the premises which his deed purports to convey." (38 N. J. L. 167.)

Upon a review of the whole case, I am of opinion that in the absence of actual notice of the agreement between Brophy and Sullivan, that Tagliabue and respondent had the right to rely and act upon the averments made by Brophy in his deed to Sullivan, that his conveyance of the title was absolute, and, having thereby divested himself of all title and right of possession, that he continued in possession in subordination to the title of his vendee, and that they are entitled to protection as *bona fide* purchasers for value.

The judgment of the district court is affirmed.

LEONARD, J., concurring:

In my opinion it is unnecessary to decide, in this case, how evidence of open, notorious, exclusive possession by Brophy, at the time of Tagliabue's purchase, would have affected plaintiff's case; and I express no opinion as to whether

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## Points decided.

proof of such possession would, or would not, be evidence of implied notice of the equities claimed by defendant. It is enough to say that it is not necessarily true from the allegations in the complaint, that such was the character of Brophy's possession at the time Tagliabue received his deed from Sullivan, and paid the purchase money; and there was no evidence that Brophy's acts at that time, and for a long time prior thereto, were at all inconsistent with what, from the record, appeared to be the truth; that is, that Sullivan was the sole owner. From all the authorities, Tagliabue had a right to believe that Sullivan was such owner, and to act upon that belief, unless Brophy's possession was so open, notorious, and exclusive as to amount to implied notice of his equities. Tagliabue swore that, at the time of the purchase, and when he received the deed and paid the purchase money, he had no knowledge or notice of Brophy's claim, and that he believed he was obtaining a perfect title. It nowhere appears that he was not justified, as a reasonably careful business man, to so believe. (See *Havens v. Dale*, 18 Cal. 366; *Bell v. Twilight*, 2 Fost. N. H. 518; *Hewes v. Wiswell*, 8 Greenl. 97; Hill. on Vend. 410.)

As modified above, I concur in the opinion of Mr. Justice Hawley.

BEATTY, C. J.: I concur.

[No. 997.]

L. P. DREXLER, RESPONDENT, v. A. J. TYRRELL AND PHILIP REESE, APPELLANTS.

**MORTGAGE EXECUTED TO EVADE PAYMENT OF TAXES.**—Upon a review of the testimony: *Held*, sufficient to show that the mortgage, sought by plaintiff to be foreclosed, was, at the request of the mortgagee, executed to a citizen of California for the sole purpose of preventing an assessment and of evading the payment of taxes, in the state of Nevada, upon the money at interest secured thereby. (Hawley, J., dissenting.)

**IDEM—MORTGAGE VOID.**—*Held*, that the mortgage in question, having been so executed at the instance and request of the mortgagee, was illegal and void.

**IDEM—PAYMENT OF TAXES.**—The fact that the mortgagee afterwards paid the full amount of taxes upon the money at interest secured by the

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mortgage, is immaterial. The mortgage contract was void when executed, and proof that the state suffered no injury would not change the result.

**IDEM—CONTRACT VITIATED BY FRAUDULENT ACTS OF PLAINTIFF.**—The fund consisted in the turpitude of the motive which influenced the mortgagee at the time of the execution of the mortgage.

**DEBTS SECURED BY MORTGAGE TAXABLE.**—A debt secured by mortgage is subject to taxation, although the mortgagee is indebted to an amount equal or exceeding the amount of his mortgage.

**COURTS WILL NOT ENFORCE ILLEGAL CONTRACTS.**—If a contract is illegal it will not be enforced by the courts in favor of the party at whose instance and for whose benefit it was entered into. Courts are as incapable of enforcing such contracts as if the act was prohibited in terms, and a penalty imposed in case of violation.

**POLICY OF REVENUE LAWS—CONTRACTS OPPOSED TO IT VOID.**—It is the policy of the revenue laws that all property within the state, except such as is in terms exempted, shall be taxed; and any mortgage or contract entered into for the sole purpose of placing property, otherwise taxable, beyond the operation of the revenue law, is opposed to that policy, and therefore illegal.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

*B. C. Whitman and Lewis & Deal*, for Appellants:

I. The mortgage in this case was executed in the name of J. H. Latham for the purpose of defrauding the revenues of the State of Nevada. Upon this point there is no conflict of testimony, for Drexler's own testimony shows that to have been the object. Such being the fact, the mortgage should be held to be void. (*De Witt v. Brisbane*, 16 N. Y. 508; *Wheeler v. Russell*, 17 Mass. 258; 2 Chitty on Contracts (11th ed.), 971-976, and notes; 4 D. & E. 466; 5 Id. 242; *Birby v. Moor*, 51 N. H. 402; *Roby v. West*, 4 Id. 285; *Coppell v. Hall*, 7 Wall. 542; *White v. Russ*, 3 Cush. 448; *Fulker v. Dame*, 18 Pick. 472-481; *Foster et al. v. Thurston*, 11 Cush. 322; 44 N. Y. 87; *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Ritchie v. Smith*, 6 Manning, G. & S. 462; 2 Comp. L. 3129, 3130, 3131.)

*Stone & Hiles*, for Respondent:

I. The judgment should be affirmed, because the findings

and judgments are amply sustained by the evidence. (*Carlyon v. Lannan*, 4 Nev. 158; *State v. Yellow Jacket Silver Mining Co.*, 5 Id. 418; *Lewis v. Wilcox*, 6 Id. 215; *Worthing v. Cutts*, 8 Id. 120; *Doe v. Vallejo*, 29 Cal. 387; *Kimball v. Gearhart*, 12 Id. 48; *Cohen v. Dupont*, 1 Sanford, 262.)

II. The mortgage and note are not void. They were not made in the name of Latham for the purpose of evading the revenue laws of the state. The testimony of plaintiff, contained in the transcript, shows that the taxes on said note were paid as demanded by the proper revenue officers of Storey county. There is nothing in the revenue laws of the state which either expressly or impliedly renders void a credit of choses in action for failure to list it for taxation. Mortgages are exempt from taxation by the statute. The debt only is taxed. (*State v. Earl*, 1 Nev. 394; Comp. L., vol. 2, secs. 3129, 3131.)

III. Even had there been an attempt to evade the payment of a tax on the note, there being no penalty provided by statute making the note void or the mortgage void, plaintiff could enforce them against defendant. (*Brown v. Duncan*, 10 Barn. & Cres. 93; *Smith v. Mawhood*, 14 Mees. & Welby, 452; *Johnson v. Hudson*, 11 East, 180; *Wetherell v. Jones*, 3 Barn. & Adolph. 221; *Lindsey v. Rutherford*, 17 B. Mon. (Ky.) 245; *Harris v. Runnels*, 12 How. (U. S.) 82.)

IV. The contract or transaction must, to render it void, be tainted with illegality itself; a resort to something collateral or extrinsic can not be had to render it so. Thus, if the note and mortgage are valid contracts, no subsequent evasion of payment of taxes could make them void. (*Armstrong v. Toler*, 11 Wheat. 258.)

V. If it be conceded that the law has been evaded, and the state defrauded of its revenue, such a defense can not be urged by appellants to defeat a debt incurred by them, which is upheld by a valid consideration, or to defeat a valid security and incident to such debt. If the state has lost any tax due it, such loss is the subject-matter of a suit between it and the taxpayer; and the evasion of such tax can not be invoked to aid another citizen to avoid an honest

debt. (*Edmunds v. Hildreth*, 16 Ill. 214; *Edmunds v. Myers*, Id. 207; *Steele v. Worthington*, 2 Ohio, 182; *Mohney v. Cook*, 26 Pa. St. 349.)

VI. The authorities cited by appellants do not sustain the defense of fraud and evasion made by them. A careful examination of them will disclose the fact that they construe and apply statutes which, either in express terms or by necessary implication, prohibit the transactions out of which the suits grew. In many of those cases the statute expressly prohibited the transaction, while in others, penalties were imposed for doing the act which constituted the essence of the litigation. In none of them was any contract pronounced void by reason of things collateral—things which did not necessarily become elements in the contract itself. In none of the cases was it held or intimated that where a statute is wholly silent concerning the transaction itself, it would be rendered invalid; nor was any shadowy ground of public policy or vague “spirit of the law” resorted to, to enable the court to pronounce them void. In this case neither a statute nor a principle of the common law can be invoked to invalidate either the debt or security.

By the Court, LEONARD, J.:

Some time prior to May 6, 1876, the defendants purchased the property described in the complaint herein, situate in Virginia City, in this state, at which time there was a mortgage thereon for ten thousand dollars, owned in fact by L. P. Drexler & Co., brokers in Virginia City, although it does not appear with certainty in whose name said note and mortgage were taken.

On the twenty-fourth day of May, 1876, at plaintiff's request, at Virginia City, defendants executed and delivered a new interest-bearing note, with mortgage upon the same property as security, to J. H. Latham, a broker and resident of San Francisco, California. The mortgage was recorded in the office of the recorder of Storey county on the same day, at the request of L. P. Drexler & Co. All the parties named, except Latham, were, at the time of the transaction, and are, residents of this state. Latham hav-

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ing died in June, 1876, and his wife, Nettie M. Latham, having been appointed sole executrix of her husband's will, and named therein as the sole legatee, she, on the twenty-first day of March, 1879, and subsequent to her discharge as executrix, assigned the note and mortgage in suit to plaintiff, who brought this action to recover judgment for the amount mentioned in the note, and to foreclose the mortgage. Plaintiff obtained judgment with decrees of foreclosure and sale, as prayed for in his complaint. For present purposes we shall consider the assignment by Mrs. Latham to plaintiff as valid, and that thereby the legal title to the note and mortgage was vested in him.

Defendants admit receiving the ten thousand dollars from Drexler, and that they executed the note and mortgage as before stated. They do not deny the alleged indebtedness. But among other defenses they allege in their answer that, "the sum of money for which the note and mortgage mentioned in the complaint were given, was loaned to the defendants by the plaintiff, L. P. Drexler, who is a resident of the state of Nevada; that defendants are informed and believe, and upon such information and belief allege, that the said loan was made by the said Drexler for his own benefit and profit; that the said note and the said mortgage were executed at the request of the said Drexler to one J. H. Latham, a citizen and resident of California; that as defendants are informed and believe, and so allege the fact to be, he, the said plaintiff, procured the said note and mortgage to me so executed to the said Latham, for the purpose of defrauding the revenues of the state of Nevada, and that by reason of the said note and mortgage being so executed to said Latham, the said Drexler has avoided the payment of all taxes to the state of Nevada upon said mortgage; that defendants are informed and believe, and upon such information and belief allege the fact to be, that said Latham never had any interest whatever in said note and mortgage, or in the money secured thereby, but that his name was used solely for the purpose of enabling the said plaintiff to so, as aforesaid, defraud the revenues of the state of Nevada;



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that by reason of such fraud the said note and mortgage are null and void."

The court found as facts, that all the taxes, *which were due* from the plaintiff to the state upon the said note or mortgage, had been fully paid before the commencement of the action, and that said note was not made in the name of James H. Latham for the purpose of defeating taxation thereof by the state of Nevada, or of defrauding the revenue of the state, or for the purpose of defrauding the revenue of the state out of any tax due or to become due upon the mortgage securing the same.

Many typographical errors appear in the transcript, but we shall assume in support of the judgment, that the court found, also, that the mortgage was not made in the name of Latham for the purpose of defeating taxation or defrauding the revenues of the state.

The fourth assignment of error is: "That the findings of fact are contrary to law and evidence in this: that the court finds that the note and mortgage sued on were not made in the name of J. H. Latham for the purpose of defrauding the revenues of this state; whereas, all the evidence shows that such was the purpose of plaintiff."

The seventh assignment is that, "the court erred in finding that the taxes had been paid on the note and mortgage, because the evidence shows that they were not." It becomes necessary, first, to ascertain whether there was any substantial evidence to support the above findings, and especially the fourth. That we may not do injustice to the plaintiff, all the testimony in this connection will be stated.

Mr. Tyrrell, one of the defendants, testified that he had a conversation with the plaintiff at the time the mortgage was given; that plaintiff then explained to him why the mortgage was made in the name of Latham, and that "the reason given was that it would save paying taxes on the mortgage;" that plaintiff told him "he had most of his mortgages made that way, in the name of some one in California, for that purpose."

Mr. Reese, the other defendant, testified that soon after defendants purchased the property plaintiff wanted a new

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note and mortgage; that he asked plaintiff why they were in the name of Latham; that plaintiff replied: "We do that to avoid paying the taxes. That is just the word, and that is about all that was said.

Plaintiff testified in rebuttal as follows:

Question. You have heard the testimony of the defendants in this case, in regard to the conversation about this note and mortgage, and the loaning of the money, and in regard to the desire to have it made in the name of James H. Latham. What occurred in those conversations that you had with them, if you had any? Answer. There was a mortgage at the time upon the property, and Mr. Reese afterwards took Mr. Cummings' place; I think Mr. Tyrell was the one that spoke to me about the renewal; he asked me if I would have it renewed; I had the mortgage drawn up, and when he came there I think that the old mortgage was still in the name of Latham; I am not positive about it; either Mr. Reese or Mr. Tyrell spoke about it; I think it was Mr. Tyrell asked me about the mortgage being drawn up in that name; I told him to this effect; it was to keep the mortgage from being assessed, and the reason of that was this; it had been the duty of the recorder to estimate every fall the number, and hand them to the assessor, and sometimes there was a portion of those that had been paid: on that account it produced confusion; you yourself told me that the mortgage was not assessable; I believe the supreme court has decided to that effect; for that reason, and others, I had it put in that way.

Q. As I understand you, it was not to avoid the payment of the taxes at all; that the note itself was assessable. Did you pay the taxes on that note? A. Yes, sir; and the assessor has made his assessment every year, and we have paid as I have testified in my affidavit. It was not to avoid any taxes.

Q. It was to prevent the recorder, as you think, from interfering and taxing the mortgage, under the law; that he had no right to do that under the law? A. Yes, sir. You told me so yourself. You told me it was not assessable, and I think that the supreme court has so decided.

Q. You were then trying to prevent double taxation on the note and mortgage? A. Yes, sir.

Q. You paid taxes upon a certain sum? A. Yes, sir; to make it more convenient for the business.

Q. How much? A. I think from the start I have paid on (all) the taxes on the note that were necessary; there were three interested in it. \* \* \*

Q. It was the property of these three, held in trust for them? A. Yes, sir.

Q. How would the assessor assess you in taxing this property? A. Well, he has been in the habit of doing this way; has gone around to these brokers and has assessed them so much on every kind of property that belongs to them.

Q. In that assessment did you include this note? A. Yes, sir; it was all included, all the property that belonged to the firm.

Q. You paid each assessment, each different amount? A. Yes, sir; he comes and make an assessment of the property belonging to the firm; I think that is the way they have assessed these banks; I know it is the way that Mr. Tritle and the other brokers and the savings bank do.

Cross-examination:

Q. Do you pretend to tell me, for instance last year, that you paid taxes on this note? A. Yes, sir; I do.

Q. Did you pay on ten thousand dollars on this note? A. No, sir; I did not pay any individually.

Q. Who did? A. The firm paid it.

Q. How much was your assessable property? A. The assessor assessed it at ten thousand dollars; assessed the firm that, ten thousand dollars.

Q. Is that all you were assessed? A. Yes, sir; I think that is the same assessment that Mr. Tritle paid.

Q. Did the firm of Drexler & Co. have only ten thousand dollars out at that time? A. The assessor came around himself; he did not require us to make any statement at all. \* \* \*

Q. Did you fill out any list at all, an assessment list that he gave you? A. I think Mr. Dana attended to that part of

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the business. I knew that the assessor came around. I talked to him about it. These other firms were doing the same amount of business; we were willing to pay just as they did.

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Q. Do you not know that this note was not taxed by the assessor? A. I do not know anything of the kind.

Q. Do you know whether he did tax it or not? A. I presume that he did; he assessed it with the balance.

Q. Did you make any report to him yourself? The Court. Of any property at all? A. No, sir; I did not. He just assessed as a whole the property of the firm. It has been assessed as a whole. \* \* \*

Q. You do not know whether this note has been taxed? A. I know it was included in the property of the firm; ten thousand dollars assessed of the firm.

Q. Do you not think that is wrong when you have a note for ten thousand dollars? A. I know it is the universal custom all over the country. I do not think it would be fair to make me put in everything I have, when everybody else is doing different. \* \* \*

Q. Had Drexler & Co. any securities on hand last year? Did they have notes or mortgages? A. No (yes), sir.

Q. To what extent? A. I can't tell you. I do not remember. I swear positively it has been taxed. The assessor assessed it, and we have paid the money on it. \* \* \*

Q. Did you not have a large amount of property besides this note and mortgage that was taxable in this county last year? Question objected to.

The Court. He has explained it to you just as fully as he can answer; he has stated that he had a large amount of property outside of this note, and this note is for ten thousand dollars. He made the same arrangement to pay as all the brokers, ten thousand dollars on the whole of their property; Mr. Drexler can not be supposed to have intended to defraud the government; for that reason I will sustain the objection.

Q. Didn't you have a large amount of property besides this note and mortgage that was assessable in this county

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last year? A. We had a large amount. I told you that before.

On re-direct examination, plaintiff stated that, since the execution of the note, the assessor had not demanded of him any statement, under oath, of the property of the firm, and he did not know that any such demand had been made of the other members; that "the assessor put in the assessment; we didn't put it down; he put it in himself;" that as a member of the firm, he "had never been cited to appear before the board of equalization."

In our opinion, the testimony of plaintiff, as well as defendants, shows conclusively that the mortgage was executed to Latham solely for the purpose of evading the payment of taxes upon the money at interest secured thereby, and that such purpose was fully accomplished. It is claimed by counsel for defendants that, "such being the facts the mortgage should be held void."

At this point it is proper to notice an argument of counsel for plaintiff. They say: "If the amount of this note can not be recovered, and the security foreclosed, the denial of such relief is not because the debt was tainted with illegality when created, but for the subsequent omission to list it for taxation, and to pay the tax imposed on it. If the respondent paid these taxes there could be no pretense of evasion, notwithstanding the instruments were executed to a non-resident. The illegality consists, then, not in the making of an illegal contract, and the taking of an illegal security, but in the subsequent failure, if any such occurred, to pay the tax imposed, or in an evasion or avoidance of such tax."

We say, in reply, that if the mortgage contract was legal when executed, it is so now; that is to say, if it was legal in the beginning, and evasion of assessment and payment was an afterthought, then the *legality* of the mortgage is not affected by the subsequent misconduct. And the testimony in relation to assessment, and payment of taxes, was wholly irrelevant and immaterial, except so far as it tended to show either that plaintiff did or did not procure it to be executed and delivered to a non-resident, for the purpose

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of defrauding, or enabling him to defraud, the revenues of the state.

If, however, the mortgage contract was fraudulent and unlawful when made, it must always remain so, and proof that the state suffered no injury thereby could not change the result. "The fraud consists not in the actual injury sustained by the person intended to be injured, but in the act itself and the turpitude of the motive which influenced the party to its commission; and that which was once a fraud always remains a fraud." (*Jackson v. Marshall*, 3 Am. Dec. 699; *Gale v. Lindo*, 1 Verm. 475; *Gibbs v. Smith*, 115 Mass. 592; *Fowler v. Scully*, 72 Pa. St. 456; *Bell v. Leggett*, 3 Seld. 176; 1 Story on Cont., sec. 762.)

Let us now examine the testimony, with the view of ascertaining whether there is any substantial evidence that plaintiff did not procure the mortgage to be executed in the name of Latham, for the purpose and with the intent above stated.

In the first place, let it be remembered that the testimony of the defendant was plain and positive as to his declared intent. He went upon the witness stand, not to deny that he had made the statements, but to explain *why* he made them. He was fully advised by the pleadings that an explanation would be necessary. From first to last he did not pretend that he had any other object except to *avoid an assessment* of the mortgage. Had it not been for the subject of taxes, the thought of having the note and mortgage drawn in the name of a non-resident would not have entered his mind. There was no necessity of doing so for convenience in business, or for profit, outside of the matter of taxes. It must be admitted that the *natural* and *probable* result of his conduct was that he would escape assessment upon the money loaned, whether that was the *necessary* result or not. The reason first given for having the mortgage so drawn is, that he did it to prevent confusion; in brief, that the recorder, before that, had sometimes included in his abstract of unsatisfied mortgages, mortgages that had been paid; and to avoid the confusion consequent to such mistake he did as stated. Outside of the law, then, which every man is

presumed to know, he was aware, as a fact, that one of the recorder's duties would be to include his mortgage in the list to be used for assessment purposes, should it be taken in his name. To prevent the recorder from so doing would certainly and effectually prevent a possible recurrence of "confusion," but it would probably prevent assessment at the same time. But it is sufficient to say, that plaintiff had the power in himself to satisfy the mortgage just as soon as it was paid, and such would have been his duty under the statute. (Comp. L. 263, 264.) And if he obeyed the law, his mortgage, or the money thereby secured, would not have been taxed after satisfaction, and it would have been a matter of no moment, to him, how much "confusion" was wrought by the lapses of other parties. It would not have been more laborious, or expensive, to satisfy a mortgage taken in plaintiff's name, than one in favor of a non-resident. He knew the latter would have to be satisfied when paid; and he knew that the same act would satisfy his mortgage. But he said he had other reasons; and stated that, "it was not to avoid any taxes, but it was to prevent the recorder from interfering and taxing the mortgage under the law, that he had no right to do, under the law; that he was trying to prevent double taxation on the note and mortgage."

The idea conveyed is, that he supposed the note would be taxed ten thousand dollars, and the mortgage as much more, if he did not have them written in favor of a non-resident; but if so taken, that the note would be assessable, while the mortgage would not be. It is conceived, that plaintiff had no reason to think, and could not have thought, if the note and mortgage were taken in his name, that he would be required to pay taxes upon a sum in excess of the amount secured. There is no law, no decision of this or any other court, and, it is believed, no practice justifying the conclusion. Surely, if he had any just ground to fear such a result, it is because the law sanctioned it; and if that was the case, then he had no right, by the device adopted, to endeavor to escape the burden imposed. And if he really thought that the note and mortgage could each be taxed ten

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thousand dollars, if they were taken in his name, and that the note would be taxable, although taken in Latham's name, why should he not have supposed that the mortgage would also be taxable if drawn in favor of Latham? If the note is taxable to plaintiff, it is because it is property owned by him within this state. If the note is his property, so is the mortgage, and from his statement, he could not have expected to avoid payment upon the mortgage as well as upon the note at last, except by deceiving the recorder and assessor in relation to the true ownership of the mortgage; and certainly to succeed in that, he must have anticipated the same result as to the note. Because, he could not have supposed that either officer would think the note belonged to him, while the mortgage was the property of Latham, nor could it have been so. Is it not true, then, from plaintiff's own testimony, either that he could not have expected to escape taxation upon twenty thousand dollars for the ten thousand dollars loaned—and, consequently, having the note and mortgage drawn in favor of Latham was a useless effort—or that, by having them in Latham's name, he expected to escape taxation entirely? But, notwithstanding the assertion, that the mortgage was drawn to a non-resident to prevent double taxation, as stated, still, plaintiff testified that, it was not done to avoid any taxes, *because the mortgage was not assessable*. And counsel for plaintiff say in their brief: "The note is the instrument which is taxable in this state. No tax is levied on the mortgage, and no law of the state requires the holder of a mortgage to list it for taxation." Then it is said that plaintiff paid taxes on the note, consequently there was neither an attempt to evade assessment and payment, nor was either, in fact, evaded. If those things are true, then what becomes of the claim of double taxation? It can not be true that plaintiff thought the mortgage, if taken in his name, would be unassessable, and that he had it made to Latham to prevent double taxation. If it was not assessable, where was the danger that it, as well as the note, would be assessed? And what reason existed for "preventing the recorder from interfering and taxing it?" Why did he conclude that any officer would do what he had



no right to do under the law? Had he ever known an assessor, upon money at interest secured by mortgage, to require payment on two dollars when only one was loaned? He does not say so. But if he was aware of such a case, did the board of equalization refuse to do justice? And more than all, if assessor and board had been forgetful of duty, were the courts unmindful of theirs also? Those avenues of escape from unlawful burdens were open to him, as to other citizens, and he had every reason to believe they would be ample for any emergency that might arise.

Moreover, upon what authority is the conclusion based, that a note secured by a mortgage, whether to a resident or non-resident, is assessable without regard to the mortgage, and that a mortgage is not assessable? The statute gives the assessor authority to assess "money at interest secured by mortgage," and it also requires the recorder of the county to attend on the board of equalization, with an abstract of all unsatisfied mortgages and liens remaining on record in his office; and the board shall make use of such abstract in equalizing the assessment roll, and may require the assessor to enter any mortgage, lien, or other property not assessed upon the roll. In this respect the statute of 1861 (in force when *State v. Earl*, 1 Nev. 397, was decided), was the same as the existing statute when this mortgage was executed, and is like the present one. In that case this was decided: that "the tax on money at interest, secured by mortgage, is neither a tax on coin, which is taxed as tangible property; a tax on the land mortgaged, which is taxed at its value, without regard to the mortgage; nor a tax on pieces of paper, upon which the note and mortgage are written; but it is a tax on a *chose in action*; in other words it is a tax on the right which a party has to receive or collect a certain amount of money; that all choses in action follow the person of the owner, and that this state can tax such choses in action only, as belong to its own citizens or residents, although the property mortgaged has a *situs* in this state, and the mortgage is recorded here." That is the only decision of this court justifying the belief or assertion that a mortgage is unassessable; and according to that, it is cer-

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tainly just as proper to say that, the note was not taxable as that, the mortgage was not so. The right to collect the money due, by foreclosure and sale, was assessable, but neither the note nor mortgage, as such, was so. Had the note and mortgage been taken in the plaintiff's name, he would have had no right to give in the note, alone, to the assessor, without regard to the mortgage, as a "solvent debt" merely. Such debts can be assessed only to the extent that the amount due the party assessed exceeds his indebtedness of the same character. But it is not so with debts secured by mortgage. They are subject to taxation, notwithstanding the mortgagee is indebted to an amount equal or exceeding the amount of his mortgage. (Comp. L. 3129; *State v. National Bank*, 4 Nev. 351.) Nor would the assessor have had a right to assess the note separate from the mortgage, had they been taken in plaintiff's name.

But plaintiff also testified, that the firm was assessed each year on the note, and that they paid taxes thereon, that the mortgage was not made to Latham for the purpose of avoiding payment of any taxes. Those statements were made upon these facts: Drexler & Co. owned a large amount of property in Storey county, besides the note and mortgage in question, but what amount does not appear. Plaintiff was asked several times to state the amount, but did not do so. He made an arrangement with the assessor, that the firm should pay upon ten thousand dollars, the same as other brokers paid on. The firm made no statement of their property, nor were they asked to do so. It does not appear that the assessor had any knowledge that the note belonged to plaintiff or the firm. When asked if he knew whether the assessor had or had not assessed the note, plaintiff stated, that he *presumed* it was assessed with the balance, "as a whole." When asked if he did not think it was wrong to pay on only ten thousand dollars, when he had a note for that sum, and a large amount of property besides, he said: "I know it is a universal custom all over the country, and I do not think it would be fair to make me put in everything I have, when everybody else is doing different." Upon those facts, it is true that he testified: "I

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swear positively it (the note) has been taxed and we have paid the money on it." But we submit that the only ground for that statement was, that the firm, by an arrangement with the assessor, was assessed ten thousand dollars only, upon all their property. In other words, the assessor, in violation of his official duty, let them off, by paying upon a certain sum in bulk, which was much less than the value of their property. If it is true, that the note was assessed, it is equally certain that the balance, "a large amount of property," was not assessed, and hence, that the assessment, if such it may be called, was confined to the note. How could plaintiff say, then, that the note was assessed? Only upon the theory, that the assessment of different parcels of property, as a whole, no matter how many, or how great in value, for a sum, no matter how small, is an assessment of each parcel, whether the assessor intended to assess it or not, or whether he did or did not know of its existence. That such assessment, if allowed to remain, would release a party from further payment, is undoubtedly true; but it would be no evidence that he had been assessed upon any particular piece of property, or in any proper sense had paid taxes thereon. If the arrangement between plaintiff and the assessor had been, that the firm should pay upon one hundred dollars only, could it then have been said that the note was assessed? Suppose the firm had other notes and mortgages in the same condition, say for ten thousand dollars, could plaintiff have testified that those notes, too, were assessed, except upon the theory above stated? If it is true, that an assessment like this is an assessment of every parcel, regardless of the amount of the assessment or the value of the property, then plaintiff might have escaped the difficulties encountered in stating that he had the mortgage made to Latham to avoid double taxation, by claiming that the mortgage and note were both assessed, and that he had paid upon both.

Plaintiff did not testify, that he did not intend to evade payment of taxes upon *this money at interest secured by mortgage*. He did not say he did not intend to keep *this property from being assessed*. Could he have done so?

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Then why did he put himself to the trouble of placing the title in the name of a non-resident, when he knew, or ought to have known, that under the law he could not, in any event, be compelled to pay upon a sum greater than the amount loaned and secured? Why did he, *ex industria*, by placing the mortgage to Latham upon record, notify the assessor, recorder, and board of equalization, that the mortgage was the property of a non-resident, and consequently that the right of collection was unassessable, if he was willing to pay upon as large a sum after doing so; as, under the law, he would have been required to pay upon had he pursued the natural and usual course, and taken the title in his own name? It is plain that the plaintiff intended to prevent the recorder from putting his mortgage in the abstract of unsatisfied mortgages for assessment purposes. Had it been drawn in his name and recorded, as the present mortgage was, it would have been included in the recorder's abstract; and if the board of equalization had done their duty, the money at interest secured thereby would have been entered upon the assessment roll as property that had not been assessed. He says he did it to prevent the recorder from doing just what the law requires that officer to do. He did it to prevent such an assessment as the law declares shall be made. In one sense, it may be that, he "did not intend to avoid the payment of any taxes;" that is, he intended to pay what he was obliged to pay, but he did not intend to have the property in question assessed. The firm's assessment of their property, as a whole, under the arrangement with the assessor, is no proof that the note was assessed, or that plaintiff's intentions were to have it assessed, either at the time the mortgage was executed to Latham, or at the time the arrangement was made with the assessor.

It seems to us that plaintiff's explanations only strengthen the evidence of the defendants, that the mortgage was made to Latham for the sole purpose of evading the payment of taxes thereon, or upon the money secured thereby. Because, the mortgage was attacked for fraud, and proof was made of his declarations at the time of its execution, which, unexplained, showed the intent and purpose to have

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been as claimed by defendants. An explanation was attempted, but the result was failure, as we have endeavored to show; and inferences unfavorable to plaintiff must necessarily be drawn from such failure. Our opinion, therefore, is, that the mortgage in question was executed to a non-resident, at the instance and request of plaintiff, for the sole purpose of preventing an assessment of the money at interest secured thereby, and of evading payment of taxes to become due to the state; that such purpose has been accomplished, and that there was no substantial evidence in the case opposed to such conclusions.

Counsel for defendants urge that those facts render the mortgage contract unlawful, and that courts must refuse to enforce it. If counsel are correct there is no doubt that defendants may avail themselves of that defense to prevent foreclosure. (*Fowler v. Scully*; *supra*, 468; *Blythe v. Lovinggood*; 2 Ired. (Law); 21; *Gaston v. Drake*; 14 Nev. 175.)

There are certain principles affecting this case, so well settled by a long, unbroken line of decisions, that court and counsel can not differ upon them.

Courts will not lend their aid to enforce illegal contracts or actions grounded upon immoral or illegal acts. Every act is unlawful which the law forbids to be done, and every contract is void which contravenes the law. (Metcalf on Contracts; 1 Story on Cont. 556; 2 Chitty on Cont. 982, note t.)

"All contracts, the object of which is to induce an omission of duty, are unlawful and void no less than those which are made for the purpose of encouraging the commission of unlawful acts." (Metcalf, 246.)

"Agreements contravening the ends and objects of the enactments of the Legislature, or as it is most commonly expressed, the policy of those enactments, are void." (Smith's Law of Cont. 221.)

"Nor is it necessary that the contract should violate the express words of a law, for agreements contrary to the policy of statutes are equally void." (Sedg. on Const. of Stats., 69.)

"No contract can be enforced in the courts of the United

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States, no matter where made or where to be executed, if it is in violation of the laws of the United States, or is in contravention of the public policy of the government or in conflict with existing treaties." (*Kennett v. Chambers*, 14 How. U. S. 39; *Hamay v. Eve*, 3 Cranch, 242.)

Contracts against the policy of bankrupt and insolvent laws are illegal and void.

"And it must be observed that a contract, although not expressly prohibited by a statute, may be illegal if opposed to the general policy and intent thereof, as if made to insure to one creditor of a bankrupt a greater share of his debt than the others can have, or a contract made in order to enable another to infringe that policy and intent." (Smith's Law on Cont. 17.)

*Bell v. Leggett*, 3 Seld. 176, was an action upon promissory notes given by a third person to a creditor, in consideration of his withdrawing opposition to the discharge of his debtor as a bankrupt, but without the knowledge or connivance of the debtor. The notes were held to be void as against the policy of the bankrupt law. The lower court considered the arrangement wrong, but on the ground that there was no provision against it in the bankrupt law, it was held not to make the notes void; but the court of appeals decided that they were void as against the policy of the bankrupt law.

In *York v. Merritt*, 77 N. C. 214 (see facts), the Court said: "So it appears that the plaintiff was to cover up the land for the defendant, until he got his discharge in bankruptcy and then reconvey to him. This testimony discloses a transaction *contra bonos mores*, in which both parties participated. But then it was not alleged in the complaint, nor in the answer, nor was there any issue submitted to the jury, which in express terms involved it. It may, therefore, do the plaintiff injustice to assume its truth as to him; but we may assume its truth as to the turpitude of the defendant, because it is his own testimony, and being true as to him, it shows that he is not entitled to the judgment which he obtained, and, therefore, there must be a new trial. The alleged turpitude of the transaction, although

so plainly stated in the testimony, seems to have been allowed no effect whatever at the trial. If this was because such things are so common that honesty is benumbed, it ought to be the oftener declared that the courts will not aid one party to enforce a fraud against another. And that where both parties have united in a transaction to defraud another, or others, or the public, or the due administration of the law, or which is against public policy, or *contra bonos mores*, the courts will not enforce it in favor of either party."

In *Sharp v. Teese*, 4 Halst. (N. J.) 352, which was an action upon a promissory note given in consideration of withdrawing opposition to a discharge under the insolvent law, after stating the purposes of the law, the court said:

"Any transaction or arrangement which tends to defeat either of these purposes is inconsistent with the policy of the law. The attempt to contravene the policy of a public statute is illegal. Nor is it necessary to render it so, that the statute should contain an express prohibition of such attempt. It always contains an implied prohibition, and to such attempt the principles of the common law are invariably hostile, \* \* \* by at all times refusing the aid of the law to carry it into effect or enforce any contract which may be the result of such transactions."

So, *Dial v. Hair*, 18 Ala. 798, shows that D. procured his son to enter upon and occupy certain public land for the purpose of acquiring a pre-emption right to the same, and it was agreed between them that so soon as such right was perfected, D. would pay for the land and the son should convey one half of it to him. The court said: "It may be admitted that at the time of entering into this agreement, there was no particular act upon the subject of pre-emption that declared such a contract void in express words, but if, upon a review of all the legislation of congress upon the subject, such a contract would be considered as contravening the design and policy of the laws, a court of equity would not enforce it. \* \* \* The contract disclosed by the bill is illegal—it can not be enforced, and the chancellor erred in decreeing a specific performance." There

was no prohibition of the contract in terms, nor was any penalty imposed by statute. The contract was declared illegal, simply and only upon the ground, that it was entered into for the purpose of enabling the plaintiff to obtain lands, by evading the policy of the law. The same principles are declared in *Thompson v. England*, 1 Hawk. L. and Eq. 137, and in *McDermed v. McCastland*, Hardin (Ky.), 21. (See, also, *Glenn v. Mathews*, 44 Tex. 404.)

We have been thus particular in stating the law—and perhaps needlessly—in relation to contracts that are against the policy of the law, for the reason that one of the principal arguments of counsel for plaintiff is, that plaintiff omitted the performance of nothing required, and did nothing prohibited by the statute; that since the revenue law is silent upon the subject it can not be assumed that the legislature intended to visit upon plaintiff so severe a penalty as that claimed by counsel for defendants, and that it can not be held, for any reason, that the mortgage contract is illegal.

If a contract is illegal, it matters not why it is so. When that fact is ascertained, it will not be enforced in favor of the party at whose instance and for whose benefit it was entered into. If it is illegal, as against the policy of the law, courts are as incapable of enforcing it, and thus affirming it, as they would be if the identical act was prohibited in terms, and, in addition, a penalty was imposed in case of violation.

The constitution provides that "the legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation, for taxation, of all property, real personal, and possessory, excepting," etc. Following the constitutional requirement, the legislature passed the revenue law, entitled "An act to provide revenue for the support of the government of the state of Nevada," wherein it is provided, that "all property, of every kind and nature whatsoever, within this state, shall be subject to taxation," with certain exceptions stated; and "moneys at interest, secured by mortgage or otherwise," are made taxable.

Between certain dates the assessor is required to assess "all property subject to taxation in his county." He is re-



quired to demand from each person, etc., a statement, under oath or affirmation, of all his property within the county, or claimed by him, in his possession or under his control. Any person who refuses to make such statement, when it is demanded, is guilty of a misdemeanor, and if he willfully makes a false statement, under oath, "he shall be deemed guilty of perjury." The recorder is required to furnish the board of equalization with an abstract of unsatisfied mortgages and liens, for use as before stated. Recorders are not permitted to enter satisfaction of mortgages, (except for purchase money); and courts shall stay foreclosure proceedings, on motion of defendant, until affidavit is made, that "all taxes, for county and state purposes, due or payable on the money or debts, secured by the mortgage, have been paid." Assessors are liable for taxes on all taxable property which is not assessed through his willful neglect; and if a non-assessment is caused by a refusal by the owner \* \* \* to give a statement to the assessor, the person whose refusal caused the omission, "shall pay double the taxes imposed upon the property when assessed." From the foregoing epitome the intent and policy of the revenue law are too plain to require a statement. They are that all property within the state, except such as is in terms exempted, shall be taxed. It must follow, that any contract, arrangement, or device, entered into for the sole purpose of placing property, otherwise taxable, beyond the operation of the revenue law, is directly opposed to the only policy of that law. And if there is one statute more than another, of the policy of which courts should not countenance an evasion, that one is the revenue law. Upon its proper and legal enforcement the life and prosperity of the state depend; and if one citizen escapes payment of a just portion of taxes, the burden that he should bear must fall upon others who are already heavy laden. It may be admitted that the legislative intent did not extend beyond the object stated in the title, to provide revenue. It is probable that they did not stop to consider what would be the result of a studied evasion, upon contracts entered into, in whole or part, for that purpose. But those facts do not change the situation.

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Opinion of the Court—Leonard, J.

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*Their* duty was to provide revenue by legal enactments; that having been done, the duty of enforcing or annulling contracts according to the facts presented, rests upon the courts, and if the case shows a contract violative of the principles of the common law, against statutory provisions, or the plain policy of either, it can not be enforced in favor of a guilty party. A contract may be illegal because the consideration was such, or the act to be performed is of that character; and it is said, that this mortgage is valid, because "it was based upon a lawful consideration, and no principle of public policy or good morals prohibited its creation." That it would have been legal had it been taken in plaintiff's name, there can be no doubt; but when it was executed for the purpose of contravening the revenue law, by obtaining the full benefits of the loan in this state, without bearing burdens legally imposed upon him and other citizens alike, it became illegal. To say otherwise, would be to affirm a contract entered solely for an avowed illegal purpose. The state did not establish judicial tribunals for the purpose of legalizing acts, the object and result of which are her destruction. It is idle to say that this mortgage, the instrument itself by which plaintiff intended to evade, and did evade, the law, is legal, because another, had it been given in plaintiff's name, would have been so. This instrument has an illegal element which can not be separated from that which, otherwise, would have been legal, and it can not be foreclosed without legalizing an illegality. Nor is there the slightest novelty in the distinction made. The books are full of cases that fully recognize it. (*Chugas v. Penaluna*, 4 Term. 486; *Biggs v. Lawrence*, 3 Id. 454; *Aiken v. Blaisdell*, 41 Vt. 668.) There are cases where courts have held that the contracts sued on, were, in themselves, legal, and could be enforced, although an incidental illegality occurred in carrying them into effect; such as contracts for the sale of spirits and tobacco, when the seller had failed to take out a license as required by law, and when the statute inflicted a penalty in case of non-compliance with the requirement. Those cases are cited by counsel for plaintiff in support of this mortgage. There is no similarity between

them and the one in hand. They were decided upon the ground that the contracts sued on were in no manner tainted with illegality; that the transactions, the sale, were strictly legal, *after*, as well as *before*, the enactment requiring a license, *there having been no agreement, express, or implied, in the contracts themselves, that the law should be violated.* For instance, in *Witherell v. Jones*, 3 Barn. and Adolph, 221, it is said, that "where a contract which a plaintiff seeks to enforce is expressly or impliedly forbidden by the statute or common law, no court will lend its assistance to give it effect. But when the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovery, by an infringement of the law *not contemplated by the contract*, in the performance of something to be done on his part."

And in *Johnson v. Hudson*, referred to in Story's Conflict of Laws, 748, the contract was held valid, "*since the contract of sale was wholly independent of, and collateral to, the illegality.*" In those cases the contracts were for the purpose of sale only, while our contract, the mortgage, was executed for the purpose of securing the money loaned, *but also to evade the payment of taxes upon the money secured.* The last being violative of the policy of the revenue law, and subversive of the rights of the state, was unlawful, and it tainted the whole instrument with illegality.

In *Ex parte Cohn*, 13 Nev. 426, it was held, that the statute requiring foreign insurance companies to pay a certain tax (Comp. L. 3947), was constitutional, although insurance companies incorporated under our laws were not required to pay any tax. Now, without deciding the question (for courts are by no means agreed, 78 Pa. St. 200), let it be conceded, that a contract of insurance by a foreign company, without compliance with the law, would be valid, if made in its own name, and that both parties are bound thereby, although no tax has been paid. Suppose, for the purpose of evading payment, and escaping the penalty, a foreign company makes an arrangement with a home company, to take risks in the name of the latter company. The home company assigns the claim for premiums to the for-

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Opinion of the Court—Leonard, J.

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eign company, which brings suit for their collection. We have no hesitation in saying they could not be collected, because the very contract would be based upon an intentional violation of the policy of the statute. Under the revenue law the property of widows is exempt from taxation to the extent of one thousand dollars. Suppose this mortgage had been for that sum only, and to evade payment of taxes on that money, plaintiff had caused it to be executed in the name of a widow in Storey county, and recorded, agreeing to pay her one half the amount of taxes saved by the arrangement. The money secured is not taxed, but plaintiff refuses to pay the widow. She sues and he pleads the facts. We have no doubt that courts would be obliged to refuse to enforce the claim. And we are also certain, that if she should refuse to assign the mortgage to him he could not compel her to do so. Take another case. A. lives near the border of this state and owns a band of cattle. If, for any legal purpose, he may wish to drive them into California, he can do so, and there, as here, make any lawful disposition of them, although that may result in his escaping taxation in this state. But should he, for the sole purpose of evading payment of taxes, make a colorable sale and delivery merely, he could not recover the cattle or their value. The courts would say: "You have made your bed in fraud, and so far as the law is concerned, you shall lie there."

Mr. Smith, in his Law of Contracts, page 236, puts a case which aptly illustrates the distinction, at common law, between a contract which is legal, although an incidental illegality occurs, and one which is itself illegal. He says: "Suppose, for instance; A employs B. a builder, to repair the front of his house, and B., in so doing, erects an indictable nuisance in the public street; still, as the contract to repair the house is legal, and the erection of the nuisance in so doing *was not contemplated by the agreement*, B. might recover for the repairs which he had executed. *But it would be otherwise if it had been made part of the agreement that the repairs should be performed by means of the erection of*

*the nuisance; for there the illegality would have entered into and formed part of the contract."*

Our opinion is, that the mortgage is illegal, because it was executed at the instance and request of plaintiff for the purpose of evading a legal duty, and in contravention of the plain policy of the revenue law. And it is equally so under the principles of the common law.

In *Blythe v. Lovingsgood*, 2 Ired. (Law), 21, plaintiff and defendant were bidders at a public sale for a piece of land belonging to the state. It was agreed between them, that if the plaintiff would fail to comply with his bid (he was the lowest bidder), and allow the land, according to the conditions of the sale, to be taken by defendant, he (the defendant) would give him one hundred dollars. The action was upon a note given in pursuance of that agreement. Recovery was had in the lower court, but on appeal it was said: "If the plaintiff intended to comply with the terms of sale, but failed in consideration of the defendant's executing to him the note, then the conspiracy had the effect of depriving the state of so much of the purchase money as made up the difference between the two bids; and such a transaction, we think, was fraudulent towards the state. \* \* \* It has been repeatedly decided in England, that the vendor of goods could not recover the price of the vendee, when he aided the vendee, either in packing or otherwise, to defraud the revenue laws of that country. \* \* \* We are of the opinion that the agreement in this case was in pursuance of a fraudulent design to defraud the state of a fair price for its land, and that the plaintiff ought not to recover."

We quote also from *Curtis v. Perry*, 6 Ves. jun., 739a: "It is perfectly clear that if this is to be considered as a question between Chiswell and Nantes, the former could not be heard to say he had any interest in these ships. \* \* \* He (Nantes) did acquire them in his own individual person, and Chiswell, to effect the purpose he had, must be understood to have agreed that Nantes should be apparently the sole owner. The reason for waiving any right Chiswell had, in consequence of the manner in which Nantes made this

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Opinion of Hawley, J., dissenting.

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purchase, was that a profit might be made by the employment of them in contracts with the government, and Chiswell was a member of parliament, who, the law says, shall not be a contractor. The moment the purpose to defeat the policy of the law, by fraudulent concealing that this was his property, is admitted, it is very clear he ought not to be heard in this court to say that it is his property."

And there is still another reason why plaintiff was not entitled to a decree of foreclosure, etc.: Although it is true that he made, and according to the letter of the statute (Comp. L. secs. 3211, 3212), could make, an affidavit, "that all taxes for county and state purposes, *due or payable* on the money or debt secured by the mortgage, had been paid," because, by reason of non-assessment, there was nothing "due or payable," still, by his studied act, he intentionally produced that result, and, without paying taxes on the money or debt, made it possible to comply with the letter of the statute. He did by indirect means what he could not accomplish directly, and still be entitled to a decree.

In order to obtain the benefit of notice to subsequent purchasers and mortgagees, plaintiff was compelled to place the mortgage upon record. Had it been taken in his name, either the assessor or board of equalization must have made use of it for the purpose of assessment, and no decree could have been granted until the taxes had been paid. We think with counsel for defendants that the mortgage must be held to be void.

The decree of foreclosure and sale is annulled and set aside, and the judgment is modified by striking therefrom the sum of five hundred dollars allowed as counsel fees.

HAWLEY, J., dissenting:

The testimony of Mr. Drexler presents many bad features as to the mode of assessing property in Storey county. If his testimony is true, the county assessor has failed to perform his duty; and it is apparent that, by his neglect, several persons have been enabled to evade the payment of taxes justly due to the state. The revenues of this state have thereby been defrauded. These facts, however, are

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Opinion of Hawley, J., dissenting.

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not sufficient to authorize this court to declare the mortgage in question void.

In my opinion the testimony of Mr. Drexler does not admit that the mortgage was executed in the name of a non-resident for the sole purpose of evading the payment of the taxes upon the money at interest. He denies that such was his purpose.

In my opinion the evidence is sufficient to sustain the findings of the court below upon this question.

I dissent from the judgment declaring the mortgage void.

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REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,  
APRIL TERM, 1880.

[No. 1004.]

REESE GOLD AND SILVER MINING COMPANY,  
RESPONDENT, v. RYE PATCH CONS. M. & M. CO.  
ET AL., APPELLANTS.

MOTION TO REDELIVER POSSESSION OF PROPERTY MADE BEFORE APPEAL IS PERFECTED, DENIED.—At the time the motion was made, no notice of appeal from the judgment had been given, and at the time the court denied the motion for the redelivery of the possession of the premises, the appeal from the judgment had not been perfected: *Held*, that the order of the court denying the motion was correct.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts sufficiently appear in the opinion.

*R. M. Clarke, M. S. Bonniwell, Neumann, and Bickhoff*,  
for Appellants:

I. The undertaking on appeal providing for the liability of the sureties upon the affirmance of the judgment, operates as a stay. (*Karth v. Light*, 15 Cal. 324; *England v. Lewis*, 25 Id. 337.) An appeal suspends the operation of a judgment. (*People v. Frisbie*, 26 Cal. 135.) If, after an execution has been levied, the court orders that the judgment be not enforced, we submit, upon the authorities cited,

~~Opinion of the Court, Hawley, J.~~

that under the law the perfecting of an appeal works this result: the order releases levy. (*Mulford v. Estudillo*, 32 Cal. 131; *Barropilkef v. Hathaway*, 31 Id. 395.) An appeal duly perfected stays execution of the judgment below. (*Covarrubias v. Sheriff*, 52 Cal. 622; *People v. Commissioners*, 25 How. Pr. 257; *Britton v. Phillips*, 16 Abb. Pr. 33; *Hutchinson v. Bours*, 13 Cal. 52; *Fulton v. Hanna*, 40 Id. 278.)

II. The court erred in denying the motion to recall the execution. (*Jackson v. Roberts*, 7 Wend. 88; *Dobbins v. Dollarhide*, 15 Cal. 374; *Sanchez v. Carriaga*, 31 Id. 172; *Day v. Graham*, 1 Gil. 488; *Thompson v. Thornton*, 41 Cal. 526; *Bryan v. Berry*, 8 Id. 133; *Leonard v. Peacock*, 8 Nev. 157, 247.)

*George G. Berry and Lewis & Deal*, for Respondent:

I. The notice should state the grounds upon which the motion will be made. To say that the "writ was improperly issued" is not the statement of any ground. (*Freeborn v. Glazer*, 10 Cal. 337; *Loucks v. Edmonson*, 18 Id. 203; *Freeman on Executions*, sec. 74.)

II. The execution was *functus officio* before the notice of motion was filed or served. (*Freeman on Executions*, sec. 477.)

III. The bond on appeal, when filed, was ineffectual for any purpose. (*Johnson v. Badger Mill & M. Co.*, 12 Nev. 261; *Leveaga v. Wise*, 13 Id. 296.)

IV. The amount of the undertaking is not sufficient to stay execution. (1 Comp. L. 1402, 1404, 1406, 1408; *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 185; *Dobbins v. Dollarhide*, 15 Id. 375.)

V. In no case can the defendant demand the return of the property as an absolute right.

By the Court, HAWLEY, J.:

This is an appeal from an order of the district court denying defendants' motion for the re-delivery of the possession of the premises in controversy in said action, and for a stay of proceedings upon filing a bond.

Said motion was made upon the ground that the writ of execution under which the sheriff ousted defendants from

their possession, was improperly issued, and upon the provisions of the statute. (1 Comp. L. 1406-7-10.)

The motion was filed September 11, 1879, and the time for hearing fixed for September 13.

The record shows that the writ of execution was properly issued and delivered to the sheriff on the second day of September, 1879.

On the eleventh day of September the sheriff made the following return thereon: "I hereby certify and return that I executed the within writ, so far as the same directed and required me to place the plaintiff in said action in possession of the property therein described, by removing all persons found in possession of the same, and by placing Samuel Brown, trustee and agent of the plaintiff, in the full, complete, and sole possession of the said property on the second day of September, 1879, and that a stay of execution having been granted as to the money judgment mentioned in said writ, the same was not executed by me."

The order fixing the amount of the appeal bond to stay execution, as to possession, was not made until the thirteenth day of September, 1879. On the seventeenth of the same month, the court denied defendants' motion, "on the ground that the court had no power to grant the same."

The bond on appeal from said order was filed September 24.

From all the facts set forth in the record it appears that the object of the suit was consummated, and the judgment, in so far as it related to the possession of the property, was satisfied prior to the time when defendants' motion was made.

The order of the court denying the motion was correct. The writ of execution was not improperly issued. No stay had been granted, except "as to the money judgment." That part was not enforced. At the time the motion was made no notice of appeal from the judgment had been given, and at the time the court denied defendants' motion for the re-delivery of the possession of the premises, the appeal from the judgment had not been perfected.

The order appealed from is affirmed.

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Opinion of the Court—Hawley, J.

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[No. 1028.]

## EX PARTE GEORGE WHITE AND JOSEPH PERGUE.

SUNDAY—NON-JUDICIAL DAY.—A judgment of a justice of the peace, rendered upon the trial of a criminal case, on Sunday, is null and void.

## HABEAS CORPUS before the Supreme Court

The facts appear in the opinion.

*M. S. Bonnifield*, for Petitioners.

*M. A. Murphy*, for State.

By the Court, HAWLEY, J.:

The return to the writ of habeas corpus, issued in this case, shows that petitioners were arrested and brought before a justice of the peace on the first day of February, 1880, on a charge of having committed a misdemeanor. In answer to questions asked them by the justice they stated that they did not desire counsel. They plead guilty, and waived the time prescribed by statute for passing sentence. The justice thereupon, on said first day of February, passed sentence, and rendered judgment imposing a fine and imprisonment. The first day of February was Sunday.

Was the justice authorized to try and decide the case on Sunday? We think not. Sunday is *dies non-juridicus*. At common law all judicial proceedings which take place on that day are void.

Our statute has made certain exceptions to this rule; but in our opinion, none of the exceptions apply to this case.

The third subdivision of section 50 of an act concerning courts of justice, upon which counsel for the state relies, provides that the courts of this state may be open, and that judicial business may be transacted on Sunday "for the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature." (1 Comp. L. 955.)

This exception only applies to the exercise of the powers of a magistrate.

"A magistrate is an officer having power to issue a war-

## Points decided.

rant for the arrest of a person charged with a public offense." (Cr. Pr. Act, sec. 101; 1 Comp. L. 1729.)

A justice of the peace acting as a magistrate, may transact judicial business on Sunday; may issue warrants for the arrest of parties charged with crime; may proceed with the preliminary examination, and may commit, discharge, or release upon bail, the parties under arrest.

In the present case, the justice, in receiving the plea, passing sentence, and rendering judgment, acted in the exercise of his powers as a justice of the peace. In this respect he acted without any authority of law.

The judgment rendered by him is utterly null and void. (*Swann v. Broome*, 3 Burr, 1595, *Arthur v. Mosby*, 2 Bibb, 589; *Pearce v. Atwood*, 13 Mass. 324; *Chapman v. State*, 5 Blackf. 111; *Hemens v. Bentley*, 32 Mich. 91; *Freeman on Judgments*, sec. 138.)

The petitioners must be discharged. It is so ordered.

[No. 979.]

OVERMAN SILVER MINING COMPANY, RESPONDENT  
v. PHILIP CORCORAN ET AL., APPELLANTS.

MINING AND MILLING ACT, FOR CONDEMNATION OF LAND, CONSTITUTIONAL.—

The act entitled "an act to encourage the mining, milling, smelting, or other reduction of ores in the State of Nevada," (Stat. 1875, 111), is constitutional. (*Dayton G. & S. M. Co. v. Seiwelt*, 11 Nev. 394, affirmed.)

LOCATION OF MINING CLAIM.—DISCOVERY OF ORE.—No valid location of a mining claim can be made until a vein, or deposit, of gold, silver, or metalliferous ore, or rock in place, has been discovered.

CONFLICT OF EVIDENCE.—Rule as to conflict and weight of evidence enforced.

CONDEMNATION OF LAND—NECESSITY FOR.—The lands sought to be condemned were the most eligible and convenient for the erection of expensive machinery and sinking a shaft; no other lands could have been selected, except at great expense and at places inaccessible to a railroad or to wagon roads, without which the business of the mining company could not be successfully conducted. Held, that a necessity existed for the condemnation of the land in controversy, for the protection and advancement of the mining interests of Storey county.

APPEAL from the District Court of the First Judicial District, Storey County.

## Argument for Appellants.

The facts are sufficiently stated in the opinion.

*Lewis & Deal*, for Appellants:

I. The act under which the land described in the record was condemned is unconstitutional and void. The petitioner is a mere private corporation, organized to carry on the business of mining for its own benefit, in which the public has no interest, and to permit it to take appellants' property, is to permit private property to be taken for private use. (Green's *Brices Ultra Vires* (note), 284; 51 Cal. 269; 42 Ga. 500; 5 Nev. 285; 44 Vt. 649; 4 Hin. 140; 66 N. Y. 569; *West Bridge Co. v. Dix*, 6 How. (U. S.) 546; 25 Iowa, 540; 2 Seld. 366; 34 Ala. 311; 2 Pet. 627; 18 Cal. 229; 2 Kent's Com. 340; 4 Coldw. 419; 18 Cal. 153; 8 Ohio St. 344; 7 W. Va. 191; Cool. Const. Lim. 530-2; Sedg. Const. Law, 155.)

II. The land sought to be condemned is a part of appellants' mining claims, containing veins of rock in place bearing the precious metals, gold and silver. It was located by appellants and their predecessors in interest, in accordance with the acts of congress, and has been worked so as to hold the same under said act.

As to what is a "vein" or "lode" within the meaning of the mining laws of the United States, see 14 Sawyer, 302; *Mt. Diablo M. & M. Co. v. Callisan*, U. S. C. C.; 1 Landowner, 18, 114, 180.

III. The legislature did not intend that one mining claim might be taken to enable another claim to be worked. The courts would not permit such an interpretation of the law unless the legislature clearly indicated that such a thing could be done. (43 Conn. 234; 23 Ohio St. 510.)

IV. The term "mining claim," as used in the constitution of the state, and in the act of the legislature, is never embraced or included in the term real estate. (Const., art. IV., secs. 4, 6, 8; Stat. 1866, sec. 2, subd. 11, 101; Stat. 1866, ch. XCVIII.; Stat. 1875, 111; 1 Comp. L., 1019-1022 *et seq.*; Id. 1049, 1317, 1373.)

V. The evidence does not show that a necessity for the condemnation of the property existed. (Stat. 1875, 111;

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Argument for Respondent.

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Stat. 1866, 228, 229; see, also, 6 How. 809; *Le Coul v. Police Jury etc.*, 20 La. Ann. 308.

*Stone & Hiles, for Respondent:*

I. The statute under which the land in controversy was appropriated, is constitutional. (*Dayton G. & S. M. Co. v. Seawell*, 11 Nev. 394; *Thorn v. Sweeney*, 12 Nev. 255.)

II. The testimony elicited at the trial shows that a necessity exists for the appropriation of the land to the possession and use of petitioner. The word "necessity" must not be used in a limited sense. It means the use of the property for the public good or public necessity; a want, an exigency, an expediency for the interest or safety of the state. (*McCulloch v. State of Maryland*, 4 Wheat. 413; *Stuyvesant v. Mayor*, 7 Cow. 606; *Gilmer v. Lime Point*, 18 Cal. 251; *Curtis v. Leavitt*, 15 N. Y. 168.)

III. If the lands in controversy were valid locations of mining claims upon the public domain, under the laws of the United States, respondent would still have the right to an appropriation of the land in controversy to its possession and use. Because the testimony shows that a greater necessity exists for the use of the land by respondents for working and developing its mining claim upon the Comstock lode, than appellants have for the use of the land for working and developing any mining claim which they have. The power and right of eminent domain of a state extends over the public lands of the United States within the limits of the state, as well as over the lands of any private proprietor, the government of the United States being, so far as the exercise of such power is concerned, in the same position as any private proprietor, except in cases where the federal government is in the actual occupation of the land and is using it for its own public purposes, as for a fort, or military post, or as the site of a custom-house, a court-house and the like. The public use, within the meaning of the statute, attaches to land only, after the special proceedings mentioned in the statute have been properly and regularly had and done, and that after land has been appropriated by proceedings under the statute to the public uses mentioned

in and defined by the statute, the lands may afterwards, by the exercise of the *dominium eminens*, or by like proceedings, upon a proper showing, be appropriated to a like or different public use. In a word, that one public use must yield to another which is more urgent. (*United States v. Railroad Bridge Co.*, 6 McLean, 517; Ditch and Canal Law of Congress, 1866; 1 Red. on Railways, 247.)

The question as to when a necessary implication is to be inferred from a statute to exercise the right of eminent domain, depends, in a great measure, upon the nature of the exigencies as they arise, and the circumstances of the particular cases.

In support of the views relied upon by respondent, counsel cite the following additional authorities. (1 Redfield on Railways, sec. 70; *P. P. & J. R. R. Co. v. P. & S. R. R. Co.*, 66 Ill. 175; *C. R. I. & P. R. R. Co. et al. v. The Town of Lake*, 71 Id. 333; 81 Id. 523; *New York Central & Hudson River R. R. Co. v. M. G. L. Co.*, 63 N. Y. 331; *Matter of Rochester Water Commissioners*, 66 Id. 418; *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How. 83; *Inhabitants of Springfield v. Conn. R. R. Co.*, 4 Cush. 63; *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. 360.)

*B. C. Whitman and Wm. Woodburn*, also for Respondent.

By the Court, HAWLEY, J.:

Respondent is a mining corporation engaged in the business of mining, milling, and the reduction of ores in Storey county, and instituted this proceeding to have condemned and appropriated to its use certain lands belonging to appellants, under the provisions of the act entitled "an act to encourage the mining, milling, smelting, or other reduction of ores in the State of Nevada" (approved March 1, 1875), so as to enable it "to develop its mine and successfully carry on its said business."

The lands in question have been for several years located and claimed as mining ground.

The court before which this proceeding was tried, in its finding of facts, says: "That at the time of the location



made by said defendants and their predecessors in interest in the said tracts of land, no vein or ledge of gold, silver, or other metalliferous-bearing ores, earth, or rock in place, had been discovered within any one of the said tracts of land, nor within any mining claim or claims of which said tracts of land, or any one of them, is or are claimed by the defendants to be a part of the surface ground, nor has there been since such locations were made, any vein, or ledge of gold, silver, or other metalliferous-bearing ores, earth, or rock in place, discovered or developed within any one of said tracts of land, or within any mining claim or claims of which said tracts of land, or any one of them, are claimed by defendants to be a part of the surface ground.

\* \* \* That a necessity exists for the appropriation to the use of the petitioners of the three tracts of land described in the petition herein, for the purposes alleged in its petition, and particularly for the working and developing of its mining claim and quartz ledge, situated upon the Comstock lode in said Gold Hill mining district, and that the said three tracts of land are a part of the public lands or domain of the government of the United States of America."

Appellants seek to set aside the order of the court condemning their lands upon the following grounds, which they claim "are supported both by legal principles and the decided cases," viz:

1. "That the act authorizing the condemnation of property by mining companies for their own purposes is unconstitutional, because not taken for a public use."

2. "That the act in question does not authorize the condemnation of mining claims; that the words 'real estate,' as used in it, does not include mining property."

3. "If mining is a public use, the land in question was, at the time it was sought to be condemned, appropriated to such public use, and could not therefore be condemned by any other company, unless the statute expressly authorized the taking of the property so used."

1. This court, in *Dayton G. & S. M. Co. v. Seawell*, 11 Nev. 394, after a very thorough examination of all the decided cases then published, held that the act in question was

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constitutional. The only additional authorities now cited by appellants, upon which we are asked to overrule the decision in *Dayton v. Seawell*, are *Consolidated Channel Co. v. Central Pacific R. R. Co.*, 51 Cal. 269; *Salt Company v. Brown*, 7 W. Va. 191; and *Petition of Deansville Cemetery Association*, 66 N. Y. 569. These cases shed no additional light upon the question discussed in *Dayton v. Seawell*.

The truth is, as stated by Mr. Justice Cooley, that courts often find that they are somewhat at sea when they undertake to define, in the light of judicial decisions, what constitutes a public use.

"The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use, and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare, which, on account of their peculiar character and the difficulty, perhaps impossibility, of making provision for them otherwise, it is alike proper, useful and needful for the government to provide." (Cooley's Const. Lim. 532, See, also, Mills on Eminent Domain, from secs. 10 to 20, and authorities there cited.)

This question was discussed at length in *Dayton v. Seawell*, and without again attempting to review the authorities, it is enough to say that we are satisfied that the reasoning of this court in that case is sufficient to justify the conclusion there reached that the act in question is constitutional.

2. If the findings of the court as to the non-existence of any vein or ledge of gold, silver, or other metalliferous bearing ores, earth or rock, is sustained by the evidence, then the second and third points (as above stated) relied upon by appellants, need not be considered, for under the laws of congress no valid location of a mining claim can be made until a vein or deposit of gold, silver, or metalliferous ore or rock in place has been discovered. (*Gleeson v. Martin White M. Co.*, 13 Nev. 457.)

Are the findings sustained by the evidence?

It is claimed by appellants that the evidence conclusively

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shows that "one or more ledges of gold and silver-bearing quartz rock in place were discovered prior to the location of the claims, and have been developed since," and that upon this point "there is no substantial conflict."

This view is sought to be sustained upon the ground that the testimony of the witnesses introduced upon the part of the appellants was given after a careful examination, and is direct, clear, and positive, while the testimony of respondent's witnesses was given without anything more than a superficial examination, and is simply negative in its character.

The record, however, shows that all of respondent's witnesses had been engaged for several years in the business of mining in Storey county, and were familiar with the Comstock lode. They say that assays of gold and silver can often be found in the country rock; that quartz can be found in many places over the hills from Virginia City to Washoe valley; that there are small seams of quartz and some quartz boulders to be found within the surface boundaries of the land sought to be condemned; but that there is no quartz vein, or lode, or anything to indicate a vein formation. Perhaps the strongest objection urged against the insufficiency of respondent's testimony is as to the superficial examination of the shaft "A," in the sinking and timbering of which, according to the testimony of one of the witnesses for appellants, some sixteen thousand dollars was expended.

This shaft is fifty feet deep. A witness for appellants testifies that it contains quartz-bearing mineral, having walls on each side of the ledge; that this ledge was, near the surface, about the width of his hand, but after going down about twenty feet "it widened between four and seven feet." The witnesses for respondent did not go down into this shaft, as there were no means then provided for their going down. They examined the dump containing the earth and rock taken out of the shaft. They found porphyry, feldspar, mixture of lime and broken up quartz boulders, but nothing, in their judgment, to indicate a quartz vein.

Every lawyer at all familiar with the trial of mining cases where the question of existence, or non-existence, of a lode

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or vein is raised, understands the difficulty that is often, we might say always, encountered in the attempt to ascertain the facts. Practical miners, experts, and men of science are often examined as witnesses, and they frequently differ as much in their statement of facts as in their conclusions of judgment. It is especially the province of a jury to determine the disputed question of fact thus raised. When suits of this character are tried, it is often the custom to allow the jurors to visit and examine the ground in dispute, the better to enable them to correctly decide all questions where there is any conflict of opinion.

This proceeding was tried before the court without a jury. The judge presiding has had many years of experience in the trial of mining cases where the question presented in this proceeding has doubtless been often raised.

The record shows that he was requested to visit the premises, but does not state whether he complied with the request or not. In either event it is safe to say that he had better opportunities than we have of judging the character of the respective witnesses and the weight that ought to be given to their testimony.

In our opinion here was a substantial conflict in the testimony, and this statement is sufficient to authorize us (under the previous and frequent rulings of this court) to say that the findings of the court are sustained by the evidence.

3. The only remaining ground to be considered is, whether or not any necessity exists for the condemnation of the land for respondent's use.

It was held in *Dayton G. & S. M. Co. v. Seawell*, that the object for which private property is to be taken must not only be of great benefit and for the paramount interests of the community, but the necessity must exist for the exercise of the right of eminent domain.

It is shown by the testimony in this case that the object of respondents is to sink a vertical shaft upon the lands sought to be condemned, for the purpose of striking the Comstock lode in its eastward dip at a point about four thousand feet below the surface of the earth. The lands

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Opinion of the Court—Rawley, J.

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are situated about three quarters of a mile east of the present underground works of the respondent. The Comstock lode dips to the east at an angle varying from thirty to thirty-five degrees.

The formation to the west of the lode is syenite, which is so hard as to render the sinking of shafts or the running of tunnels or drifts therein very difficult and expensive.

The respondent in its present workings, at a depth of about one thousand six hundred feet, has reached this hard formation, and every foot in depth which it may sink vertically carries it farther away from the lode which it is endeavoring to work and develop. And this work, if continued, would have to be prosecuted in a syenitic formation which, according to all the testimony, would render successful excavation impossible.

This testimony, in our opinion, sustains the findings of the court that a necessity exists to appropriate this land for the use of respondent. The fact that respondent proposes to abandon its present workings to erect new and expensive hoisting works and sink a new shaft at an enormous expense indicates very clearly that a necessity exists for procuring some land for the purpose mentioned, for, as is well said by respondent's counsel, "It is contrary to the common sense and experience of mankind to say that men will propose to perform such gigantic labor and incur such vast expense when no necessity exists therefor. Men never engage in such enterprises except upon the most mature deliberation, and by being impelled by the necessities of their present situation."

It may, for the sake of the argument, be admitted, as claimed by appellants, that respondent could have gone six hundred feet further west or six hundred feet further east and procured other land upon which to erect the necessary hoisting works and sink a shaft. The record, however, shows that all the adjacent lands are located, and claimed as mining locations; hence the same objection could have been urged wherever the location of a site was chosen, and if this fact should be considered of sufficient importance to prevent the condemnation of the lands in question,

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Opinion of the Court—Hawley, J.

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then it would follow that no lands could ever be procured by the respondent under the act of the legislature.

This case would then come within the category of cases which, as was said in *Dayton G. and S. M. Co. v. Seawell*, were liable to happen, that "individuals, by securing a title to the barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such localities," and confirms the opinion there advanced, that "the mineral wealth of this state ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining."

The law does not contemplate that an "absolute necessity" should exist for the identical lands sought to be condemned. The selection of any site for the purposes specified must necessarily, to some extent, be arbitrary.

The position contended for by appellants is not sustained by any sound reasoning, and is wholly unsupported by authority.

In the matter of the petition of the N. Y. and H. R. R. Co., the court, in discussing this question, said: "It is claimed that there are other lands in the vicinity, equally well adapted to the use of the applicant as those sought to be acquired by these proceedings, and which, possibly, might be acquired by purchase from the owners. But such objections to these proceedings are untenable. The location of the buildings of the company is within the discretion of the managers, and courts can not supervise it. The legislature has committed to the discretion of the corporation the selection of lands for its uses, and if the necessity of lands for such purposes is shown, and the lands sought are suitable, the courts can not control the exercise of the discretion, or direct which of the several plats of ground shall be taken. If the taking of one plat of ground in preference to another could be shown to work great mischief,

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and result in great loss, which could be prevented by taking another, and the proceeding to take one parcel compulsorily, in preference to another equally well adapted to the uses of the company, is from some unworthy or malicious motive, and not in the interests of the public, the court might entertain the question, and in the exercise of a sound discretion withhold its consent to the appropriation. But in this case there are good reasons, resulting from the present occupation of, and the expensive improvements put upon these premises by the appellant, why they should be taken if suitable and proper for the purposes required, the owners not claiming that they will sustain any especial injury peculiar to themselves, which would not be sustained by the owners of adjacent lands, if taken. (40 N. Y. 553. To the same effect, see *Boston and Albany R. R. Co.* 53 N. Y. 576.)

It appears from the testimony that the lands in controversy were the most eligible and convenient; that no other lands could have been selected, except at great expense, and at places inaccessible to a railroad or to wagon roads, without which the business of respondent could not be successfully conducted.

Upon a review of all the facts, it appears to our satisfaction that the appropriation of these lands to respondent's use will be of great benefit and advantage to the mining industry of Storey county; that it is necessary to condemn such lands for the protection and advancement of said interests, and that the benefits arising therefrom are of paramount importance as compared with the individual loss or inconvenience to appellants.

This brings the case within the provisions of the statute, and shows that a necessity exists for the exercise of the law of eminent domain. (*Dayton G. and S. M. Co. v. Sedwell*, *supra*; *Stuyvesant v. The Mayor of New York*, 7 Cow. 606; *Gilmer v. Lime Point*, 18 Cal. 250.)

The order and judgment appealed from are affirmed.

## Statement of Facts.

[No. 976.]

W. R. LEE, ET AL., APPELLANTS, v. ANGUS McLEOD,  
RESPONDENT.

**SUFFICIENCY OF EVIDENCE.**—Rule as to weight and conflict of evidence enforced.

**FINDINGS—IMMATERIAL ERRORS.**—Upon a review of the special issues found by the jury. *Held*, that the errors relied upon by appellants were immaterial.

**ESTOPPEL—INSTRUCTION MUST BE APPLICABLE TO THE CASE.**—An instruction which left out the essential ingredients of an estoppel applicable to the facts of this case. *Held*, to be properly refused.

**MISCONDUCT OF JUROR—WHEN NOT SUFFICIENT TO AUTHORIZE A NEW TRIAL.**—The fact that a juror, during a recess of the court, had a conversation with the plaintiffs' counsel upon some immaterial matters connected with the trial, and was, at times, during the trial, inattentive and indifferent to the presentation of plaintiffs' case, is not sufficient to authorize a new trial.

**IDEM—WHEN OBJECTIONS MUST BE MADE.**—If plaintiff thought that the acts of the juror were calculated to unduly influence the result of the trial, it was his duty, to have called the attention of the court to such misconduct at the time. He should not be permitted to take the chances of a verdict in his favor and wait till after the verdict is rendered against him before making any objection.

**MOTION—WHEN MUST NOT BE CONDITIONAL.**—Where certain motions, offers, and requests were made by counsel to introduce the judgment roll in a former suit as a bar "upon condition that the court would, in advance, hold," before certain other evidence was withdrawn, "that the judgment and findings in the former suit was conclusive of the issues in this suit." *Held*, that the motion and the offer were conditional; that the court was justified in refusing to give any opinion in advance, and for this reason it did not err in excluding the judgment in the former suit as evidence.

**APPEAL** from the District Court of the Third Judicial District, Esmeralda County.

The second instruction referred to in the opinion of the court reads as follows: "If the jury believe from the evidence that the defendant, McLeod, saw the plaintiffs while engaged in the construction of the mill, dam, and ditch, and was advised of their purposes, and saw plaintiffs expending large sums of money in such improvements; and if defendant permitted plaintiffs to make such improvements and expenditures without objection, and if defendant si-



## Argument for Respondent.

lently acquiesced in the making of such improvements, or encouraged the plaintiffs to make such improvements or expenditures by offers of material or otherwise; then you are instructed that defendant is estopped to deny or interfere with plaintiff's improvements and the use of the same in a reasonable manner."

R. M. Clarke, T. W. W. Davies, and N. Soderberg, for Appellants:

I. The court below erred in refusing to give to the jury plaintiffs' instruction No. 2. It correctly and clearly states the doctrine of equitable estoppel as applicable to this case, and established by an unbroken line of authority. (*Duchess of Kingston's case*, 2 Smith's Leading Cases, 796, 737, 738.)

II. The judgment roll and findings in the former case of *McLeod v. Lee et al.*, were competent evidence to go to the jury upon the question of plaintiffs' right to construct, maintain, and operate the ditch and dam in question. (Freeman on Judgments, secs. 283, 284; *Marsh v. Pier*, 4 Rawle, 273; *Walker v. Chase*, 53 Maine, 258 *Sturtevant v. Randall* 53 Id. 149; *Vallandingham v. Ryan*, 17 Ill. 25; *Rex v. Carlisle*, 2 B. & Ad. 362; *Duchess of Kingston's case*, 2 Smith's Leading Cases, Hare & Wallace notes, 616, 736, 737, 738; *Sherman v. Dilley*, 3 Nev. 21; *Gray v. Dougherty*, 25 Cal. 266.)

A. C. Ellis and M. A. Murphy, for Respondent:

I. No subsequent declarations of a juror can be given to disturb his verdict. (1 Gra. & Wat. on New Trials, 127, 128.)

II. The second instruction was not applicable to the case at bar, and was properly refused.

III. Appellants had no right to rely upon the testimony and at the same time rely upon the doctrine of estoppel. They could not conditionally withdraw all testimony showing the right of plaintiffs to maintain the dam and ditch, if the court would only hold a former judgment not pleaded an estoppel. Estopped by record must be pleaded. (*Davis v. Perley*, 30 Cal. 634; *Hanson v. Chiatovich*, 13 Nev. 398; *Sharon v. Minnock*, 6 Id. 386; *Ransom v. Stanberry*, 22 Ia.

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835; *Phillips v. Van Schaick*, 37 Id. 236; *Wood v. Ostram*, 29 Id. 185; *Lansing v. Montgomery*, 2 Johns. 383; *Howard v. Mitchell*, 14 Mass. 242; *Isaacs v. Clark*, 12 Vt. 693.)

IV. There is no distinction, on principle, between the effect or conclusiveness of a judgment, as to which a motion for new trial is pending and the case of an appeal, and it has always been so held by the courts. (Freeman on Judgments, sec. 251; 1 Greenl. on Evid., sec. 510; *Pitton v. Walter*, 1 Strange, 161; *Sherman v. Dilley*, 3 Nev. 27; *Shaffer v. Kreitzer*, 6 Binn. 432; *Ridgley v. Spencer*, 2 Id. 71; *Sanders v. Whiteside*, 10 Cal. 88; *Woodbury v. Bowman*, 13 Id. 634; *McGarrahan v. Maxwell*, 28 Id. 91; *Thornton v. Mahoney*, 24 Id. 582; *People v. Frisbie*, 26 Id. 135; *Broom's Leg. Max.*, secs. 341, 342, 343.

By the Court, HAWLEY, J.:

This case came before this court on appeal from an order of the court granting a nonsuit, and was remanded for a new trial. (12 Nev. 281.)

The issues involved are the same as in *McLeod v. Lee et al.*, 14 Nev. 398. It is therefore unnecessary to repeat the history of the case.

1. It is urged that the evidence is insufficient to justify the verdict in favor of defendant. The evidence presented by this appeal is substantially the same as in the case of *McLeod v. Lee*. A re-examination of the testimony strengthens the conviction expressed in that case that the evidence is sufficient to sustain a verdict in favor of McLeod.

2. The jury, in answer to special issues, found that the plaintiff Lee did not erect his flouring mill, nor did he or the other plaintiffs construct the water ditch upon the faith of any permission given by the defendant McLeod for the diversion of the water; that the defendant McLeod never gave any permission to plaintiffs, before the flouring mill was erected and the ditch constructed, to divert the water of Walker river through said ditch; that after that time he gave permission to plaintiffs to erect a temporary dam eighteen inches high that would wash out when the freshets came, and if it did not wash out that it should be cut out or

removed if there was any danger of an overflow on defendant's land; that the accumulation of the sand in the ditch was caused solely by the dam, the cut dug by defendant having no appreciable influence in causing the deposit; that the plaintiffs were not deprived of any water, and had not sustained any loss or damage on account of the cut dug by the defendant.

In the light of these findings, supported as they are by the testimony, nearly all the questions of pretended error argued by appellants' counsel are immaterial.

If the damages were caused solely by the acts of the plaintiffs themselves in the erection of the dam, then they could not have been prejudiced by the action of the court in excluding the evidence of damages resulting to them since the filing of plaintiffs' complaint.

The question whether the court erred in excluding the new evidence offered by plaintiffs in rebuttal as to the height of the dam, is, under the findings of the jury, wholly immaterial. The court did not err in excluding the evidence tending to show that the defendant had purchased forty acres of land, situate within the inclosure of the Mills brothers, for the purpose of showing the animus of defendant in the construction of the cut. It was wholly immaterial what the animus of defendant was in digging the cut. Other reasons might be assigned to sustain the action of the court. But, in our opinion, these questions are not deserving of any further notice.

3. Plaintiffs' instruction number two was properly refused. It was calculated to mislead the jury. It left out the essential ingredients of an estoppel applicable to the facts of this case. It ignored the terms, if any, upon which the defendant, McLeod, consented, or acquiesced, in the erection of the dam, and, also, the question whether or not the plaintiffs had, on account of such consent or acquiescence, performed any labor or expended any money on the faith thereof. (*Lee v. McLeod*, 12 Nev. 284.)

4. The affidavit of T. W. Davies, one of plaintiffs' attorneys, stating that George Daly, one of the jurors, during a recess of the court, gratuitously participated in the

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conversation of counsel with reference to matters connected with the trial, and familiarly spoke to said plaintiffs' attorney as to his efforts "to show a man's mind in 1876 by a deed made in 1877," and that the same juror "was, at times, inattentive and indifferent \* \* \* during the respectful presentation of plaintiffs' case," and "occupied the attention of other jurors at the closing argument by plaintiffs' counsel by writing in a book and passing the same to other jurors," is not sufficient to authorize a new trial.

To deprive a party of a verdict which he may have honestly obtained after a tedious, protracted, and expensive litigation, merely because a juror may have, during the trial, improperly spoken to one of the attorneys of the opposite party about an irrelevant and immaterial matter that occurred in court, and was at times inattentive to the arguments of said attorney, it not affirmatively appearing that the losing party received any injury, or the winning party any benefit from the acts of the juror, would be in any case incompatible with the proper administration of justice, and under the facts of this case would be wholly unwarrantable.

The remarks of the juror, even if sneeringly made, and his subsequent indifference, do not indicate any improper bias upon the part of the juror against the plaintiffs, or in favor of the defendant in the action.

They were not caused or occasioned by any act of the defendant.

It is not shown what was written in the book by the juror. It may have been perfectly harmless. We can not, upon the facts alleged, presume that anything was written or shown to other jurors, that was prejudicial to either party.

It is true that in many cases it is as much the duty of a juror to listen as attentively to the arguments of counsel as to the testimony of witnesses in order to fully, fairly, and correctly understand the force of certain facts and their legal relation to each other as effecting the real issues involved in the case; but it does not necessarily follow that if a juror fails to pay such attention to the evidence or argument as the attorney thinks that he ought to bestow, that such acts are prejudicial to the losing party. If counsel for

plaintiffs thought that the acts of the juror were improper and were calculated to unduly influence the result of the trial, it was his duty to have, then and there, called the attention of the court to such misconduct, in order that it might, at that time, have taken such action as would then have been proper under the circumstances. A party ought not to be permitted to take the chances of a verdict in his favor and wait till after the verdict is rendered against him before making any objection. If, with a full knowledge of all the facts, he proceeds with the trial and takes his chances, he ought, in justice and fair dealing, to submit to the consequences.

The authorities to be found upon this subject sustain the views we have expressed. (*Baxter v. The People*, 3 Gil. 368, 379; *Taylor v. California Stage Co.*, 6 Cal. 228; *McAlister v. Sibley*, 25 Maine, 487-8; *Martin v. Tidwell*, 36 Ga. 345; *Pettibone v. Phelps*, 13 Conn. 445; *People v. Morrissey*, 1 Buff. N. Y. Superior Court, cited in 9 U. S. Dig., new series, p. 561, par. 54.)

The alleged misconduct of the juror Jones is also devoid of merit. If it was known to the plaintiffs that he "was and for a long time had been at enmity with A. L. Greeley, one of the plaintiffs' counsel" that fact ought to have been brought out upon the examination of the juror as to his competency, and the court could then have determined whether or not he had any such bias or prejudice as would influence his conduct as a juror. The fact that Jones, "after he was discharged as a juror, in a sarcastic and unfriendly tone, said: I wonder how Greeley feels now," is no reason why a new trial should be granted.

5. On the second day of the trial of this cause, plaintiffs moved the court "to withdraw from the consideration of the jury the issue. \* \* \* Whether the plaintiffs in this action had the right, as against the defendant Angus McLeod, to construct and maintain the dam and ditch in question," on the ground that in the suit of *McLeod v. Lee*, "the same subject-matter and embracing the same period of time, it had been determined by final judgment of this court, duly made and entered, and which has never been

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Points decided.

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set aside or reversed, that plaintiffs had the right to construct and maintain said dam and ditch, \* \* \* and to limit the subject of inquiry and issue to be tried in this action to what damage, if any, \* \* \* plaintiffs have suffered by the acts of the defendant."

The plaintiff then "offered in evidence the findings, additional findings, and judgment in the cause of *Angus McLeod v. W. R. Lee et al.*, \* \* \* and offered to prove that the parties to that suit were the parties to this suit, and that the dam and ditch mentioned in said findings was the same as those mentioned in the pleadings in this cause, and that the time referred to was the same in that action as in this."

After the close of the testimony plaintiffs asked leave of the court "to file a supplemental complaint and make proof of the same," to strike out so much of the testimony given at the trial as referred to the rights of plaintiff to construct said dam and ditch, and to withdraw that issue from the consideration of the jury.

The bill of exceptions states that these motions, offers, and requests, were made "upon condition that the court would, in advance, hold, before the evidence was withdrawn, that the judgment and findings in the former suit was conclusive of the issues in this suit."

There was no absolute offer of the judgment roll in the former suit in evidence as a bar. The offer was conditional, and the court was justified in refusing to give any opinion in advance as to what its rulings would be. The action of the court, in excluding the judgment and findings in the former suit must be sustained upon this ground.

The judgment of the district court is affirmed.

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[No. 1024.]

THE STATE OF NEVADA EX REL. AH CHEW, RELATOR, v. RICHARD RISING, JUDGE OF THE FIRST JUDICIAL DISTRICT, RESPONDENT.

MANDAMUS WILL NOT ISSUE BEFORE RESPONDENT IS IN ACTUAL DEFAULT.—  
Relator was to be tried in the district court for a violation of a munic-

## Opinion of the Court—Beatty, C. J.

ipal ordinance. He demanded a jury trial. The court announced that he would try the case without a jury, and thereupon set the case for trial on May 1: *Held*, that the respondent was not in actual default, even if relator was entitled to a jury trial, and that the writ of mandamus should not be issued.

**APPLICATION for writ of mandamus.**

The facts appear in the opinion.

*Kirkpatrick & Stephens, and Lindsay & Dickson*, for Relator:

I. Relator is entitled to a jury trial. (1 Comp. L. 2221, 2227, Stat. 1864-5, 216, sec. 31; Id. 1869, 121; *People v. Smith*, 9 Mich. 194.)

*J. H. Graham*, for Respondent:

I. Relator is not entitled to a jury trial. (Const., art. 6, sec. 13; 1 Dill. Mun. Corp. sec. 358, note 1; *Davenport v. Bird*, 34 Iowa, 524; *Williamson v. Commonwealth*, 4 B. Mon. 146; *State ex rel. Rosenstock v. Swift*, 11 Nev. 141; *Byers v. Commonwealth*, 42 Pa. St. 89; *McGear v. Woodruff*, 33 N. J. L. 213.)

II. Mandamus is not the proper remedy in this case. The district court having decided judicially. (*Moses on Mand. ch. 3, 19-58.*)

By the Court, BEATTY, C. J.:

The relator was convicted by a justice of the peace of Virginia City, of having violated a municipal ordinance, and was sentenced to pay a fine therefor, and, in default of payment, to be imprisoned in the city jail. From this judgment he appealed to the first district court, of which the respondent is judge. He there demanded a jury trial, but the respondent announced that he would be tried without a jury, and set the case down on the calendar for the first of May, proximo.

Thereupon this application was made for an alternative writ of mandamus, commanding the respondent to impanel a jury to try the relator, or to show cause why he should not do so.

The petition was filed April 5, and the alternative writ is-

sued, notwithstanding grave doubts on the part of the court as to its being the proper remedy for the supposed grievance. At a subsequent day the respondent showed cause, and besides claiming that the relator has no right to a jury trial, took the further objection that, even if he has such right, he can not enforce it by means of this proceeding.

This objection is, in our opinion, fully sustained by the decision in *State ex rel. Piper v. Gracey*. The rule adopted in that case is, that "mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is therefore incumbent on the relator to show an actual omission on the part of the respondent to perform the required act, and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed, nor does the law contemplate such a degree of diligence as the performance of a duty not yet due." (11 Nev. 233-4.)

Upon these grounds the writ was denied in that case, notwithstanding the strong presumption that the respondent would refuse to perform his plain duty; that the relator would be injured thereby, and that he had no other plain or adequate remedy. In reference to these matters we said: "The court, however, can not anticipate that the auditor will not perform his duty within the time prescribed by the statute, and an actual default or omission of duty is just as essential a prerequisite to the issuance of the writ as is the want of an adequate remedy in the ordinary course of law." (p. 236.)

In this case it can in no event be claimed that the respondent is in actual default. He has, it is true, announced his intention of trying the relator without a jury, and we presume that he will do so; but even if the relator has a right



## Points decided.

to a jury trial (and we are not to be understood that he has) he has, as yet, suffered no injury, and respondent is not yet in default.

If, as the relator claims, he has a statutory right to a jury trial in the district court, and he is denied it, he must seek his remedy in some other form.

The proceeding is dismissed.

[No. 957.]

**E. E. RICORD, MOTHER AND GUARDIAN OF W. C. RICORD, A MINOR AND W. C. RICORD, RESPONDENTS,  
v. THE CENTRAL PACIFIC RAILROAD COM-  
PANY, APPELLANT.**

**MINOR—SUIT PROPERLY BROUGHT IN NAME OF GUARDIAN.**—When this action was commenced, W. C. Ricord, to whom the cause of action stated in the complaint belonged, was a minor; *Held*, that the suit was therefore, properly brought in the name of E. E. Ricord, his mother and guardian.

**IDEM—ATTAINING MAJORITY BEFORE TRIAL.**—At the time of the trial the minor had attained his majority, and upon his motion he was joined with his mother as a party plaintiff; *Held*, *error*; that it would have been proper to substitute him as the sole plaintiff in her place, but having no joint interest in the cause of action they could not be united as plaintiffs.

**RAILROAD CORPORATIONS—WHEN MAY BE HELD LIABLE.**—A corporation can not be bound, even by the act of its board of directors, unless done in the pursuance of some object embraced by its charter, or of some power conferred upon it by law.

**IDEM—CRIMINAL PROSECUTIONS.**—The prosecution of criminal offenders is one of the objects and privileges of a railroad corporation, and it can be held accountable for any malicious prosecution.

**IDEM—CHARACTER OF PROOF TO SHOW AUTHORITY.**—To show that a criminal prosecution was instituted by authority of the corporation it is not necessary to produce a resolution of its board of directors. It is sufficient to show that its legal advisers, acting in conjunction with such of its servants and agents as have knowledge of the facts, instituted the proper proceedings.

**IDEM—SUFFICIENCY OF EVIDENCE.**—Upon a review of the testimony: *Held*, that there was sufficient proof that the prosecution against Ricord for embezzlement was instituted and carried on by the defendant.

**NONSUIT—FAILURE OF PROOF TO SHOW MALICIOUS PROSECUTION.**—Ricord was first arrested for embezzlement, was tried and acquitted. He was

## Points decided.

then arrested for grand larceny, and released; was afterwards charged with same offense before another magistrate, and held for embezzlement: was then taken before the district judge on habeas corpus and remanded for obtaining money on false pretenses; then came before the supreme court on habeas corpus, and was remanded for embezzlement (11 Nev. 287). Subsequently he was indicted for embezzlement, pleaded former acquittal, and this plea was found true by the jury. He then instituted this suit for malicious prosecution for his second and third arrest and second indictment and trial for embezzlement: *Held*, that the court erred in refusing to grant a nonsuit upon the ground that there was no proof that the prosecution was maliciously instituted without probable cause.

**MALICIOUS PROSECUTION—PROBABLE CAUSE—MALICE.**—In an action for malicious prosecution it devolves upon the plaintiff to show affirmatively that the prosecution was malicious and without probable cause.

**IDEM.**—The defendant caused the arrest of plaintiff and supported its charge with evidence sufficient to procure his commitment and indictment for embezzlement. *Held*, that this was *prima facie* evidence of the existence of probable cause.

**PLEA OF FORMER ACQUITTAL—NOT EVIDENCE AS TO DEFENDANT'S KNOWLEDGE.**—The findings of the jury and the judgment of the court on plaintiff's plea of former acquittal was not evidence against the defendant to show knowledge on its part that plaintiff had been acquitted of the identical charge upon which it caused his arrest.

**INDICTMENT FOR EMBEZZLEMENT—INSUFFICIENCY OF.**—The indictment upon which plaintiff was first tried, failed to charge that the money he was accused of embezzling had been intrusted to him by his employers: *Held*, fatally defective.

**EMBEZZLEMENT—ONE OR MORE OFFENSES.**—If a clerk by authority of his master collects one bill and fraudulently converts the money, the offense of embezzlement is complete, and if he collects another bill after the first conversion, and then fraudulently converts the proceeds, he is guilty of a second offense.

**PROBABLE CAUSE—ADVICE OF COUNSEL.**—Advice of counsel after a full disclosure of facts, justifies the institution of a criminal prosecution.

**IDEM—INSTRUCTION.**—The defendant affirmatively showed that it acted in perfect good faith, under the advice of counsel, and the decision of the district court and of the supreme court that there was good reason to charge a second offense for embezzlement: *Held*, that the court erred in not instructing the jury that there was probable cause for the prosecution.

**IDEM—CHARACTER OF EVIDENCE.**—*Held*, that the court erred in excluding evidence of facts within the knowledge of defendant at the time the second prosecution was instituted, tending to show that plaintiff was actually guilty of two separate and distinct offenses.

APPEAL from the District Court of the Second Judicial District, Washoe County.

## Argument for Appellant.

The facts sufficiently appear in the opinion.

*I. B. Marshall and H. S. Brown*, for Appellant:

I. E. E. Ricord is the plaintiff in this suit. The words "mother and guardian of W. C. Ricord, a minor," is a mere *descriptio personae* of the plaintiff. (*Rogers v. Hatch*, 8 Nev. 38; *Talmage's Adm'r v. Chapel*, 16 Mass. 71; *Merritt v. Seaman*, 6 N. Y. 168; *Root v. Price*, 22 How. Pr. 372.) The action must be brought in the name of the infant by his guardian. (*Fox v. Minor*, 32 Cal. 111, 119; *Whitney v. Hitchcock*, 4 Denio, 461; *Karr v. Parks*, 44 Cal. 46.) The parent can only recover for loss of services. (*Cowden v. Wright*, 24 Wend. 429; *Peck v. Mayor N. Y.* (3 N. Y.), 3 Com. 489; 1 Chit. on Pl. 60; 2 Kent's Com. 188; 23 N. Y. 158-465; *Sawyer v. Sauer*, 10 Kan. 519-522; Sedg. on Meas. of Dam. 551, and note (1), 553; *Rodgers v. Smith*, 17 Ind. 323.) The right of action for the injury *per se* exists only in favor of the son. (Sher. & Red. on Neg., secs. 608, 608a; *Oakland R. R. Co. v. Fielding*, 48 Pa. St. 320; *Penn. R. R. Co. v. Kelly*, 31 Id. 372; *Gilligan v. N. Y. and Harl. R. R. Co.*, 1 E. D. Smith, 453; *Whitney v. Hitchcock*, 4 Davis, 461; *Rogers v. Smith*, 17 Ind. 323.)

II. An amendment to a complaint which changes the parties to a suit cannot be made. (*Little v. V. & G. H. Water Co.*, 9 Nev. 319; *Quillen v. Arnold*, 12 Id. 234.)

III. E. E. Ricord and W. C. Ricord having no interest in common, should not have been united as plaintiffs. (*McBeth et al. v. Van Sickle*, 6 Nev. 134.)

IV. Where a defendant has fully and fairly stated his case to counsel, and acts by advice thereof, it is a good defense to this action. It shows that there was probable cause. (*Potter v. Seale*, 8 Cal. 224; *Levy v. Brannan*, 39 Cal. 485; *Wicker v. Hodgkins*, 14 Am. Rep. 75.)

V. The defendant's motion for a nonsuit should have been granted. A railroad corporation is not liable in an action for malicious prosecution unless the corporation directed the arrest. It must be the act of the board of directors. (*Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 54;

## Argument for Appellant.

*Goodspeed v. East Haddam Bank*, 22 Conn. 540; *Roe v. Birkenhead L. & C. J. R. R. Co.*, 7 Exch. 36.)

A corporation is not liable for a willful trespass of a person employed by it, although the act be authorized and sanctioned by the president and general agent thereof. (*Vanderbilt v. The Richmond Turnpike Co.*, 2 Const. N. Y. 479; *Ill. Cent. R. R. Co. v. Downey*, 18 Ills. 259; *Church v. Mansfield*, 20 Conn. 284; *Steamboat Co. v. Housatonic R. R. Co.*, 24 Id. 40; *Eastern Counties R. W. Co. v. Broom*, 2 Eng. Law and Eq. 406.)

The agent or servant must be acting within the scope of his authority in order to make his master or principal liable for his wrongful acts. There is no railroad officer, employee, or agent, whose duty it is to prosecute an individual for the commission of a public offense. It is impossible for the defendant, as a company, to complain of an individual for a public offense. The agent or servant of a corporation in charging a person with the commission of a public offense necessarily acts as a citizen, with the responsibilities of a citizen; and not as the agent of a corporation. (1 Comp. L. 2317; *Ellis v. C. P. R. Co.*, 5 Nev. 205; *Gough v. Great Northern R. W. Co.*, 3 E. & E. 672; *Poulton v. L. & S. W. R. W. Co.*, 2 Law Rep. (Q. B.) 1866-7, 534; *Allen v. L. & S. W. R. W. Co.*, 6 Law Rep. (Q. B.) 1870-1, 65; *Edwards v. London & N. W. R. W. Co.*, 5 Law Rep. (Com. Pl.) 1869-70, 445.)

The master is not liable for the willful and malicious acts of his servants when they happen outside of the scope of his employment, and are not connected with his master's business or orders. (*Wood's Law of Master and Servant*, 545, 547; *Roe v. Birkenhead*, 7 Exch. 36; 35 Eng. Com. Law Rep. 448; *Gillett v. Mo. V. R. R. Co.*, 55 Mo. 315; *Lyons v. Martin*, 8 A. & E. 512; *Coleman v. Riches*, 16 C. B. R. 104; *Frazier v. Freeman*, 43 N. Y. (4 Hand) 566; *Isaacs v. Third Av. R. R. Co.*, 47 N. Y. 122; *Journal of Jur.*, vol. 18, 414, 415; *Bolingbroke v. Swindon Local Board*, 9 Law Rep. (Com. Pl.) 1873-4, 575; *Porter v. C. R. I. & P. R. R. Co.*, 41 Ia. 358; *Mali v. Lord*, 39 N. Y. 381.)

The holding of a party to answer, by a committing magis-

## Argument for Respondent.

trate, is *prima facie* evidence of probable cause. (*Whitney v. Peckham*, 15 Mass. 243; *Reynolds v. Kennedy*, 1 Wilson, 232; *Ulmer v. Leland*, 1 Greenl. (Me.) 135; *Maddox v. Jackson*, 4 Munf. (Va.) 462; *Ganea v. S. P. R. R. Co.*, 51 Cal. 140.) No malice was shown. It must be proved. (*Levy v. Brannan*, 39 Cal. 485.)

VI. The first indictment did not state facts sufficient to constitute a public offense. (1 Comp. L. 2380; *People v. Logan*, 1 Nev. 110.) A plea of former conviction or acquittal is only available in cases where the first indictment was a valid indictment. (Wharton's Am. Crim. Law, 191; 2 Hale's Pleas of the Crown, 247; *State v. Hall*, 3 Nev. 172; *Ex parte Maxwell*, 11 Id. 434-5.) In order to prove that a party has been acquitted of the same offense, it must appear that both trials were for the same acts. In law and in fact it must be the same offense. The acquittal or conviction must be for the same act or crime. (1 Rus. on Cr. 835, 836; 2 Hale's Pl. Cr. 240; Wharton Am. Cr. L. 259, 260; *People v. McGowan*, 17 Wend. 386; *State v. Ainsworth*, 11 Vt. 91; *Vawter v. Commonwealth*, 2 Va. Cas. 127; *Freeland v. The People*, 16 Ill. 382; 4 Black. Com. 336.) The difference of evidence conclusively establishes the distinctness of the accusations. (*State v. Jesse*, 3 Dev. & Batt. N. C. 102; *Commonwealth v. Dove*, 2 Va. Cas. 29; 1 Bishop Crim. Law, secs. 534, 680; Roscoe's Crim. Ev., 450; 3 Arch. Crim. Pr. & Pl. 445.)

VII. What is probable cause is a question of law, to be determined by the court upon the circumstances of every particular case. (Principles of the Common Law, by Indermaur, 352; *Scott v. Simpson*, 1 Sanf. 601; *Burlingame v. Burlingame*, 8 Cow. 142; *Gorton v. De Angelis*, 6 Wend. 418; *Stone v. Crocker*, 24 Pick. 81; *Fagnan v. Knox*, 66 N. Y. 526.)

*R. M. Clarke*, for Respondent:

I. This action was properly brought in the name of the mother and guardian. (1 Comp. L. 1074; 32 Cal. 117.)

When the son attained his majority it was proper to make him a party plaintiff in the action. (Civ. Pr. Act, secs. 13, 14, 16, 17, 68.)

## Argument for Respondent.

II. A corporation, although an artificial person, without any soul and incapable of thought, may, under some circumstances, be held liable in an action for malicious prosecution and false imprisonment. (*Brokaw v. N. J. R. R. Co.*, 3 Vroom. 328; *Vance v. Erie R. R. Co.*, 3 Id. 334; *Ganea v. S. P. R. R. Co.*, 51 Cal. 140; *Goodlow v. City Cincinnati*, 4 Ohio, 514; *Golf v. G. N. R. Co.*, 3 Ellis & Ellis, 672; *Goodspeed v. East H. Bank*, 22 Conn. 540; *Maynard v. Fire Fund Ins. Co.*, 34 Cal. 48; *Phil. W. & B. R. R. Co. v. Quigley*, 21 How. (U. S.) 202.)

III. A railroad corporation is liable for the wrongful acts of its officers in all cases where such wrongful acts are authorized by the directors of the corporation, and in all cases where the wrongful act is done by an officer or agent of the corporation in pursuance of the authority of such officer, or concerning a subject over which such officer has control, and in all cases where such wrongful act has been adopted or ratified by the corporation. And the act of authorization or ratification may be shown by circumstantial evidence. (*Thayer v. City of Boston*, 19 Pick. 511, 516, 517, *Clarke v. Peckham*, 9 R. I. 455, 471, 472; *Eastern Coun. R. R. Co. v. Broom*, 6 Exch. 314. And authorities cited under II.)

IV. It was not competent to prove Ricord guilty of embezzlement upon the trial of this case. The question of his actual guilt was not involved; on the contrary, the question was: Had the defendant *at the time the prosecution was instituted* probable cause to suppose him guilty? And only such facts as existed and were known to the defendant at the time of the prosecution, could be received in evidence. (2 Greenl. Ev., secs. 454-455; 1 Hilliard on Torts, 450-455 inc.; Bigelow's L. C. on Law of Torts, 198, 199, 200; 1 Amer. L. Cases, 211, 212, 213; *Bacon v. Towne*, 4 Cush. 217-238-239; *Ash v. Marlow*, 20 Ohio, 119; *Cooper v. Utterbach*, 37 Md. 282; *Harkrader v. Moore*, 44 Cal. 144; *Seibert v. Price*, 5 Watts & Serg. 438; *Hall v. Suydam*, 6 Barb. 83; *McLaren v. Birdsong*, 24 Ga. 265; 105 Mass. 212; 36 Conn. 56; 106 Mass. 300; *Fant v. McDaniel*, 1 Breb. 173; *Brainard v. Brackett*, 33 Maine, 580; *Cooper v. Turrentine*, 17 Ala. 13; *Collins v. Love*, 7 Blackf. 416.

## Argument for Respondent.

V. The issue presented upon the trial of this case was precisely the same as was presented to and tried by the trial jury upon Ricord's plea of *autrefois acquit*, and such proofs as were competent there, and none other were competent here. (1 Bish. Cr. Pr. 816; *Duncan v. Commonwealth*, 6 Dana, 295; *State v. Andrews*, 27 Mo. 267; *State v. Small*, 31 Id. 197; *Boyer v. State*, 16 Ind. 451; *Porter v. State*, 17 Id. 415; *State v. Smith*, 22 Vt. 74.)

VI. If the first indictments were such that the prisoner could have been legally convicted upon it by any evidence legally admissible, though sufficient evidence was not in fact adduced, his acquittal upon that indictment is a bar to a second indictment for the same offense. (3 Greenl. on Ev., sec. 36; Arch. on Crim. Pl. 87; *Rex v. Emden*, 9 East, 437; *Rex v. Clarke*, 1 B. & Bing. 473; *Rex v. Taylor*, 3 B. & C. 502; 1 Russ. on Crimes, 832; *Commonwealth v. Roby*, 12 Pick. 496; *Rex v. Vandercomb*, 2 Leach C. C. (4 ed.) 768; *Regina v. Bird*, 5 Cox C. C. 11; 2 Eng. Law & Eq. 439.)

The testimony offered by the defendant was not for the purpose of proving what occurred before the committing magistrate, or before the several grand juries, or upon the trials upon the two indictments, but to show the actual guilt of Ricord by producing evidence which had never before been produced, and which was not submitted on any occasion before.

VII. It was not a crime for Ricord to demand and receive money for the corporation. (*People v. Murphy*, 51 Cal. 376.)

He must have either withdrawn himself from the company and gone away with the money with intent to steal the same, and defraud his employers thereof, or embezzled the money, or otherwise converted the same to his own use, with intent to steal the same and defraud his employers thereof. (Cr. Pr. Act, sec. 74; 1 Comp. L. 2384; 25 Ohio St. 162-168; 118 Mass. 443.)

To constitute a crime there must be a conversion of the money, coupled with the intent to steal the same, and neither the conversion nor the intent to steal can be drawn

## Argument for Appellant.

from the mere failure to account for it, or from the mere failure to pay it over, or from both. (2 Bish. Cr. Law, 372, 373, 376; Russ. on Cr., 181, 182; Roscoe Cr. Ev. 415, 416; 51 Cal. 379; 25 Ohio St. 162; 118 Mass. 443.)

VIII. Although the advice of counsel may in some cases be interposed as a defense to the action for malicious prosecution, in such cases it must always be shown that the defendant, relying upon the defense communicated to counsel learned in the law, all the facts bearing upon the guilt or innocence of the accused, of which he had knowledge, or which by reasonable diligence he could have ascertained, and then in good faith have acted upon the advice. (*Ash v. Marlow*, 20 Ohio, 119; 38 Mo. 21; Big. L. C. on L. of Torts, 200, 201, 202; *Cole v. Curtiss*, 16 Minn. 182.)

IX. The question of probable cause is a mixed question of law and fact, and when the facts are in doubt, or in controversy, they must be submitted to the jury; and in such case it was the duty of the court to instruct the jury that if they find the facts in a designated way, then such facts do or do not amount to probable cause. (2 Greenl. Ev., sec. 454, 406, 407; 16 Minn. 183; 20 Ohio, 119; 44 Cal. 145; 111 Mass. 492.)

X. Although malice must be established as a fact in every action for malicious prosecution, yet when want of probable cause is shown, the fact of malice may be inferred. (2 Greenl. Ev., secs. 454, 455; 1 Hill. Torts, 441; Big. L. C. on L. of Torts, 198-200; 39 Mo. 39, 136; 50 Id. 83; 37 Md. 283, 284; 16 Minn. 182; 66 Me. 202, 203; 45 Md. 198; 28 Gratt. 909; 44 Cal. 145, 149.)

XI. The first indictment charged all the material facts necessary to constitute the crime of embezzlement. (1 Comp. L. 1859, 1868; *Ex parte Ricord*, 11 Nev. 287; *Ex parte Hedley*, 31 Cal. 108.)

*H. S. Brown*, for Appellant, in reply:

I. As to liability of corporation. (Cooley on Torts, 119; *Weckler v. First Nat. Bank*, 42 Md. 581; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Fowler v. Scully*, 72 Pa. St. 456; *Yellow Jacket M. Co. v. Stevenson*, 5 Nev.



224; *Gillett v. M. V. R. R. Co.*, 55 Mo. 315; *Ellis v. C. P. R. R. Co.*, 5 Nev. 255; *Rankin v. N. E. & N. S. M. Co.*, 4 Id. 78.)

II. That it was competent for defendant to prove, that at the time the prosecution was instituted there was probable cause to believe that Ricord was guilty of embezzlement. (*Jones v. Gwynn*, 10 Mod. 217; *Goodrich v. Warner*, 21 Conn. 439; *Mowry v. Miller*, 3 Leigh, 561; *Hickman v. Griffin*, 6 Mo. 42; *Bell v. Percy*, 5 Ired. 85; *Johnson v. Chambers*, 10 Id. 291; *Anderson v. Buchanan*, Wright, 725; *White v. Ray*, 8 Pick. 467; *Sears v. Hathaway*, 12 Cal. 277; 1 Hill. on Torts, 471.)

By the Court, BEATTY, C. J.:

This is a suit for malicious prosecution. Plaintiffs recovered four thousand dollars damages in the district court. Defendant appeals from the judgment and from the order overruling its motion for a new trial.

The judgment and order appealed from must be reversed, and the cause remanded; but we shall not pretend to discuss in detail the fifty-four specifications of error in the rulings of the district court, since in our opinion, the decision of a few general propositions will be sufficient for its guidance in any future trial of the case.

1. When the action was commenced, W. C. Ricord, to whom alone the cause of action stated in the complaint belonged, was a minor. This being so, the suit was properly brought in the name of E. E. Ricord, his mother and guardian. (Comp. L. 1074.)

At the time of the trial he had attained his majority, and, upon his motion, he was joined with his mother as a party plaintiff. This, we think, was error. It would have been proper to substitute him as the sole plaintiff in her place (Comp. L. 1079), but since they had no joint interest in the cause of action, they could not be united as plaintiffs, (Comp. L. 1077.)

Whether this technical error, standing alone, would have necessitated a new trial of the case, as contended by counsel for appellant, is a question which, under the circum-

stances, need not be decided. There are other grounds for remanding the cause, even though we should conclude that this particular error could be cured by simply ordering a proper amendment of the proceedings in the district court.

2. At the close of plaintiff's testimony the defendant moved for a nonsuit, on three grounds:

"1. Because there is no proof that this prosecution was instituted and carried on by the defendant.

"2. Because there is no proof that it was instituted without probable cause.

"3. Because there is no proof that it was instituted maliciously."

So far as the first ground is concerned, the court did not err in denying the motion.

We are willing to concede the first proposition of appellant's counsel, that a corporation can not be bound, even by the act of its board of directors, unless done in pursuance of some object embraced by its charter, or of some power conferred upon it by law. But we do not think that the prosecution of criminal offenders is always and necessarily outside of the objects and privileges of a railroad corporation. It is the object of such corporation to acquire property, and it is their privilege to protect it by every lawful means. It is not only a lawful, but a perfectly legitimate and even a commendable means of protecting private property, to institute criminal proceedings against those who infringe the right by criminal practices. And this is even more emphatically true of corporations than of natural persons. Their property is so vast, and their business so extended and complicated; they are so constantly and in so many directions exposed to the danger of loss by theft, robbery, and embezzlement, that they are compelled, by the same policy that induces penal legislation on the part of the state, to let it be known that they will prosecute vigorously and systematically all criminal acts by which they are directly injured. That they act in conformity with this policy, is notorious. They have not only their corps of legal advisers and their local attorneys, but they keep a force of detectives continually employed in ferreting out depredators

upon their rights, and assisting the public authorities in bringing them to justice. No law and no public policy restrains them in this respect, and to decide that they can never be held to a proper accountability for what they are constantly doing, would simply be to endow them with an additional and most invidious privilege.

Assuming, then, that a railroad corporation may, as such, institute a criminal prosecution against a servant who is suspected of embezzling its funds, and that it has a private and particular interest in making such prosecutions effective, the question arises as to the character of proof required to show *prima facie* that a particular prosecution has been instituted by its authority.

For this purpose we do not consider it necessary to produce a resolution of its board of directors. It is absurd to suppose that such a corporation will adopt a regulation requiring its directors to be convened every time a clerk is to be arrested for embezzlement, or a tramp for breaking into its cars. On the contrary, it is only reasonable to presume, in the absence of opposing proof, that its legal advisers, acting in conjunction with such of its servants and agents as have knowledge of the facts, will be authorized to institute the proper proceedings in such cases.

In this case the plaintiff was first arrested at the instance of defendant's general superintendent. The original complaint against him for embezzlement was drawn by its local attorney at Winnemucca and verified by its train-master. The president of the company was consulted and several other circumstances concurred to show that the prosecution was the act of the corporation.

But it is not on account of the first prosecution that this action is brought. Ricord was tried and acquitted on the first charge of embezzlement, and immediately afterwards arrested on a charge of grand larceny. The complaint in that case was drawn by the same attorney, and verified by the same train-master, who drew and verified the original complaint for embezzlement. The committing magistrate, after examining the witnesses, refused to hold plaintiff to bail, and he was released from custody. Immediately

thereafter the same charge of larceny was laid before another justice of the peace of the same county, who, after a hearing, committed the plaintiff for embezzlement. He was then brought before the district judge of Humboldt county on habeas corpus, and was remanded on a charge of obtaining money by false pretenses. He next sued out a writ of habeas corpus in this court, and after a hearing, was remanded on the warrant of the justice of the peace for embezzlement. (*Ex parte Ricord*, 11 Nev. 287.) Subsequently he was indicted for embezzlement, and pleaded former acquittal, which plea was found true by a jury impaneled to try the issue. He then commenced this action, alleging that the defendant maliciously, and without probable cause, procured his second and third arrest, and his second indictment for embezzlement, well knowing that he had been tried and acquitted of the charge.

The question was, therefore, not whether the defendant instituted the original prosecution, but whether it instigated the proceedings subsequent thereto.

The plaintiff's testimony on this point showed clearly that although the second complaint (the first for larceny) was drawn and verified by the attorney and train-master of the defendant, they were acting solely on the authority and in obedience to the wishes of the district attorney of Humboldt county. He had prosecuted Ricord under the indictment for embezzlement, and was satisfied that he was only acquitted because, under the law, as given to the jury in the charge of the court, he had been indicted for the wrong offense. Under the circumstances, he deemed it his duty to prosecute him for larceny, and the first complaint, in which that offense was charged, was drawn and verified at his request and without any reference to or consultation with any person having authority to act for the defendant. This was very clearly shown, and if the motion for a nonsuit had been made with reference to that part of the complaint, counting upon the first arrest for larceny, it should have been sustained on the ground that the defendant did not cause that arrest. But the motion was general, and comprehended all the causes of action set out in the complaint,

and there was testimony sufficient, in our opinion, to show *prima facie* that the defendant caused the third arrest and the second indictment.

It was shown that, after the discharge of the plaintiff on the first accusation of larceny, defendant's local attorney requested the district attorney to have him rearrested and taken before another magistrate; that the district attorney refused to do so; that defendant's attorney thereupon took one of its locomotives and went with its train-master and other of its servants to Golconda, in an adjoining township, where the second charge of larceny was laid before another justice of the peace, who issued a warrant for plaintiff's arrest, and afterwards committed him for embezzlement. In all these proceedings the track and trains of defendant were freely used, and there seems to have been a perfect understanding and active co-operation between its attorney and all its local agents and servants. Afterwards one of its general attorneys came from its principal office in San Francisco, and aided the prosecuting officers of this state in resisting the discharge of Ricord in the several habeas corpus proceedings instituted in his behalf. This general attorney was instructed by the head of defendant's "department of justice" to go to Winnemucca and to advise and co-operate with its local attorney, who had caused plaintiff's arrest. He, in obedience to these instructions, opposed the discharge of Ricord in the district court and in this court, and on his return to San Francisco charged the expenses of his trip to the defendant, and he testifies they were paid. In view of these facts, the court was right in refusing to nonsuit plaintiff on the first ground of the motion.

But the motion should have been sustained on the second and third grounds.

It devolved upon the plaintiff to show affirmatively that the prosecution was malicious, and without probable cause. If he had proved want of probable cause, that would have been *prima facie* sufficient to show malice also (though it would not have been a necessary presumption.) But his testimony, so far from showing want of probable cause, showed affirmatively that there was probable cause.

We have seen that the defendant was not responsible for the second arrest. If it had caused that arrest, plaintiff's discharge therefrom might have been some evidence of want of probable cause therefor; but it did not cause that arrest. It caused the third arrest, and supported its charge with evidence sufficient to procure his commitment and indictment for embezzlement, and this is *prima facie* evidence of the existence at that time of probable cause. The plaintiff, therefore, in opening his case, supplied affirmative evidence of a fact that he was bound to disprove, and he offered nothing to rebut this evidence. He did not prove or attempt to prove that the defendant's witnesses testified falsely before the committing magistrate or the grand jury, or that they suppressed any fact tending to exculpate him or entitle him to his discharge, nor did he show what their testimony was.

The particular fact that he was bound to prove, in view of the allegations of his complaint, and of his admissions on the trial, was, that defendant's agents knew that he had been acquitted of the identical charge upon which they caused his third arrest; and this he utterly failed to do.

He seems to have relied upon the finding of the jury, and the judgment of the court on his plea of former acquittal. But that judgment was not competent evidence against the defendant of the fact determined. It was *res inter alios acta*, and did not even prove that plaintiff had ever been acquitted of any charge, much less did it prove that defendant knew or ought to have known the facts upon which the verdict was based. It was competent evidence in this case for one purpose only, and that was to show that the prosecution for which defendant is sued, was at an end before this action was commenced. It devolved upon plaintiff to prove, by other and independent evidence, that he had in fact been acquitted of the charge upon which defendant caused him to be prosecuted, and that the defendant's agents knew the facts which established the identity of the offense. This he failed at all points to do.

In the first place, the indictment upon which he was first tried was so fatally defective that it would not have sup-

ported a judgment of conviction. It wholly failed to charge in any way that the money he was accused of embezzling had been intrusted to him by his employer. This is an essential element of the crime of embezzlement (Comp. L. 2380), and must be charged in some form to make a valid indictment. We held in *Ex parte Ricord*, 11 Nev. 287, that such an averment would be supported by proof that the money was collected by authority of the employer from third parties, but we did not hold that the allegation could be dispensed with. This indictment charges that Ricord was, at, etc., the hired clerk of the Central Pacific Railroad Company, and that then and there he was intrusted with money, the property of said company; but *non constat* that he may not have been intrusted with the money by third parties without any authority from his employer.

This being so, it follows that the plaintiff was not in legal jeopardy on his first trial, and that the verdict and judgment therein did not support his plea of former acquittal.

But, passing over this point, which is absolutely fatal to the plaintiff's case, the other testimony, as to the matters investigated on his first trial, tended only to show that the second indictment was for a distinct offense. It showed that the prosecution offered testimony tending to prove that the plaintiff had collected money from Levy & Co., on the fifth of June, and had never accounted for it; that an attempt was then made to prove the collection of money from N. Del Banco on the seventh of June, and that this testimony was excluded by the court on the objection of the defendant (plaintiff here), because it was proof of another and distinct offense. In other words, he proved, in relation to this matter, the identical state of facts upon which we held in *Ex parte Ricord* that there was probable cause for the second prosecution.

We held in that case, that if a clerk by authority of his master collects one bill and fraudulently converts the money, one offense is complete, and if he collects another bill after the first conversion and then fraudulently converts the proceeds, he is guilty of a second offense. Here the plaintiff collected money of Levy on the fifth of June and of Del

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Banco on the seventh. It was certainly possible that he might have committed two embezzlements, and the fact that the court held that the collection of the money from Levy and Del Banco could not be proved under the same indictment, and that the testimony in regard to the collection from Del Banco was excluded at the instance of this plaintiff, was of itself sufficient to justify the defendant in instituting another prosecution for the larceny or embezzlement of the Del Banco money. Of course, the objection of the plaintiff to Del Banco's testimony, and the ruling of the court thereon, do not prove the fact that there were two offenses, but the defendant is not bound to prove that there were in fact two distinct offenses. It is absolved unless the plaintiff proves that it had no good reason to suppose he had committed two offenses. He made no attempt to prove, and there is no pretense, that the defendant did not entertain a well-founded belief that he had embezzled one hundred and forty dollars, collected from Levy on June 5, and two hundred dollars and upwards collected of Del Banco on June 7. This being so, we repeat, the defendant was justified by his objection and the decision of the district court, in instituting another prosecution for the larceny or embezzlement of the Del Banco money. He not only admitted, but claimed, that it was a distinct offense from that for which he was then on trial, and a court of high and general jurisdiction, with full knowledge of all the facts then in possession of the defendant, so decided. It is settled law, that advice of counsel, after a full disclosure of the facts, justifies the institution of a criminal prosecution, and if the advice of counsel is a justification, *a fortiori*, the decision of the district court ought to be.

The fact that the first grand jury that investigated the charges against plaintiff found but one indictment against him, is no proof that he committed but one offense, and the fact that Del Banco, as well as Levy, testified before that grand jury, is no proof that their indictment was based upon the collection of the Del Banco rather than the Levy money. In short, the plaintiff introduced no testimony tending to prove that he had been acquitted of the charge upon which



his second indictment was based, and for this reason also the motion for a nonsuit should have been allowed.

3. The court erred again at the close of the trial, in not instructing the jury that there was probable cause for the prosecution. Not only had the plaintiff failed signally to show a want of probable cause, but the defendant had shown affirmatively (what it was not, under the circumstances, called upon to show), that it had acted throughout in perfect good faith under the advice of counsel, and the decision of the district court and this court, that there was good reason to charge a second offense.

4. It was error to exclude from the consideration of the jury, the proceedings in this court on plaintiff's application to be discharged upon habeas corpus. Our judgment in that case justified the defendant in procuring the second indictment, unless it knew some material fact tending to exonerate the plaintiff that was not disclosed on the hearing in this court. There was no testimony that it knew any such fact; on the contrary, the defendant offered to prove several facts not disclosed in *Ex parte Ricord*, the only tendency of which was to make its justification more complete.

5. The court erred in excluding evidence of facts within the knowledge of defendant at the time the second prosecution was instituted, which tended to show that plaintiff was actually guilty of embezzling the money collected from Lévy and Del Banco. Every time evidence of this character was offered it was met by the objection that the question of Ricord's actual guilt was not in issue. He admitted that defendant had good reason to believe that he had embezzled the money, and contended that the only question in the case was, whether he had been twice indicted for the same offense. It is true the defendant could in no event have been held bound to prove plaintiff's actual guilt. The most it could have been required to do was to prove that there were good grounds for believing him guilty of two offenses, but it was no ground of objection to testimony having this tendency, that it had a still stronger tendency. In cases of this character, testimony tending to show probable cause will often necessarily tend to prove that the plaintiff was

guilty of the offense of which he was acquitted, but there is no reason for rejecting it. Under one line of decisions, indeed, it would only be an additional reason for accepting it. But we waive that point.

If this plaintiff, upon another trial, succeeds in making out a *prima facie* case, the defendant will be entitled to prove every fact within the knowledge of its agents at Winnemucca, up to the time of the commencement of the second prosecution, which tends to show that he was guilty of embezzlement. To prove two offenses it must prove each, and to this end it may prove all about the circumstances of his leaving Winnemucca and his trip to Omaha, what money he had of his own, what money he spent before leaving, what expenses he incurred on the trip, what companions he took with him, what charges he made and omitted to make in the cash books of defendant, and generally everything that defendant could have proved against him on his trial, if it, instead of the state, had conducted the prosecution.

6. There were some instructions erroneously given and refused, but we need not notice them particularly. There will be no difficulty in any future trial of the case in conforming to the views above expressed.

The judgment and order appealed from are reversed, and the cause remanded.

LEONARD, J., having been of counsel for plaintiff at a former trial in the district court, did not participate in the foregoing decision.

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[No. 1021.]

THE STATE OF NEVADA, RESPONDENT, v. ON GEE HOW, APPELLANT.

**OPIUM ACT—SUFFICIENCY OF INDICTMENT—MODE OF USING OPIUM NOT ESSENTIAL.**—It is the intent to use opium that gives character to the act. The mode of using it "by smoking or otherwise" is unessential, and need not be stated in the indictment.

**IDEM.**—The indictment charged that the defendant "did unlawfully resort

## Argument for Respondent.

to a room, \* \* \* kept to be used by persons for the purpose of indulging in the use of opium, \* \* \* and then and there so kept by some person or persons to this grand jury unknown, for the purpose of indulging in the use of opium \* \* \* by smoking or otherwise: *Held*, that the words "for the purpose of indulging in the use of opium," as they occur in the latter part of the indictment, refer to defendant, and charge his purpose.

**IDEM—PLACE OF RESORT MUST BE STATED.**—An indictment under section 6 of the opium act, must charge the defendant with going to a house, room, or apartment kept "to be used as a place of resort" by some person or persons for the purpose of using opium. The omission of the words "as a place of resort:" *Held*, a fatal defect.

**APPEAL** from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

*W. J. Tuska, and Kirkpatrick & Stephens*, for Appellant:

I. An indictment upon the statute must state all the facts and circumstances which constitute the statutory offense, so as to bring the accused perfectly within the provisions of the statute. (*Wood v. People*, 53 N. Y. 511; *People v. Phipps*, 39 Cal. 326; *Chitty Cr. Law*, 280; 1 Bish, on Proc. 612, 613, 614, 616, 617; *Howel v. Commonwealth*, 5 Gratt. 664; *State v. McKenzie*, 42 Maine, 392; *State v. Gove and wife*, 34 N. H. 510; *State v. O'Bannon*, 1 Bailey, 144; *Morse v. State*, 6 Conn. 9; *State v. Morse*, 1 Greene, 503.)

II. The indictment must be direct and certain as to the offense charged, and the particular circumstances. (*People v. Saviers*, 14 Cal. 29; 1 *Chitty Cr. Law*, 169, 170, 171, 228, 229, 230, 236; *Biggs v. People*, 8 Barb. 547; *State v. Brannan*, 3 Nev. 238; *Murphy v. State*, 24 Miss. 590; *People v. Davis*, 4 Park. Cr. 61; *Valentine's case*, 4 City Hall Rec. 33, 36.)

III. The use of "or" in indictment, fatal. (*People v. Gilkinson*, 4 Park. Cr. 26; *People v. Tomlinson*, 35 Cal. 503; 1 *Bishop Cr. Pr.* 191, 234, 333, 334.)

*M. A. Murphy*, Attorney-General, for Respondent:

An indictment which adopts the words of the statute is well formed. (Stat. 1879, 121, 122.) The words "or otherwise," as used in this indictment, are surplusage, and

can be stricken out, and the indictment still be sufficient to charge the party with the crime. (*Rex v. Wardle*, 2 East's Pl. of the Cr. 784, 785; *Brown v. Commonwealth*, 8 Mass. 59; *State v. Gilbert*, 13 Vt. 647.)

By the Court, BEATTY, C. J.:

The appellant was convicted upon an indictment, the material portion of which reads as follows:

"That the said On Gee How, on or about the twentieth day of July, A. D. 1879, and before the finding of this indictment, at the county of Storey aforesaid, did unlawfully resort to a room or apartment kept to be used by persons for the purpose of indulging in the use of opium, or a preparation containing opium, by smoking or otherwise, said room or apartment being situated in the cellar or basement of the building at No. 4 (a) South H street, in the city of Virginia, county and state aforesaid, and then and there so kept by some person or persons to this grand jury unknown, for the purpose of indulging in the use of opium, or a preparation containing opium, by smoking or otherwise, contrary to the form," etc.

The defendant demurred to this indictment, and moved in arrest of judgment upon various grounds, which were overruled by the district court; and now, on appeal from the judgment, he relies on the following points:

"(a) That the words 'place of resort' are omitted in the description of the premises referred to in the indictment.

"(b) That the words 'by smoking or otherwise' being in disjunctive, are fatal.

"(c) That no purpose or intent on the part of the defendant is alleged in the indictment."

The second and third of these points (b and c) we think are unfounded. The words "by smoking or otherwise" are wholly unessential and may be rejected as surplusage. It is the intent to use opium that gives character to the act. The mode of using it is entirely indifferent and need not be changed.

The purpose of the defendant is charged by the words "for the purpose of indulging in the use of opium," where

they occur for the second time in the indictment. Where they first occur they describe the purpose for which the place was kept. But we think the district court erred in not sustaining the demurrer on the first ground (a).

The only object of the law upon which the prosecution rests (Stat. 1879, 121) is the suppression of the places commonly known as opium dens (*State v. Ah Sam*, decided at January term). To this end it imposes a penalty (Sec. 6) upon the patrons and supporters as well as upon the keepers of such places. To smoke, or otherwise use opium in places other than those described in the statute, or to go to other places with intent to use it is no crime, and therefore it is essential that an indictment under section 6 of the act should charge the defendant with going to the sort of place defined by the statute; that is to say, to a house, room, or apartment kept "to be used as a place of resort" by some person or persons for the purpose of using opium.

This indictment omits the words "*as a place of resort*," and the omission is sought to be justified upon the ground that those words would have added nothing to the meaning of the language used.

We think, however, that this argument is based upon an erroneous construction of the statute. A house or apartment kept as a *place of resort* is a place for the entertainment of persons other than the inhabitants or occupants of the premises, and it was only such places that the legislature had in view. But the place described in this indictment may, for aught that is alleged, have been kept for the exclusive use of the persons residing therein. This, in our opinion, was a fatal defect.

The judgment is reversed, and the cause remanded. The district court will, if it see proper, submit the charge to another grand jury.

## Argument for Appellant.

[No. 1023.]

THE STATE OF NEVADA, RESPONDENT, *v.* WILLIAM PEARCE, APPELLANT.

**GOOD CHARACTER OF DEFENDANT—HOW PROVEN.**—When a witness is called to prove the good character of the defendant, his testimony must be confined to the reputation which defendant sustains in the community as to the particular trait of character at issue.

**CHARACTER OF DECEASED IN CASES OF HOMICIDE—WHEN IN ISSUE.**—The character of the deceased can only be brought in issue where the circumstances are such as to raise a doubt whether the homicide was committed in malice or was prompted by the instinct of self-preservation; *Held*, upon a review of the facts, that no evidence as to the character of the deceased would have justified defendant's action, or had any tendency to reduce the offense.

**ARGUMENT OF COUNSEL—ORDER OF.**—At the close of the testimony defendant offered to submit the case without argument; the prosecution objected, and the attorney-general opened the case. The defendant's attorney then moved to submit the case. The court denied the motion. Defendant's attorney then moved the court to require the other attorney for the state to argue the case before he made his argument. The court denied the motion. Thereupon defendant's attorney argued the case, and T. H. Wells, attorney for the state, closed the argument: *Held*, that no error occurred prejudicial to defendant.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

N. Soderberg, for Appellant:

I. The district court erred in excluding the evidence offered on behalf of defendant touching his general disposition and character for peace and quietness. Such evidence is relevant and important in all criminal cases. It was admissible in *favorem vitæ*, as reflecting upon the probability or improbability of the evidence adduced against him, and also upon the truth or falsity of his defense. (1 Taylor on Ev., sec. 325; *Reg. v. Rowton*, 1 Whart., Cr. L., sec. 686.)

Defendant was not limited to proving what people may have said of him; but was entitled to show his character from parties with whom he was acquainted. (*Gandolfo v. State*, 11 Ohio St. 114; *State v. Lee*, 22 Minn. 407; 1 Phill., on Ev. 177.)

## Argument for Respondent.

The testimony is to go to the jury and be considered by them in connection with all the other facts and circumstances; and if they believe the accused to be guilty, they must so find, notwithstanding his good character. (*Harrington v. State*, 19 Ohio St. 264, 269; *People v. Ashe*, 44 Cal. 288; *Lee v. State*, 2 Tex. Ct. App. (1877), 388; *Slover v. People*, 56 N. Y. 315; *Kistler v. State*, 54 Ind. 400; *Carson v. State*, 50 Ala. 134; *Roscoe's Cr. Law*, 4th Am. ed. 96, 97; *Cancemi v. People*, 16 N. Y. 501; *State v. Henry*, 5 Jones (N. C.), 66.)

II. The court erred in excluding defendant's proffered evidence as to the character of deceased for violence. The evidence of Halsey's character was material and proper to explain the situation of the parties, and their acts and deeds at the time of the difficulty. It was part of the *res gestae*. (*Monroe v. State*, 5 Ga. 85; *Queensbury v. State*, 3 Stew. & Port. 308; *Keener v. State*, 18 Ga. 194; *Franklin v. State*, 29 Ala. 14; *Dukes v. State*, 11 Ind. 557; *State v. Hicks*, 27 Mo. 588; *Payne v. Commonwealth*, 1 Metc. (Ky.) 370; *State v. Matthews*, 78 N. C. 523.)

III. The court erred in its rulings relative to the manner of the argument to the jury. (Stat. 1861, 472, sec. 355; *State v. Smith*, 10 Nev. 106.)

M. A. Murphy, Attorney-General, for Respondent:

I. Evidence of good character must be restricted to the traits of character in issue, and should be confined to a reasonable period of time before the commission of the offense for which the party is on trial. (3 Greenl. Ev., secs. 25, 26.) A witness who is called to testify as to a defendant's character can not give the results of his own experience or observation. Nor can he express his own opinion, but must confine himself to general reputation. (1 Whart. Ev., secs. 49, 563; 1 Whart. Cr. Law 636; Fisher's Dig. Cr. Law, 573; *Regina v. Rowton*, 2 L. & C. Cr. Cases, 520.)

II. There was no error committed by the court in refusing to hear evidence as to the character of the deceased, because it was no part of the *res gestae*. (*Commonwealth v. Hilbard*, 2 Gray, 294; *Commonwealth v. Mead*, 12 Id. 167; *Wise*

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v. *State*, 2 Kans. 419; *State v. Tilly*, 3 Ired. L. 424; 1 vol. Whart. Cr. Law, sec. 641; 3 Greenl. on Ev., sec. 27; Heard Lead. Cr. Cas., 2 vol., 355.)

By the Court, HAWLEY, J.:

The defendant, Pearce, was convicted of murder in the second degree, for the killing of Samuel Halsey, at Sweetwater, in Esmeralda county, on the twenty-fourth of November, 1878, and sentenced to the state prison for a term of twenty years.

We are of opinion that the errors assigned, upon which appellant seeks a reversal, are untenable.

1. The court did not err in excluding the questions asked of the witnesses, Curran and Wilson, as to their individual knowledge of the good character and disposition of the defendant for peace and quietness. There was no offer made to prove defendant's general character in this respect.

The rule of law, applicable to this case, requires that when a witness is called upon to prove the good character of the defendant, his testimony should be confined to the reputation which defendant sustains in the community as to the particular trait of character at issue. Evidence of defendant's character means evidence of his general reputation. This inquiry is usually made for the purpose of ascertaining the tendency and disposition of the defendant's mind with reference to the probabilities of his committing, or abstaining from committing, the crime charged against him. The proper way of getting at this disposition of his mind is by introducing evidence of his general character, founded on his general reputation in the neighborhood where he lives. Witnesses who are acquainted with this reputation are permitted to give negative testimony to the effect that they have never heard defendant's character called in question; because, as has been frequently said, the mere fact that no unfavorable comments were ever made against him in the community where he resides and is well known, would authorize a witness to say that his general character was good. Some judges have expressed the opinion that "the best character is that which is the least talked of." But



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witnesses are not, as a general rule, authorized to give the results of their own personal experience and observation, formed from sources not common to the acquaintances of the defendant, and having no reference to his general character in the community.

Taylor, in his work on evidence, says: "The inquiry must be confined to the general character of the prisoner, and must not condescend to particular facts; for, although the common reputation in which a person is held in society may be undeserved, and the evidence in support of it must, from its very nature, be indefinite, some inference, varying in degree according to circumstances, may still fairly be drawn from it; since it is not probable that a man who has uniformly sustained a character for honesty or humanity will forfeit that character by the commission of a dishonest or cruel act. But the mere proof of isolated facts can afford no such presumption. 'None are all evil,' and the most consummate villain may be able to prove that on some occasions he has acted with humanity, fairness, or honor." (1 Taylor on Ev., sec. 326.)

2. The form of the question asked by defendant's counsel relative to the character of the deceased, whether "he was a man of peaceable and quiet disposition of mind, or whether he was a quarrelsome, violent, or dangerous man," was, perhaps, subject to the same objection. It would have permitted the witness to answer as to isolated facts, instead of being confined to his character as known to the defendant, or to the community at large. We are, however, satisfied, that no testimony had been given in the case which authorized the introduction of any evidence in relation to the character of the deceased. The character of the deceased can only be brought in issue where the circumstances are such as to raise a doubt whether the homicide was committed in malice or was prompted by the instinct of self-preservation. It may, in such cases, always be inquired into, by the defendant, for the purpose of enabling the jury to determine the real motive which actuated the defendant, or the reasonableness of his fears that his own life was in danger. Every case must, in this respect, be gauged with

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reference to its own surroundings; for, as is stated by Bishop: "There can be no general rule on the subject other than the one which rejects the evidence of character and of general bad conduct, except where the foundation for it is specially laid in the facts, real or assumed, of the particular case \* \* \* A single incident of apparently trivial import might render this evidence properly admissible in the particular instance, while, in other circumstances, many such incidents might, together, fail to work out the like result. In this nature of things, the evidence must fit the individual case, as the garments fit the individual back." (2 Bish. Cr. Pr., sec. 629.)

All the circumstances, testified to by the respective witnesses, clearly show that defendant had no ground whatever upon which to base any reasonable belief that he was in any danger of his life, or of receiving any bodily harm, and that he did not act under any such belief.

The homicide occurred at a public house, and was witnessed by half a dozen or more persons. The deceased had been drinking freely and was somewhat out of humor. He and others were in the bar-room, and had been playing games of dice for money. The defendant was winning, and the deceased was losing at the game. Deceased accused defendant of charging him with stealing twenty-five cents, which defendant denied. Opprobrious epithets were used by deceased. He refused to drink with defendant, and during the controversy about the money slapped him in the face. Defendant threw a tumbler, which hit deceased in the face. Deceased then, in the language of one of the witnesses, "walked rather slowly and retreated toward the front door," and went out of the house, remarking to defendant, "I won't fight you in your own house; but come outside and I'll fight you." The defendant—then behind the counter at the bar—took his pistol in his hand and started towards the front door. Lusignau, one of the persons present in the room caught hold of him, when he was two or three feet from the door, and tried to prevent him from shooting. Two shots were fired by him at the deceased. The witnesses vary in their testimony, as to the interval between the shots,

from two seconds to five minutes. When the first shot was fired the deceased was outside of the house, and distant fifteen or twenty feet from the front door, and walking towards it. Defendant was still held by Lusignau inside of the house, three feet from the front door. This shot went through the door and struck a triangle near the house. Defendant then released himself from Lusignau, still remaining at the same place, and as stated by one of the witnesses, "he rested the pistol on his left arm, and fired with the right hand," and aimed, as testified to by all the witnesses, except the defendant, deliberately at the deceased, remarking, "I'll shoot him," and "Oh, no, I won't shoot!"

At the time of the second shot the deceased was coming towards the front door, and was "so near the door-jamb that when the shot was fired he eased himself in the door and fell." The deceased had not exhibited any weapon before or at the time of the difficulty, and none was found upon his person.

It is true that the defendant, testifying in his own behalf, stated that he knew deceased had carried a sheath-knife, and that at the time of the shooting he was afraid that deceased would cut him with a knife.

If he had stopped with this declaration, it might be admitted that there would have been some evidence in the case tending to show that the question of deceased's character for violence was material, in order to explain the action of defendant; but he did not pretend that he fired the shots because he believed that he was in danger. On the contrary, he expressly declares that the shots were fired accidentally. "I can say positively that both shots were not done intentionally by me. Nary shot, sir!"

It is apparent, from this statement of the facts, that no evidence as to the character of the deceased, whether good or bad, would have justified (or explained) defendant's action, or had any tendency to reduce the offense.

3. The record shows that at the close of the testimony defendant's counsel proposed to submit the case to the jury without argument. The prosecution objected, and the attorney-general opened the case for the state. At the close

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Opinion of Beatty, C. J., concurring.

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of this argument, "N. Soderberg, Esq., the only attorney for the defendant, \* \* \* moved the court to submit said cause upon the testimony, the argument for the prosecution already made, and instructions to the jury. The court denied the motion, and defendant's counsel excepted. Thereupon defendant's counsel moved the court to require Thomas H. Wells, the other attorney for the prosecution, to proceed to argue the cause to the jury \* \* \* before any argument made by counsel for defendant, with the understanding that either one of the attorneys for the state might make the closing argument to the jury. The court denied the motion, \* \* \* to which ruling defendant duly excepted. Thereupon said counsel for defendant argued the case on the part of the defendant, and was followed by Thomas H. Wells, Esq., who made the closing argument to the jury."

There was no error prejudicial to defendant in these rulings of the court. (*State v. Pearce*, 8 Nev. 296; *State v. Stewart*, 9 Id. 121; *State v. Smith*, 10 Id. 106.)

The judgment of the district court is affirmed.

BEATTY, C. J., concurring:

In ruling upon the offer of defendant's counsel to submit the cause to the jury upon the evidence, the opening argument of the attorney-general, and the instructions to be given to the jury, and in holding that unless counsel for defendant addressed the jury before a further argument on the part of the state, he could not address them at all, the district court violated the rule laid down in *State v. Smith* 10 Nev. 113, and if the error in these rulings had been taken advantage of in a proper manner, it would, in my opinion, have necessitated a reversal of the case. Counsel for defendant, if he thought the case was unfairly or insufficiently opened by the attorney-general, should have insisted on his offer to submit it without argument on his part, and should have positively declined to make an argument until after the argument of the other attorney for the state. Then, if he had demanded the privilege of a reply, and had been refused, the action of the court would have entitled him to a

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reversal of the judgment. But, instead of pursuing this course, he replied to the attorney-general, and this entitled the state to a closing argument.

For this reason, and for the reasons stated by Justice Hawley in discussing the other assignments of error, I concur in the order of affirmance.

LEONARD, J., concurring: I concur.

[No. 955.]

WILLIAM THOMPSON, APPELLANT, v. C. C. POWNING, RESPONDENT.

**LIBEL.—PROPRIETORS OF NEWSPAPERS.—PROCEEDINGS IN COURT.—PRIVILEGED COMMUNICATIONS.**—The public have a right to know what takes place in a court of justice, and unless the proceedings are of an immoral, blasphemous, or indecent character, or accompanied with defamatory observations or comments, the publication is privileged: *Held*, that the court did not err in refusing to allow plaintiff to introduce a copy of his complaint as published in defendant's newspaper.

**IDEM.—SUBSEQUENT PUBLICATIONS.**—The defendant published in his newspaper this article: "The Reno correspondent of the Truckee Republican has the following concerning our libel suit: 'The opinion is prevalent that it is a clear case of bulldozing and an underhand scheme concocted by Powning's enemies to ruin him financially.'" *Held*, that it was properly excluded as evidence; that it did not come within the rule which permits subsequent publications to be introduced in evidence for the purpose of showing malice. (Beatty, C. J., dissenting.)

**IDEM.—PLEADINGS.—ITEMS OF NEWS.—WHEN NO JUSTIFICATION.**—Proprietors of newspapers are not entitled, under the law, to claim any justification in publishing items of news or detailing occurring events that are libelous in their character.

**IDEM.—IGNORANCE OF PROPRIETORS NO EXCUSE.**—Newspaper proprietors are not to be released from any liability on account of any ignorance, inadvertence, or thoughtlessness on their part, nor for matter published without their knowledge or authority.

**IDEM.—RIGHTS AND PRIVILEGES OF NEWSPAPER PROPRIETORS.—SAME AS INDIVIDUALS.**—Proprietors of newspapers are liable for what they publish in the same manner as other individuals, and are subject to the same rules, rights, and privileges.

**IDEM.—PLEADINGS.—EVIDENCE.—INTENT AND MOTIVE OF DEFENDANT.—EXEMPLARY DAMAGES.**—Defendant, in his answer, admitted the publication of the alleged libelous article; but averred that he was not guilty of any malice, or wrongful misconduct: *Held*, that under the pleadings he had the right to show the circumstances under which the publication

## Points decided.

was made, and to introduce any evidence which tended to throw any light upon his intent and motive, not in mitigation of the actual damages sustained by plaintiff, but as tending to repel malice and to mitigate exemplary damages.

**ACTION FOR LIBEL.—WHAT MUST BE SHOWN.**—In order to maintain this species of action, it is necessary that there should be malice in the defendant and an injury to the plaintiff, and that the words of the article should be untrue.

**IDEM.—PRESUMPTION OF MALICE.**—The law always presumes that in the publication of an article which is libelous upon its face, it was published with malicious intent.

**IDEM.—ACTUAL DAMAGES—PECUNIARY LOSS.**—*Held*, that under the findings of the jury, the plaintiff was entitled to actual damages, that is, compensation for the injury he had received by reason of the libelous publication, to which might be added any pecuniary loss, if any, sustained by him, independent of the motive or intent with which the publication was made.

**IDEM.—EXPENSES AND COSTS.**—*Held*, that the plaintiff, in actions of this kind, is not always entitled to recover the expenses and costs that may have been incurred by the prosecution of his suit from the simple fact that he is entitled to a verdict in his favor.

**IDEM.—NOMINAL DAMAGES.**—Where there is no ill-will or malice on the part of the defendant, no special damages actual injury, or pecuniary loss, alleged or proven, the jury may find a verdict for only nominal damages.

**INSTRUCTIONS CALCULATED TO MISLEAD SHOULD BE REFUSED.**—An instruction which is calculated to mislead the jury should be refused.

**IDEM.—NEED NOT BE REPEATED.**—The action of the court in refusing certain instructions sustained, upon the ground that the principles embodied therein were given, in substance, in other instructions.

**WHETHER ARTICLE IS LIBELOUS, WHEN A QUESTION OF FACT.**—When the language of the article complained of is susceptible of different constructions, it should be submitted to the jury as a question of fact, whether it was libelous or not.

**INSTRUCTION THAT PUBLICATION WAS NOT PRIVILEGED, ERRONEOUSLY REFUSED.**—The court refused to instruct the jury that "In this case the defendant does not plead nor rely on the truth of the matter complained of, and I charge you, as a matter of law, that the publication complained of is not privileged, therefore there is no legal excuse or defense set up by the defendant." *Held*, error.

**INSTRUCTIONS FOREIGN TO THE ISSUES SHOULD BE REFUSED.**—Where the question, whether the alleged libelous article was or was not privileged, was foreign to the issues raised by the pleadings and proofs: *Held*, that the instructions given upon this point, although containing abstract principles of law that might be correct in certain cases, were not applicable to the facts of this case, were calculated to mislead the jury, and ought to have been refused.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

C. S. Varian, for Appellant:

I. For the publication of a defamatory libel the law gives an action and permits but two defenses: the truth of the libel, and that it was privileged. For the purpose of maintaining the action in the absence of legal excuse, the law infers malice, and only allows proof or pleading relative to actual malice, or bad intent, in mitigation of primitive as distinguished from compensatory damages. (*Bush v. Prosser*, 11 N. Y. 356; *Wilson v. Noonan*, 35 Wis. 321.)

II. Whatever is relied upon as a defense must be pleaded. (Civ. Pr. Act, sec. 63; *Bush v. Prosser*, 11 N. Y. 349; *Bennett v. Matthews*, 64 Barb. 410; *Wilson v. Fitch*, 41 Cal. 363.)

III. It is no circumstance in mitigation that the libel was committed by a correspondent. (*Talbutt v. Clark*, 2 M. & Rob. 312; *Sanford v. Bennett*, 24 N. Y. 20; Townshend Slander and Libel, sec. 211, n. 3; *State v. Butman*, 15 La. Ann. 166.) Nor is it any answer, even in mitigation, to say the libel was published as a matter of news. (Townshend on Libel, 439, sec. 252; *Sheckell v. Jackson*, 10 Cush. 25; *Davison v. Duncan*, 7 Ell. & B. 231.)

IV. When a publication of a defamatory libel appears, and no legal excuse is claimed or shown, evidence in mitigation is confined to rebuttal of express malice, and consequently in such case the inquiry is necessarily directed only to the motive or intent of the defendant.

V. Repetition of the defamatory matter is admissible for the purpose of showing malice. (Townsh. secs. 392-394; *Fry v. Bennett*, 28 N. Y. 328; Whart. Ev., vol. 1, sec. 25; *Van Derveer v. Sutphin*, 5 Ohio St. 293.)

VI. The publication of plaintiff's complaint was not privileged. (*Stiles v. Nokes*, 7 East, 493; *Hoare v. Silverlock*, 9 C. B. 20; *Rex v. Carlile*, 3 B. & Ald. 167; *Ryalls v. Leader*, 1 Law Rep. (x.) 298; 1 Stark. on Slander, 263; *Stanley v. Webb*, 4 Sand. 21; *Clement v. Lewis*, 3 Brod. & Bing. 297.)

VII. The testimony of the defendant as to the circumstances under which the libelous article was published, was improper, and ought to have been rejected, because not

## Argument for Respondent.

pleaded. (Civ. Pr. Act. sec. 63; *Wilson v. Fitch*, 41 Cal. 380.) It was also error to allow defendant to testify that he did not intend to injure plaintiff. (*Wilson v. Noonan*, 35 Wis. 323; 10 B. & C. 472; 3 Id. 584; 10 Eng. C. L. R. 79.) The evidence was insufficient to justify the special finding against malice.

VIII. It was the duty of the court to declare the article libelous. (*Lewis v. Chapman*, 16 N. Y. 371; *Pittock v. O'Neill*, 63 Pa. St. 253; S. C., 3 Am. Rep. 546; *Snyder v. Andrews*, 6 Barb. 43; *Sanderson v. Caldwell*, 45 N. Y. 401.) The facts being uncontroverted, it is a matter of law whether a publication is privileged. Towns. sec. 288, p. 484; *Darby v. Ousely*, 1 Hurl. & N. 1; *Wenman v. Ash*, 13 C. B. 836; *Wilson v. Noonan*, 23 Wis. 106.)

*R. M. Clarke*, also for Appellant.

*Lewis & Deal*, for Respondent:

I. The verdict is sustained by the evidence. Malice is an essential element to sustain the action of libel. (*Bush v. Prosser*, 11 N. Y. 357; *Lewis v. Chapman*, 16 Id. 372; *Maitland v. Goldney*, 2 East, 426; *Commonwealth v. Clapp*, 4 Mass. 163; 15 Pick. 339; Towns. on Slander, 136.)

II. The mitigating circumstances offered by plaintiff were properly admitted as tending to repel malice, and in mitigation of damages. (Sedg. on Dam. 686; *Reed v. Bias*, 8 Watts & Sarg. 189; *Gray v. Waterman*, 40 Ills. 522; *Reeder v. Purdy*, 41 Id. 279; Towns. on Libel, 414; *Wilson v. Noonan*, 35 Wis. 322; *State v. Harrington*, 12 Nev. 125; 53 Ind. 420.)

III. The jury found there was no malice, and as no actual damage was shown, the verdict for one dollar was in strict accordance with the decided cases. (Towns. 289, note 3; *Folkard's Stark*. 391, 647.)

IV. There was no showing that plaintiff had expended any costs in vindicating his character, nor was there any claim made by the plaintiff that he was entitled to the recovery of any such costs. But in any event the jury had no right to take that matter into consideration in making



up the verdict. (Towns. on slander, 289, and note 2,535; *Hicks v. Foster*, 13 Barb. 663; Folkard's Stark. on Slander, 739.)

V. The court did not err in excluding the published complaint. It was a matter occurring after suit brought. (*Keenholts v. Becker*, 3 Denio, 346; *Frazier v. McClosky*, 60 N. Y. 337; Towns. on Slander, 395, and note.) The publication was privileged, and therefore not admissible for any purpose. (Towns. 229, and note, 399.)

VI. Independent words or libels, which may themselves be the foundation of an action, can not be admitted even for the purpose of establishing malice. (*Howard v. Sexton*, 4 N. Y. 157; *Root v. Lowndes*, 6 Hill (N. Y.), 518; *De Fries v. Davis*, 7 C. & P. 112; *Frazier v. McClosky*, 60 N. Y. 337.)

VII. The court properly submitted the question of fact, whether the article complained of was libelous or not, to the jury. (Towns. on Slander, 281.) The instructions given by the court were correct. The exception to the charge of the court, not being specific, can not be considered by this court. When the charge contains several propositions, and an exception is taken to the charge generally, if either proposition be sound, the exception will be unavailing. (*Kluender v. Lynch*, 4 Keyes, 361; 3 Wait's Practice, 205.)

Wm. Cain, also for Respondent.

By the Court, HAWLEY, J.:

This is an action of libel brought by plaintiff to recover ten thousand dollars damage claimed to have been sustained by him on account of the alleged malicious publication by defendant, in the Reno State Journal, of an article headed "Carson Correspondence." The portion of the article complained of reads as follows:

"The town talk is the tongue-lashing of Deacon Parkinson on Washoe's ex-senator Thompson. The reverend gentleman denounces him as a scoundrel and other choice epithets, and even insinuated that the ex-senator had sold potatoes and the sacks contained bullion from Dall's mill, many years since; that the ex-senator, for a consideration,

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voted against his own resolution on fares and freights four years since, and many other sweet reflections on the gentleman."

The answer admits the publication of the article; denies "that the same was either slanderous, malicious, or defamatory;" alleges that "defendant is not guilty of the malice and wrongful misconduct" laid to his charge; denies "that the plaintiff was greatly, or at all, injured in his good name or fame, or been brought into public scandal, infamy, or disgrace, or that he has suffered any damages whatever by reason thereof;" alleges that the matters therein set forth "were reported to him as having actually taken place," and were published "as a matter of public news and occurring events, and not from any motive of malice towards plaintiff."

The jury found a special verdict that the defendant was not actuated by any malice towards the plaintiff in the publication of the alleged libel, and a general verdict in favor of plaintiff for one dollar damages.

This appeal is taken by plaintiff from the judgment and from the order of the court denying his motion for a new trial.

The plaintiff, to make out his case, offered in evidence the full text of the publication as it appeared in defendant's newspaper; also, an editorial, which appeared after the commencement of this suit, headed, "The Journal Libel Suit," which reads as follows:

"We have something on hand for which we did not bargain. It is a libel suit in which the plaintiff claims ten thousand dollars damages. Had a thunderbolt fallen from heaven and struck us, we could not have been more surprised than when Sheriff Lamb served us with a copy of the summons and complaint in an action against us for libel commenced by Hon. William Thompson. We publish in another column the full text of the complaint for the information of the public. We herewith reprint the 'false, libelous, defamatory matter' complained of."

(Here follows the portion of the article alluded to:)

"The above appeared in the Journal and was a portion of a letter headed, 'Carson Correspondence,' and was pub-

lished simply as a matter of gossip. Of its truth or falsity we know nothing; but to the best of our information and belief there is nothing in it. It crept into the paper under these circumstances, we attaching no particular importance to it. We have no disposition to libel any man, and certainly we know nothing of Mr. Thompson's character that would cause us to willfully and maliciously attempt to injure him in the estimation of the public. If Mr. Thompson had any idea that the paragraph in question had any tendency to do him any injury whatever, a simple request from him would have secured from us the publication of any explanation he could have wished to make in regard to the matter. It is safe to say that any man who read the paragraph never paid any more attention to it."

Plaintiff then offered to introduce and read in evidence a copy of the complaint and head notes, as published in defendant's paper, for the purpose of showing a repetition of the libelous matter; to show actual malice and to aggravate the damages.

The head notes were: "Ten Thousand Dollars." "The Journal's First Libel Suit." "Hon. William Thompson the Plaintiff." "Full Text of the Complaint." Then follows a copy of the complaint. The court refused to admit this testimony.

The plaintiff then introduced and read in evidence all the article taken from the Truckee Republican, as published in defendant's paper, except the sentence we have italicized, which was excluded by the court.

The article and heading thereto reads as follows:

"THAT LIBEL SUIT.

"The Reno correspondent of the Truckee Republican has the following concerning our libel suit:

"*The opinion is prevalent that it is a clear case of bulldozing, and an underhanded scheme concocted by Powning's enemies to ruin him financially.*

"The article is nothing but a vague rumor, and was written by the Carson correspondent as a piece of gossip at the capital, with no intention to slander anyone. The honorable gentleman estimates his grievance, loss of character,

and other injuries sustained from the publication of the article, at ten thousand dollars. (Outsiders think it worth about fifteen cents.) The complaint, which was published, is more damaging to Thompson's integrity than the original article. Of course he thinks he is the most abused man in the county, and nothing but a trial, and him paying the costs of suit, will satisfy him.' "

The defendant was allowed to testify, in his own behalf, that his relations with the plaintiff were pleasant; that they belonged to the same political party; that he had supported plaintiff as a candidate for public office; that he had no ill-will or malice against the plaintiff, and that he did not intend to injure him by the publication. His reason for publishing the article from the Truckee Republican was simply to show a ratification of the public sentiment, and to defend the reputation of his own paper. His testimony as to the surrounding circumstances attending the publication of the alleged libelous article, was substantially to the same effect as the editorial concerning the suit. It was published inadvertently as a matter of gossip, without his knowing, or inquiring, whether it was true or false. It was considered as a sort of joke that nobody would pay any attention to, etc.

These facts, in connection with the action of the court in giving and refusing certain instructions, substantially present all the circumstances attending the trial of this case necessary to be considered in deciding the various legal points that have been elaborately and ably discussed by the respective counsel. Before entering into any discussion of the specific rulings of the court, it is proper to state that there is some diversity of opinion to be found in the decided cases, upon the important questions involved in this appeal. It is often difficult, if not impossible, to lay down a general rule that would be applicable to all cases upon this subject.

We shall therefore endeavor, in deciding the various and vexed questions, to declare the rule which, in our opinion, is applicable to the facts of this case, is based upon substantial reason, and best calculated to promote the ends of justice, without any special reference to the conflicting au-

thorities; for it may be, as was said by the supreme court of Michigan, that "the attempt to trace the line of mere authority through the maze of hostile decisions, would be calculated only to confuse and lead the mind astray from the real principles of justice involved in it, and could serve no useful end." (*Hudson v. Dale*, 19 Mich. 28.)

1. Did the court err in refusing to allow plaintiff to introduce in evidence the publication of the copy of plaintiff's complaint? We think not.

A fair and impartial account of the proceedings in a court of justice is, as a general rule, a justifiable publication. Proprietors of newspapers are not to be punished for publishing a fair, full, and true report of judicial proceedings, except upon actual proof of malice in making the report. The reason for this rule is, that the public have a right to know what takes place in a court of justice, and unless the proceedings are of an immoral, blasphemous, or indecent character, or accompanied with defamatory observations or comments, the publication is privileged. (*Ryalls v. Leader*, 1 Ex. L. R. 298; *Wason v. Walter*, 4 L. R. Q. B. 82; *Davison v. Duncan*, 7 E. & B. 231; *Forbes v. Johnson*, 11 B. Mon. 48; *Saunders v. Baxter*, 6 Heisk. 382; *Stanley v. Webb*, 4 Sandf. 26; *Ackerman v. Jones*, 37 N. Y. 54; *Johnson v. Brown*, 13 West Va. 112, 131; *Cooley's Const. Lim.* 448; *Townshend on Slander and Libel*, secs. 221, 229.)

Preliminary proceedings which are purely *ex parte* in their nature do not come within this rule, because they have a tendency to prejudice those whom the law still presumes to be innocent, and to poison the source of justice. (*Gazette Company v. Timberlake*, 10 Ohio St. 548; *Kelley v. Lafitte*, 28 La. An. 435; *Cooley on Torts*, 210, and authorities there cited.)

Without further specification it is enough to say that the facts of this case do not bring it within any of the recognized exceptions to the general rule.

The head notes contain no words that could, by any sort of construction, be deemed malicious, or defamatory. It is apparent that the plaintiff was not injured by their rejection.

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2. Did the court err in excluding any part of the article copied from the Truckee Republican?

The words excluded do not in our opinion, come within the rule which permits subsequent publications to be introduced in evidence for the purpose of showing malice, as announced in *Townshend on Libel*, sec. 394, cited by appellant's counsel. The language did not tend to explain any ambiguity in the matter declared upon. It was not of like import; nor did it tend to indicate the motive, temper, or disposition of the defendant in publishing the article complained of. It contained a charge of an entirely different nature. It was not admissible for the purpose of proving malice, or for any other purpose. (*Howard v. Sexton*, 4 N. Y. 159; *Townshend on Libel*, sec. 392.)

3. Did the court err in admitting defendant's testimony, under the pleadings?

Is the verdict of the jury sustained by the evidence?

These questions present the most important points argued by counsel, and are so intimately blended as to be properly considered together. Our statute provides that, in an action for libel or slander, "the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages, and, whether he prove the justification or not, he may give in evidence the mitigating circumstances." (Civ. Pr. Act, sec. 63.)

As the answer of the defendant did not put in issue the question, whether the article was true, or whether it was privileged, appellant claims that all the testimony offered by defendant, tending to rebut the presumption of malice, and to mitigate the damages, was improperly admitted.

Under the rule which prevailed in many of the states prior to the adoption of statutes similar to ours, it was held that no evidence in mitigation of damages could be given when a justification was pleaded. Proof tending to establish the truth of the libel was admissible under a plea of justification; but if the proof fell short of a complete justification, it could not be received in mitigation of damages. The plea of justification, if not proven, was considered an

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aggravation of damages. It was deemed conclusive evidence of malice, and the defendant was precluded from proving that the publication was made in the honest belief that it was true, and without any malice. It was also held in some of the states following, or pretending to follow, the rule announced in *Underwood v. Parks*, 2 Strange, 1200, that if the defendant did not plead the truth of the libel as a defense, he could not, under the general issue, prove the words to be true in mitigation of damages.

To avoid the injustice and obviate the hardships arising under these rules, as applied in many cases, the legislature in several states, enacted a law similar to the statute under consideration, so as to enable the defendant not only to show, if he could, the truth of the article published in justification and defense of the action, but if his testimony did not march up to the full proof of a complete justification, he might give in evidence the mitigating circumstances which tended to rebut the presumption of malice. (*Van Derveer v. Sutphin*, 5 Ohio St. 298; *Huson v. Dale*, 19 Mich. 29; *Bush v. Prosser*, 11 N. Y. 347; *Kennedy v. Holborn*, 16 Wis. 458; *Wilson v. Noonan*, 35 Id. 321; *Wilson v. Fitch*, 41 Cal. 364.)

Since the adoption of the code, the courts have generally held that the defendant may prove, in mitigation of damages, facts and circumstances which disprove malice, although they tend to establish the truth of the defamatory charge, without any allegation in the answer that the charge is true. This question, however, is not presented by the facts of this case. The testimony introduced upon the part of the defendant did not tend, in the slightest degree, to establish the truth of the defamatory charge. It was not offered for any such purpose. The only issues raised by the answer were: whether the article was libelous; whether defendant was actuated by any malice in publishing it, and whether plaintiff had suffered any injury. Upon these issues the defendant's testimony was clearly admissible.

In *Wilson v. Noonan*, *supra*, the answer of the defendant consisted only of a general denial of each and every allegation of the complaint. In delivering the opinion of the

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court, Dixon, C. J., said: "That where the purpose is to disprove malice (by which we mean bad or wicked motive, or intent) by direct evidence, as by the testimony of the party himself, showing or tending to show the non-existence of the fact, there the absence of malice, thus proved, or offered to be, as a mitigating circumstance, need not be pleaded otherwise than by the general issue. \* \* \* So far as wicked motive or bad intent is, or may be, relied upon as a ground for enhancing the damages against the defendant, so far the defendant may meet and rebut the fact by direct evidence to the contrary, without special allegation in his answer; though if collateral facts and circumstances be relied upon to show the absence of such motive or intent, they must be pleaded. Such seems to be the fair and reasonable interpretation of the statute, and the meaning which must be ascribed to the words 'mitigating circumstances,' as used in it."

The collateral facts, averred in the answer and testified to by the defendant, that the article was reported by a correspondent and was published as a matter of news, without any intention to injure the plaintiff, did not tend to justify the publication. Proprietors of newspapers are not entitled, under the law, to claim any justification in publishing items of news or detailing occurring events that are libelous in their character, whether furnished by correspondents, reported by other persons, or copied from other newspapers. (*Talbutt v. Clark*, 2 Mood. & Rob. 312; *State v. Butman*, 15 La. An. 166; *Perret v. New Orleans Times*, 25 Id. 170; *Sanford v. Bennett*, 24 N. Y. 27; *Cooley on Torts*, 209, 219.) They furnish items of news and editorials at their own risk. They are responsible for whatever appears in their paper. They are not to be released from any liability on account of any ignorance, inadvertence, or thoughtlessness on their part, nor for matter published without their knowledge or authority. (*Dunn v. Hall*, 1 Ind. 344; *Buckley v. Knapp*, 48 Mo. 159; *Storey v. Wallace*, 60 Ill. 51; *Moore v. Stevenson*, 27 Conn. 27, *Cooley on Torts, supra*.) They are liable for what they publish in the same manner as other individuals, and are subject to the same rules, rights, and



privileges. They have the right to publish the truth, but no right to publish a falsehood to the injury of others. (*Sheckell v. Jackson*, 10 Cush. 25; Towns. on Libel, sec. 252; Cooley's Const. Lim. 453-455.)

If the proprietor of a newspaper, to quote the language of Nelson, C. J., in *Hotchkiss v. Oliphant*, 2 Hill, 514, "chooses to become the indorser and retailer of private scandal, without taking the trouble of inquiring into the truth of what he publishes, there is no ground for complaint, if the law, which is as studious to protect the character as the property of the citizen, holds him to this responsibility. The rule is not only just and wise in itself, but it steadily and inflexibly adhered to and applied by courts and juries, will greatly tend to the promotion of truth, good morals, and common decency on the part of the press, by inculcating caution and inquiry into the truth of charges against private character before they are published and circulated throughout the community."

The testimony of the defendant, in his own behalf, was an admission that he was not justified in publishing the article complained of, and, if libelous, that he was liable in damages for the wrongful act. But he had the right to show the circumstances under which the publication was made, and to introduce any evidence which tended to throw any light upon his intent and motive, not in mitigation of the actual damages sustained by plaintiff, but as tending to repel malice and to mitigate exemplary damages. (*Reed v. Bias*, 8 Watts & Serg. 190; *Robinson v. Rupert*, 13 Pa. St. 524; *Prentiss v. Shaw*, 56 Me. 427; *Shilling v. Carson*, 27 Md. 186; *Gray v. Waterman*, 40 Ill. 522; *Donnelly v. Harris*, 41 Id. 126; *Storey v. Early*, 86 Id. 463; 2 Greenl. on Ev., sec. 275.)

In order to maintain this species of action, it is necessary that there should be malice in the defendant, and an injury to the plaintiff, and that the words of the article should be untrue. (*Mailland v. Goldney*, 2 East, 426.) Malice is essential to every action for libel. (*Lewis v. Chapman*, 16 N. Y. 372.) Without some words of caution or explanation, the terms malice or malicious, as used in defining libel

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or slander, are liable to mislead courts as well as juries. As frequently used they only mean that the libelous publication was made without legal excuse. (Cooley on Torts, 219.) It is, therefore, important, in the consideration of the question of malice, to keep in view the fact, as is well expressed by Shaw, C. J., in *Commonwealth v. Snelling*, that "it is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill-will towards the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere desire to bring about a reformation of manners; but if, in pursuing that design, he willfully inflicts a wrong on others, which is not warranted by law, such act is malicious." (15 Pick. 340.) The law always presumes that in the publication of an article which is libelous upon its face, it was published with malicious intent. The law does not impute malice not existing in fact, but presumes a malicious motive for making a charge which is both false and injurious, when no other motive appears. In such cases it is unnecessary for the plaintiff, to entitle him to recover, to introduce any evidence from which malice may be inferred other than the libelous article. (*Darby v. Ousely*, 1 H. & N. 1; *Lewis v. Chapman*, *supra*; *True v. Plumley*, 36 Me. 478; *Wilson v. Noonan*, *supra*; *White v. Nicholls*, 3 How. (U. S.) 266; *Roscoe Cr. Ev.* 679; 2 Greenl. on Ev., sec. 418.)

But if the article is ambiguous, or the intentions of the publisher left doubtful, it is proper for the plaintiff to adduce any evidence which tends to show that the defendant was actuated by express malice in order to enhance the damages. (*Bush v. Prosser*, *supra*; *Huson v. Dale*, *supra*; *Fry v. Bennett*, 28 N. Y. 328; *Jellison v. Goodwin*, 43 Me. 289; *Towns. on Libel*, sec. 392.)

The presence or absence of what the books denominate express malice is often an important factor to be considered by the jury in arriving at the amount of damages that a party may be entitled to recover. (*Saunders v. Baxter*, 6 Heisk. 386, and other authorities previously cited.)

In this case the plaintiff introduced testimony tending to show actual or express malice upon the part of the defendant. The defendant introduced testimony tending to prove that he was not actuated by any malice whatever. It was the legitimate province of the jury to determine this disputed question. It is enough for us to say that the evidence is, in our opinion, sufficient to sustain the special verdict in defendant's favor. There being then, in the opinion of the jury, no express malice or ill-will upon the part of the defendant, and the article being considered libelous, the only remaining question to be determined was as to the amount of damages that plaintiff was entitled to recover.

The plaintiff was entitled to actual damages, that is, compensation for the injury he had received by reason of the libelous publication, to which might be added any pecuniary loss, if any, sustained by him, independent of the motive or intent with which the publication was made. "Damages," says Greenleaf, "are given as a compensation, recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury." (2 Greenl. on Ev., sec. 253.) The damages to be considered must be the necessary, natural, and proximate consequence of the act complained of. (2 Greenl. on Ev., sec. 256; Townshend on Libel, sec. 109.) Appellant contends that the verdict can not be sustained, because the expense and cost of plaintiff in vindicating his character were not considered by the jury. It is undoubtedly the duty of the court, whenever requested so to do, to instruct the jury as to the rules and principles which should govern them in fixing the amount of damages in any given case. But the truth is, that from the very nature of the action, the amount is to be determined by the jury as a question of fact, due regard being had to all the surrounding circumstances.

If plaintiff's counsel believed that the expenses and costs of vindicating his client's character were a necessary element for the jury to consider in awarding compensatory damages, he ought to have asked the court to so instruct the jury. No instructions were asked for upon this point. There is

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nothing in any of the instructions given which prohibited the jury from considering that question. It therefore necessarily follows that unless these expenses and costs are always to be allowed when the verdict is in plaintiff's favor, he is not, upon this ground, entitled to a new trial.

We have examined the authorities cited in Townshend on Libel, sec. 289, and Stark. on Sland. 739, referred to by counsel; also, *Finney v. Smith*, 31 Ohio St. 529, and others, which bear more or less upon this subject. Our conclusion is, that the plaintiff, in actions of this kind, is not always entitled to recover the expenses and costs that may have been incurred by the prosecution of his suit from the simple fact that he is entitled to a verdict in his favor. If the jury believed that the plaintiff was compelled to bring this action in order to vindicate his character, then they might have given him substantial damages, which would have covered the expenses and carried the costs. But, on the other hand, if the jury believed from the evidence, as the verdict intimates, that it was not necessary so to do, and that the publication of the article did not, in fact, injure the plaintiff in his business, good name, fame, credit, or reputation, or expose him to public hatred, contempt, or ridicule, and that he had suffered no pecuniary loss, they had the right to find only nominal damages.

In this connection it must be remembered that the plaintiff did not allege or attempt to prove any special damage, injury, or pecuniary loss.

Where there is no ill-will or malice on the part of the defendant, no special damages, actual injury or pecuniary loss, alleged, or proven, the jury may find a verdict for only nominal damages. (*Wakelin v. Morris*, 2 F. & F. 26; *Rundell v. Butler*, 10 Wend. 119; *Dobard v. Nunez*, 6 La. An. 294; *Flint v. Clark*, 13 Conn. 369; Stark. on Sland., secs. 391, 647; Townshend on Libel, secs. 198, 289.)

4. Did the court err in giving or refusing any of the instructions asked by the respective parties, or given by the court of its own motion?

The record presents all the instructions given or refused by the court. They are quite numerous, and cover almost

every conceivable proposition relating to the law of libel. In general terms, it may be said that all of the instructions given by the court, except as hereinafter specified, when considered as a whole, are substantially correct.

The charge of the court of its own motion, to which objection is made, is certainly subject to criticism.

After informing the jury, as to the definition of a libel, the court proceeded as follows: "If you find that the defendant was not actuated by any malice in making the publication, and that the same does not constitute a libel, as above defined, and that plaintiff has sustained no pecuniary loss or damage, then the jury must find for the defendant."

Now, if the article was not libelous and was not published maliciously, defendant was entitled to a verdict in his favor, regardless of any question of injury, loss, or damage on the part of plaintiff, and the court erred in adding, "and that plaintiff has sustained no pecuniary loss or damage." This error, however, instead of being prejudicial to the plaintiff, as claimed by his counsel, is injurious to the defendant, as it introduced a false quantity (in this connection) into the calculation as to his right to recover a verdict.

There is nothing in this charge of the court, nor in any of the instructions given, which would lead the jury to believe that they might find a verdict for defendant simply because the plaintiff had suffered no pecuniary loss, and the question whether or not such an instruction would be proper, is not presented by the record in this case.

The statement in instruction No. 3, asked by plaintiff, that the defendant "admitted *all* the extraneous matter alleged in the complaint," is too broad. It was calculated to mislead the jury, and was therefore properly refused.

The action of the court, in refusing to give instructions 4 and 18, is sustained upon the ground that the principles embodied therein were given, in substance, in other instructions asked by the plaintiff, to wit: in instructions 2, 7, 9, 16, and 21. The eleventh instruction reads as follows: "I instruct you that the following portion of the article complained of by plaintiff, *i. e.*, 'that the ex-senator, for a consideration, voted against his own resolution on fares and

freights four years since,' is, under the admissions in this case, false and without legal excuse; that it is a defamatory libel, and its publication is not privileged, and the plaintiff is entitled to recover damages he has sustained by reason of its publication by the defendant."

This instruction was refused by the court upon the ground that, "the language is susceptible of more than one interpretation; and therefore the question, whether it is defamatory and libelous, is one for the jury to determine."

If the language was unambiguous, it would have been the province of the court to determine its construction, and to instruct the jury whether or not, upon its face, it was actionable *per se*; but can it be said that the language is entirely free from doubt? Certainly the inference is very strong that the ex-senator is charged with voting in his official capacity as a state senator; but is not the language susceptible of another and different meaning? Might it not be construed to mean that he cast such a vote in a political caucus, or in some meeting or convention, having no relation whatever to his official duties as a state senator? If the language is susceptible of different constructions, it was properly submitted to the jury, as a question of fact, whether it was libelous or not. (*Snyder v. Andrews*, 6 Barb. 43; *Sanderson v. Caldwell*, 45 N. Y. 398; *Clarke v. Fitch*, 41 Cal. 480; *Van Vactor v. Walkup*, 46 Id. 124; Townshend on Libel secs. 281, 384.)

We are of opinion that the court did not err in refusing to give this instruction.

A majority of the court are of opinion that the court erred in refusing to give the seventeenth instruction asked by plaintiff, and in giving the third and fourth instructions asked by defendant.

These instructions read as follows:

Seventeenth. "In this case the defendant does not plead nor rely on the truth of the matter complained of, and I charge you, as a matter of law, that the publication complained of is not privileged; therefore, there is no legal excuse or defense set up by the defendant."

3. "Comments and criticisms on the character of public

men are allowable if not made maliciously. If, therefore, you find that the plaintiff was engaged in politics and seeking public position, and the article in question was published simply to give the people information as to the standing and qualification of the plaintiff, and not with a malicious intention of injuring the plaintiff, then your verdict must be for the defendant."

4. "A publication fairly made by a person in the discharge of some public duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned, comes within the class of privileged or authorized communications. A person, therefore, can not be held responsible for a statement or publication tending to disparage private character, if it is called for by the ordinary exigencies of social duty, or is necessary and proper to enable him to protect his own interest or that of another, provided it is made in good faith and without a willful design to defraud."

The question whether the alleged libelous article was or was not privileged was foreign to the issues raised by the pleadings and proofs.

The instructions given upon this point, although containing abstract principles of law that might be correct in certain cases (*Moore v. Butler*, 48 N. H. 161; *Gassett v. Gilbert*, 6 Gray, 94), were not applicable to the facts of this case, and were calculated to mislead the jury into the belief that the article, or some portion of it, was privileged.

If the article only contained one charge, which was alleged to be libelous, then it might be consistently claimed, as is now argued by respondent's counsel, that the plaintiff was not prejudiced by the erroneous action of the court; because the jury, by the general verdict, found that the article was not privileged. But there are two distinct charges contained in the article, both of which are alleged in plaintiff's complaint to be libelous, and upon either of these charges, if libelous, the plaintiff claimed he was entitled to recover a verdict in his favor. The court at his request instructed the jury as follows: "Twelfth—I further instruct you, that if you find the language set out in the

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Opinion of Beatty, C. J., concurring.

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complaint, 'and even insinuated that the ex-senator had sold potatoes and the sack contained bullion from Dall's mill, many years since,' constituted, in its ordinary and usual sense, a charge of larceny, as laid by the innuendo in the complaint, and you are to read and consider the whole publication in determining the question, then such charge is a false and defamatory libel, and you should consider and award the plaintiff such damages, in addition to those he may be awarded on account of the other libelous matter, as he may have sustained. That is, if you so find, you will have an additional element on which to base an award of damages; but you will award damages on the publication as a whole and not on detached parts of it."

Under these circumstances it can not be said that the error of the court, in refusing to give the seventeenth instruction, asked by plaintiff, and in giving the third and fourth instructions, asked for by defendant, was cured by the general verdict, for *non constat*, it may be that the jury, in considering the instructions given, came to the conclusion that the charge against the plaintiff as a senator was privileged, and may have based their verdict solely on the charge relating to the bullion at Dall's mill, and awarded damages accordingly.

The judgment of the district court is reversed, and the cause remanded for a new trial.

BEATTY, C. J., concurring:

I concur in the judgment, and in the opinion of the court, except upon one point. I think it was error to exclude any portion of the article copied from the Truckee Republican. If the charge contained in the excluded part was not actionable in itself—and in my opinion it was not—it was proper evidence under the rule as laid down by Townshend (secs. 392, 394), and even if it was actionable it was admissible under what I deem the more reasonable rule stated by Greenleaf (2 Ev., sec. 418.)



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Points decided.

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[No. 958.]

**D. MORESI, RESPONDENT, v. S. T. SWIFT, APPELLANT.**

**PERSONAL PROPERTY—LIEN OF ATTACHMENT—WHEN SUPERIOR TO LIEN OF CHATTEL MORTGAGE—MORTGAGEE ACCEPTING TRUST AS KEEPER.**—L., being indebted to D. and M., executed to D. a bill of sale of certain personal property, and agreed that he should have possession of the property until the indebtedness to D. and M. was paid. Subsequently, one W. brought suit against L. and attached the property, it then being, as claimed by W., in the possession of L. The sheriff appointed D. as keeper. The property was afterwards taken to the ranch of M. by order of L., and thereafter D. conveyed his interest in the property and bill of sale to M. There was no proof that D. ever returned the property to the sheriff, or that he was ever released or discharged as keeper: *Held*, that W.'s rights as an attaching creditor, if his attachment lien was valid, were superior to the rights of D. as a mortgagee, or of M. as a subsequent purchaser.

**VALIDITY OF UNDERTAKING FOR ATTACHMENT—CAN NOT BE RAISED COLLATERALLY.**—An objection to the validity of an attachment upon the ground that the affidavit and undertaking was defective, can not be raised by a third party in a collateral proceeding.

**ERRORS AGAINST RESPONDENT WILL NOT BE CONSIDERED.**—The supreme court will only consider such questions as are assigned as error by appellant. (*Maher v. Swift*, 14 Nev. 324, affirmed.)

**MORTGAGEE ACCEPTING TRUST AS KEEPER—WHEN ESTOPPED FROM DENYING VALIDITY OF ATTACHMENT LIEN.**—A mortgagee of personal property, after accepting the trust as keeper of the property for the sheriff in the suit of an attaching creditor, is estopped from claiming that the lien of the attachment was lost by any act of his.

**BONA FIDE PURCHASER—PAYMENT OF PURCHASE MONEY.**—To entitle a party to the character of a *bona fide* purchaser, without notice, he must have acquired the legal title, and have actually paid the purchase money before receiving notice of the equity of another party.

**ATTACHMENT LIEN—FAILURE OF OFFICER TO KEEP POSSESSION.**—The court instructed the jury, in effect, that they could find a verdict in favor of the subsequent purchaser, under assignment of the chattel mortgage, upon the ground that the attachment lien, although valid, and creating prior rights in favor of the attaching creditor, was subsequently lost by reason of the sheriff's failure to retain the possession, custody, and control of the property: *Held*, that upon the facts of this case, the instructions were calculated to mislead the jury, and were erroneous. (Hawley, J., dissenting.)

**CHATTEL MORTGAGE—DELIVERY OF POSSESSION—CONTINUED CHANGE OF POSSESSION.**—The court instructed the jury that a simple delivery, or getting possession at any time after the sale, rendered the sale or contract of mortgage valid as against an attaching creditor: *Held*, erroneous; that there must also have been a continued change of possession.

**CONSTRUCTIVE POSSESSION OF PERSONAL PROPERTY UNDER ATTACHMENT SUP-**

## Argument for Appellant.

FICIENT.—The court instructed the jury that "It is as essential that an officer levying a writ of attachment should actually retain actual possession and custody of the property attached, as that he should take the possession and custody at the time of the levy." *Held*, error; that constructive possession by the keeper was all that the law required.

WITNESS SWEARING FALSELY—WHEN HIS TESTIMONY TO BE DISREGARDED—MATERIAL MATTERS.—The court instructed the jury that if they believed "a witness has willfully sworn falsely on any matter in the case," they might disregard his entire testimony: *Held*, error; that the privilege should have been limited to witnesses who had willfully sworn falsely upon a material matter.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

*R. M. Clarke*, for Appellant:

I. Lopez having continued in possession and control of the property as to Winter, who was an attaching creditor, the bill of sale to Davis is void. (Comp. L., sec. 292, 294; 4 Nev. 361; 15 Cal. 503; 1 Nev. 222; 10 Id. 422.)

II. The sheriff having returned that he seized the property in attachment, his return is conclusive and can not be collaterally attacked. (*Newton v. Bank*, 14 Ark. 9; 5 Cal. 53; *Morse v. Smith*, 47 N. H. 477; *Sperling v. Levy*, 1 Daly (N. Y.), 95.)

III. Davis having accepted the office of sheriff's keeper, is estopped to deny the attachment.

IV. The removal of the property to Ormsby county was a fraud upon the attaching creditor, and neither Davis nor Moresi, who was his vendee with notice, can take advantage of it.

V. As between Davis and Moresi there never was a delivery; first, because Davis had not the possession to deliver; if he had any possession, it was the possession of keeper; second, because Moresi never took possession. The property was not present, and he did not see it until after it was taken by the sheriff.

VI. If there was no valid attachment, there was a valid levy of the execution, and the execution was levied before Moresi or Davis had acquired possession.

VII. If any errors were committed against the respondent in the court below, they can not be considered or reviewed on this appeal. (*Seawan v. Malotte*, 15 Cal. 304; *Jackson v. F. R. W. Co.*, 14 Id. 18; 18 Id. 698.)

VIII. Plaintiff's instructions were erroneous. (1 Comp. L. 292, 294.)

A. C. Ellis, for Respondent:

I. No lien was ever acquired upon the property in question by virtue of the alleged attachment in the case of *Winters v. Lopez*, because the writ was never served as required by law; possession of the property was never taken.

II. If any lien was ever created, it was lost by the sheriff parting with the possession. (*Drake on Attach.*, sec. 423 *et seq.*, and authorities there cited.)

III. No lien was created, or preserved, under said attachment, because the alleged attachment was void *ab initio*. There was no showing that the affidavit, as required by law, was ever made by or on behalf of Winters. The undertaking was not in conformity with law, it not being for gold coin of the United States. (Stat. 1869, Civ. Pr. Act, secs. 123-4.)

IV. It is incumbent on the party asserting a right under a judgment of a justice's court, to show affirmatively the regularity of the proceedings relied on. (*Swain v. Chase*, 12 Cal. 283; *King v. Randlett*, 33 Id. 318; *Jolly v. Foltz*, 34 Id. 321; 1 Nev. 188; 1 Id. 82; 2 Id. 109; 5 Id. 90.)

V. If there ever was any levy of the attachment, and if the sheriff retained the possession and control of the property, still the plaintiff was entitled to the possession of the property as against the defendant, because of the fact that the levy was a conditional one, contingent upon the right of Davis and Moresi.

VI. The return of the officer is only *prima facie* evidence; it is not conclusive. (*Drake on Attach.*, sec. 206, and authorities cited; 9 Johnson, 96; *Drake on Attach.*, sec. 210, and authorities cited; *Ritter v. Scannel*, 11 Cal. 249.)

By the Court, LEONARD, J.:

On the seventeenth of July, 1876, D. Lopez, then owner

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of the mules and other property in controversy, executed and delivered a bill of sale of the same to W. T. Davis, which, according to its terms, was intended as a chattel mortgage, to secure payment of the sum of one thousand five hundred dollars, due from Lopez, in part to Davis Bros. & Co., and the balance to respondent, Moresi; and as part of the same transaction, W. T. Davis and respondent entered into a written agreement that the said property should be put in charge of some proper person, and used in packing wood for respondent, at an agreed price per cord; and that, at the end of each month, after deducting the expenses, the remainder of the money earned in packing during the previous month should be divided between them according to their respective claims.

The property was kept at work under the agreement until the eighteenth of December, 1876.

There was testimony tending to show, that the net earnings of the train were nearly or quite enough to pay the respective claims of Davis Bros. & Co. and respondent, while, according to other testimony, it did not earn its expenses.

On the ninth day of October, 1876, J. N. Winter brought suit in justice's court, Douglas county, Nevada, against D. Lopez, and in that case, the sheriff certified in his return upon the writ of attachment, that he had attached "eleven head of mules, and the harness and fixtures thereto belonging" (including property in dispute), "as the property of the within-named defendant (D. Lopez), and placed Buck Davis (W. T. Davis), as keeper of the same, October 11, 1876." On the eighteenth day of December, 1876, the mules and packing apparatus were brought to Carson and put on a ranch owned by respondent, where the mules remained until the twenty-third day of December, when they were levied on, and afterwards sold, by appellant, as sheriff of Ormsby county, under an execution issued in the case of *Winter v. Lopez*. Lopez claimed to have placed them upon the ranch, while respondent testified that they were put there by his order. On the twenty-second day of December, when the mules were upon the ranch, and the day before appellant's levy under the execution, W. T. Davis, by

his partner, S. C. Davis, executed and delivered to respondent an assignment of the bill of sale, or chattel mortgage, from Lopez, in the following words, viz.: "Know all men by these presents, that I, W. T. Davis, named in the annexed instrument, in consideration of five hundred dollars, gold coin, to me in hand paid by D. Moresi, \* \* \* the receipt whereof is hereby acknowledged, have sold, transferred, assigned, and set over, and by these presents do sell, transfer, assign, and set over to the said Moresi, his heirs and assigns, the said instrument, and all my right, title, and interest in and to the same, authorizing him in my name, or otherwise, but at his own cost, charge, and expense, to enforce the same according to the tenor thereof, and to take all legal measures which may be proper or necessary for the complete recovery and enjoyment of the assigned property." There was no proof that any portion of the consideration for the assignment was paid in fact, either before or after the levy under execution, other than the receipt or recital contained in the assignment itself.

This action was brought to recover the property sold under execution issued upon the Winter judgment, or its value. Respondent recovered judgment in the court below, and this appeal is from that judgment and the order overruling appellant's motion for a new trial.

Upon many important issues the evidence was very conflicting. Plaintiff claimed that the property was delivered to Davis upon the execution of the bill of sale by Lopez, to be used under plaintiff's direction, and that it was so used, and the possession thereof retained by Davis and himself, under the bill of sale, until it was levied on by defendant under Winter's execution, and, consequently, that plaintiff's rights under the chattel mortgage were superior to the rights of Winter under the attachment and execution.

On the contrary, defendant claimed, that subsequent to the date of the bill of sale, and at the time of the attachment, Lopez had the custody and control of the property, and therefore, that Winter acquired a prior lien by his attachment; that Davis was appointed sheriff's keeper, and consented to act as such; that Lopez continued, with the

consent of Davis, to use the property as before, until the eighteenth day of December, 1876, when it was taken by Lopez and his men to Moresi's ranch, and there turned out to pasture.

It is urged by counsel for respondent, that Winter acquired no lien by attachment, because the affidavit and undertaking were not in conformity with the statute. If it be true that those instruments were faulty, and if we could consider any errors besides those committed against appellant, still we are of opinion that respondent can not, in this action, question the regularity of the proceedings in attachment, although it may be true that Lopez might have done so in his action. There was an affidavit and an undertaking, whether they were sufficient under the statute or not, and it is not claimed that the demand of Winter was fraudulent. (Drake on Attach., sec. 273, and authorities there cited; *Dixey v. Pollock*, 8 Cal. 573; *M'Comb v. Reed*, 28 Id. 285; *Morgan v. Avery*, 7 Barb. 657.) Respondent claims, also, that the court erred in striking out certain testimony in relation to the manner of making the levy under the writ of attachment. We are only called upon to examine errors assigned by appellant. (*Maher v. Swift*, 14 Nev. 324.)

The verdict of the jury was general and in favor of respondent, but it is impossible to know whether it was based upon a conclusion that possession of the property was taken by Davis and thereafter retained through himself and competent agents, under the bill of sale, and, consequently, that Winter's lien was subordinate to the rights of respondent; or upon the conclusion that the possession had not been taken and retained by Davis, and hence that the property was subject to attachment by *bona fide* creditors of Lopez, and consequently, that Winter obtained a prior lien, but lost it before the assignment of the bill of sale to respondent, by reason of failure on the part of the sheriff, or his keeper, to retain it in custody. Under the testimony and instructions the jury may have found for respondent upon the latter conclusion as well as the first. We must presume that the attachment was valid, nothing to the contrary ap-

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pearing, and that, by it, Winter obtained a lien prior or subordinate to the rights of respondent; and if the jury found as they might have done, that Winter obtained a prior lien by reason of failure on the part of Davis to take and retain the custody and control of the property subsequent to the date of the bill of sale, but that such lien was lost before, and at the time of its assignment, because the sheriff, or his keeper, failed to retain possession, then, in our opinion, several instructions were erroneous. There was a great deal of testimony to sustain the claim of each party as to the situation of the property at the time of the attachment, and each had a right to demand that the jury should be properly instructed, upon the hypothesis that they would find the facts in his favor. The jury were instructed in part upon the theory that Winter obtained a prior lien by virtue of his attachment, and that the sheriff appointed W. T. Davis keeper of the same. There is no proof that the keeper ever returned the property to the sheriff, or that he was ever released or discharged. We must then consider the instructions upon the theory just mentioned. It is undoubtedly true, as a general rule, that a *bona fide* vendee or mortgagee of personal property, who takes possession at a time subsequent to the sale or mortgage, but before the rights of creditors or other *bona fide* purchasers accrue by attachment, purchase, or otherwise, may hold the same against such creditors or purchasers. (*Clute v. Steele*, 6 Nev. 339; *Coty v. Barnes*, 20 Vt. 78; *Frank v. Miner*, 50 Ill. 444.)

It is also true, generally, that as to *bona fide* purchasers and mortgagees, an officer who attaches personal property must take and retain possession and control of the same. He may do so by himself in person, or by another. Unless authorized by special statute, or by the consent of *bona fide* purchasers and mortgagees, he can not, so far as the latter are concerned, appoint the debtor as his keeper, without dissolving the attachment; and for the purposes of this case, it may be admitted that, as to *bona fide* purchasers and mortgagees, without their consent, neither he nor his keeper can permit the property attached to remain in the custody and

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control of the debtor, without dissolving the attachment. But if, by the attachment, Winter acquired a prior lien, and Davis consented to act as keeper, and was appointed and put in charge as such, then the property was in the custody of the law, and *his possession under the bill of sale was vacated or suspended*. And thereafter, so long as he was keeper, his possession was, first, under the attachment, as the servant of the sheriff, so far as he was concerned. In other words, had there been no assignment of the bill of sale to respondent, Davis by retaining personal possession and control, could not have claimed, successfully, that the possession subsequent to the attachment was *his, under the bill of sale, and not the sheriff's, under the attachment*; and if the attachment lien was first, and his second, he could not have reversed the order of preference, after accepting the position of keeper, so long as he retained it, by permitting the possession and control to pass into the hands of Moresi or Lopez, and from them to him. Had the sheriff left the property with Lopez as keeper, at the request of Davis, and had there been no assignment, the latter would not have been entitled to the possession under his bill of sale, on the ground that the sheriff had appointed the debtor his keeper, and left the property in his charge; nor, under such circumstances, would the attachment lien have been lost, as to Davis, had Lopez delivered the property back to Davis. And, too, had there been no assignment, for the same reason as stated above, Davis could not have put and kept Lopez or Moresi in possession, while he was keeper, and then claimed, that by his own act, Winter had lost his lien. After assuming the office of keeper he could not then have maintained the position that the attachment was lost, as to him, by an act to which he consented and which he caused. Had there been no assignment, then, the attachment lien would have continued as to Davis, even though Lopez had the custody. So it would have been, if respondent or any other agent of Davis had it in charge. Then up to and at the time of the assignment, as to Davis, Winter had a prior lien, if he acquired such at the time of the attachment; because, whoever had the personal charge and



control, he had it as the agent of Davis, by his consent and request. The question then arises, as between respondent, the assignee of Davis, and Winter, has the former any other or greater rights than Davis would have had if he had obtained peaceable and lawful possession, at the same time, from Moresi or Lopez? We think not. He certainly has not, if, prior to the assignment, he had notice of the attachment and that Davis was acting as keeper. (Kerr on Fraud and Mistake, 315.) But passing that, there are other reasons for this conclusion.

In the first place, as before stated, there was no proof that, prior to appellant's levy under the execution, respondent paid anything for the assignment, except the recital and receipts therein, that the consideration therefor was five hundred dollars, which sum had been paid. And admitting that the bill of sale, although intended as a mortgage, vested the legal title to the property in Davis, and therefore, at the time of the attachment, as between himself and Lopez, that he held more than a mere equity, still, in order to entitle respondent to the character of a *bona fide* purchaser without notice, he must have acquired the legal title and have actually paid the purchase money before receiving notice. (Kerr on Fraud and Mistake, 318.)

"The rule that a man who advances money *bona fide* and without notice, will be protected in equity, applies equally to real estate, chattels, and personal estate." (Id. 313.)

"The purchase must be made in good faith, for a valuable consideration, and the purchase price must be wholly paid and the conveyance of the legal title received before notice. The purchaser of an equity is bound to take notice of a prior equity." (2 Story's Eq. Jur., secs. 1502, 1232; 2 Lead. Cas. in Eq., part 1, 36, 73.)

"The purchaser is not protected if he have notice before the execution of the deed and payment of the purchase money, for until then the transaction is not complete." (*Union Canal Co. v. Young*, 1 Whart. 482; see, also, *Jackson v. Summerville*, 13 Pa. St. 359; Story Eq. Pl., sec. 604, a.)

"The rule proceeds upon the ground that, as the purchaser is taking the transfer of a title which defeats the

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equitable rights of a third person, he shall be held to take subject to all the equities that attach to it at the time it passes. If, therefore, he pays no money when the title passes, he has no equity to set up against the equity of a third person, and if he has notice before he pays the money he pays in his wrong." (1 Perry on Trusts, sec. 221. See *Blanchard v. Tyler*, 12 Mich. 339; *Palmer v. Williams*, 24 Id. 329; *Bump on Fraud. Conv.* 477; *Dresser v. Mo. & Iowa R. R. Co.*, 3 Otto, 92.)

The *onus* of proving payment was upon respondent, and the receipt or recital in the assignment was not evidence of payment against Winter, a stranger to the transaction. (*Bolton v. Johns*, 5 Pa. St. 151; *Lloyd v. Lynch*, 28 Id. 425; *Union Canal Co. v. Young*, 1 Whart. (Pa.) 432.)

Again, although respondent had an equitable interest in the bill of sale from Lopez to Davis, before the assignment, as well as in the property in dispute, still, that interest was, by the attachment, subjected to the prior lien of Winter. By the assignment, the interest of Davis only was transferred, and that, as to him, was burdened with the prior attachment lien. He could not assign, nor did he undertake to assign, any interest beyond what he possessed.

In *Wright v. Levy*, 12 Cal. 257, the facts were as follows: Levy executed and delivered a promissory note to Newmark. The note was given without consideration, and for the purpose of defrauding the creditors of Levy. Newmark was aware of the fraud and participated in it. Subsequently Newmark sued out an attachment upon his note and levied upon the property of Levy. After Newmark's levy, Wright and others, creditors of Levy, also levied upon the same property. After Wright's levy, and pending the suit of Newmark, the latter sold and assigned, for a valuable consideration, the note executed by Levy, together with the action then pending, to defendant Jones, who was an innocent purchaser, and knew nothing of the fraudulent intent of Newmark and Levy. Judgment was obtained in each case, and thereupon Wright and other creditors filed a bill against Levy, Jones, and others, setting up the fraud, and praying that plaintiff might be adjudged entitled to the

money arising from the sale of the property then in the hands of the sheriff. The court below dismissed the bill and gave judgment for defendant, Jones.

The supreme court said: "It now appears that after Newmark's attachment was levied, the plaintiff got out an attachment on his debt, and it was levied on the same property as Newmark's; and that pending these attachments, and before judgment, Newmark assigned the note and lawsuit to the defendant Jones. It is found by the court that this note, attachment, etc., of Newmark, were fraudulent, but that the fraud was not known to Jones, who bought for value. The question then comes up, whether Jones is protected in his purchase? We think, on this hypothesis of fact, he is not. Newmark's proceedings were all void against the plaintiff. The plaintiff, by his levy, took the property subject only to the superior rights, or the claim, of Newmark. He had, under the assumed facts, the real title as against Newmark. In this condition Jones buys, but Jones has only the right Newmark had. Newmark having been, in fact, superseded by plaintiff, could not, by any deed or act of his, put his assignee in any better position. The question is not as to the equities of third persons; the question is as to the relative equities of Jones and Wright; and it seems Wright has, as against Jones, the oldest equity and the legal title. While the property was legally subject to his claim, Wright subjected it to his attachment; his title then vested, so to speak. No act of Newmark, subsequently, could divest it. All this is said on the assumption of the fraud of the Newmark proceedings; for the effect of that fraud, unquestionably, is to make those proceedings nullities as against Wright. When they were nullities, Wright levied on the property; and, of course, his title dating from the levy, is superior to Jones' title, dating from the assignment to him by Newmark. None of the authorities cited by respondent's counsel apply to such a case as this. \* \* \*

It is true that the case in 18 Johns. (*Anderson v. Roberts*, 531) only holds that after a sale on execution of real estate fraudulently conveyed, the sale being made of it as the property of the fraudulent grantor, an innocent grantor

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(grantee) takes no title; but the effect of a levy on chattels is not less decisive in changing the title and vesting it in the sheriff as trustee for the creditor. After it does so vest, a sale by the fraudulent grantee can not alter it. The question is not whether, when Jones took the assignment of the note, he took a good title as against third persons to the note, but whether, when he took, as incident to the note, a title or claim to the property attached, he took a superior right to the plaintiff, who had an older and better claim on it. If, by operation of law, Wright's claim to this property was superior to Newmark's, Wright was as much entitled to priority over Jones as if his right was given by contract."

As in that case the proceedings were all void against Wright, an attaching creditor of Levy, by reason of the fraud, so in this, upon the hypothesis assumed, the bill of sale was fraudulent and void against Winter, by reason of failure to retain possession by Davis, and by the attachment, the sheriff, as trustee for Winter, acquired a special property in the articles attached, which could not be taken away by any act of Davis. (See *Hetherington v. Hayden*, 11 Iowa, 340-341.)

Besides, as before stated, by the terms of the assignment itself, Davis only "sold, transferred, assigned, and set over" to respondent his "right, title, and interest" in and to the bill of sale, with power to enforce the same according to its tenor.

In *Morse v. Godfrey*, 3 Story, 391, it is said: "But there is another ground, independent of this, and quite decisive against the bank. It is this: that the very deed of transfer, by its terms, purports to 'sell, assign, transfer and set over' to the bank, all the right, title, and interest of Godfrey in and to the stock in the store, derived from the mortgage of Reed, and it contains no covenants whatsoever as to the title or otherwise. So that, it is a mere naked conveyance to the bank of the very right, title, and interest which Godfrey derived from the mortgage of Reed, and nothing more. The bank, therefore, took nothing but the 'right, title, and interest' of Godfrey, subject to all its original infirmities, and can now claim under it nothing which

Godfrey himself could not claim against the assignee." But here, Davis did not, in terms, assign the interest he obtained from Lopez, but only the interest he had at the time of the assignment, and that, upon the assumption that Winter's lien was prior, was the right to subject the property to the payment of his claim, after the first lien had been satisfied. Our conclusion is, that although in respect to strangers, other creditors or purchasers for value from Lopez, without notice, the attachment might have been inoperative, it was not so as to Davis, whether he left the property in charge of Lopez, Moresi, or other agents (Story on Bailments, sec. 125; *Bridge v. Wyman*, 14 Mass. 194; *Wheeler v. Nichols*, 32 Me. 240, 241); that if Davis, at the time of the assignment, had obtained or retaken possession from either of the parties above named, instead of making an assignment to respondent, he could not have claimed a prior right to the property under the bill of sale, and that respondent stands in no more favorable position.

The foregoing is based, of course, upon the assumption that the jury may have found for respondent, under the instructions, upon the ground that the attachment lien, although valid and creating prior rights in favor of Winter, was subsequently lost by reason of the sheriff's failure to retain its custody and control. Proceeding upon the same assumption, it becomes necessary to examine some of the instructions given for respondent.

The fourth instruction informed the jury that, "where personal property is sold or mortgaged, and the purchaser or mortgagee gets the possession of such property at any time after the sale or mortgaging, but before the levy of an attachment or execution, such delivery or getting of possession before such levy will be sufficient under the statute of frauds, and render such sale or contract of mortgage valid as against such levy of attachment or execution."

The language of the instruction quoted was used, substantially, and adopted as correct, in *Clute v. Steele*, 6 Nev. 335, and, in that case, was entirely correct; for there the only question was, as to the meaning of the words "imme-

diate delivery," as used in the statute. (Stat. 1861, p. 20, sec. 64.) There was no question in that case, but that before the attachment, and at the time thereof, the possession was in the vendee. But here, it was strenuously urged by appellant, and the testimony of several witnesses tended to show, that at the time of the attachment the possession and control was, and for a long time prior thereto had been, in the possession of Lopez. Under such circumstances, it was error to instruct that a simple delivery or getting of possession at any time after the sale, rendered the sale or contract of mortgage valid as against an attaching creditor; because there was much testimony to the effect that, quite immediately after the bill of sale was executed, and until the attachment, the property was in the possession of Lopez. It was not only necessary for Davis to have gotten possession before the attachment, but a sufficient continued change of possession thereafter was just as requisite.

The sixth instruction was based upon the hypothesis, that the respondent had the actual possession of the property from and after the execution of the bill of sale by Lopez, *and that he was the agent of Davis.*

The seventh instruction was as follows: "It is as essential that an officer levying a writ of attachment should actually retain actual possession and custody of the property attached, as that he should take the possession and custody *at the time of the levy*, and if the officer levying the writ of attachment, surrender or by any means lose, whether by design, or negligence, or accident, the actual possession and custody of such property, then other attaching creditors or purchasers or mortgagees in good faith for value, may acquire possession of the same, unless such person be in the possession as keeper, and such possession will hold against such attachment, and in the case of a purchaser or mortgagee, against any subsequent levy by attachment or execution." It is difficult to say what was intended by that instruction. Still, the jury might well have understood it as instructing them that, if the sheriff surrendered, or by any means lost, the *actual* custody, whether by the design of Davis or otherwise, yet if respondent was an assignee of

the bill of sale in good faith, for value, he could hold the property if he was not a keeper, and that was not claimed.

In the first place, there was no proof that respondent was a *bona fide* purchaser for value, as before stated, and it was error to instruct the jury as though he was such. In the second place, as to Davis, the sheriff's constructive possession was not lost, because the property was all the time in the custody of some agent of Davis, by his consent. So far as Davis was concerned, the sheriff had constructive possession all the time, for there was no testimony that Davis ever resigned his position, or asked to be, or was, released from his responsibility, and his possession as keeper was the possession of the sheriff. (Drake on Attach., sec. 431.)

The jury were told that it was as necessary that *the officer levying the writ* should actually retain the *actual* possession as that he should take possession at the time of the levy. Now, it was not necessary that the sheriff should retain the actual possession. Constructive possession by a keeper was all that the law required.

"An indispensable element of the continued existence of the lien is the officer's continued possession of the property, actual or constructive, that is, personally or by another." (Drake on Attach., sec. 350.)

The seventh instruction was misleading and erroneous.

Following is the ninth instruction: "If the jury believe from the evidence that Damacio Lopez sold or mortgaged the property in controversy to W. T. Davis, and that the said Davis, or his assignee, or vendee, got lawful possession of said property, either at the ranch of Moresi in Ormsby county or elsewhere, and that such possession was acquired peaceably and fairly and legally at any time before the actual levy of the execution in the hands of defendant Swift, and if the jury further believe from the evidence that there was a contract of mortgage between Lopez and W. T. Davis, to secure debts from said Lopez to said Davis and Moresi, or either of them, and that said indebtedness is still unsatisfied in whole or in part, then the jury should find for the plaintiff."

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Opinion of the Court—Leonard, J.

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It is difficult to perceive how the jury could have done otherwise than to find a verdict for respondent, under that instruction, if they believed that the indebtedness from Lopez had not been fully paid, although they might have believed also that Winter obtained a prior lien by his attachment; that Davis was keeper and had control and custody of the property by himself or his agents.

The possession of Davis or Moresi was "lawful," and it was "peaceably, fairly, and legally acquired," although Davis was keeper and Moresi his agent; but if Winter acquired a prior lien, and Davis was appointed and acted as keeper and Moresi as the keeper's agent, it is not true, for the reasons before stated, that fair, peaceable, and lawful possession by Davis or Moresi, at any time before levy under execution, necessarily entitled respondent to recover.

The tenth instruction was given upon the hypothesis that Lopez had the actual possession from and after the execution of the bill of sale, as claimed by appellant, and was as follows: "If the jury believe, from the evidence, that Damacio Lopez had actual possession and control of the pack train and property in controversy from and after the alleged execution of the bill of sale or chattel mortgage from him to W. T. Davis, \* \* \* and that Moresi or W. T. Davis paid the expenses of running the pack train and received the benefit of the earnings of said train in the discharge of any debt of said Lopez to Davis and Moresi, or either of them; still the jury should find for plaintiff if they further find, from the evidence, that any portion of such debts from Lopez to Davis or Moresi was unsatisfied, and that afterwards, but not as keeper, Davis or his assignee. Moresi, had gotten lawful possession of such property, at any time before the levy of the execution by Swift, whether possession was acquired at the ranch of Moresi or elsewhere."

By the twelfth instruction the jury were advised that, "a party in possession of land is presumed to be in possession of the personal property thereon until the contrary is shown." In brief, the jury were instructed that respondent could recover if he got *lawful* possession from Lopez at any



time before levy under the execution, and the mortgage debt was not paid. If Lopez had actual possession and control of the property from and after the execution of the bill of sale, as the instruction assumes to have been the case, then he brought it to respondent's ranch, as he testified that he did. If such was the case, and possession of the ranch was presumptive evidence of respondent's possession of the personal property thereon, then he must have been in "lawful" possession so far as he was concerned; for certainly, upon those facts, he did nothing unlawful. The jury, then, were bound to find for him, under the instruction, notwithstanding the facts that Winter may have acquired a prior lien; that there was no proof that respondent paid any consideration for the assignment; that he purchased no other or greater interest or better title than Davis had at the time; that Davis, had he obtained the actual possession from either Lopez or Moresi, instead of assigning his interest to respondent, could not have recovered, and that respondent was in no better situation. The fourteenth instruction was erroneous in permitting the jury to disregard the entire testimony of "a witness who had willfully sworn falsely on *any* matter in the case." That privilege should have been limited to witnesses who had willfully sworn falsely upon a *material* matter. We deem it unnecessary to consider the instructions offered by appellant and refused by the court. Enough has been said already to indicate the rights of the parties at another trial.

The judgment and order appealed from are reversed, and the cause remanded.

HAWLEY, J., dissenting:

There were two theories, upon either of which, the respondent claimed that he was entitled to recover a verdict.

First, upon the ground that at the time of the pretended levy of the attachment, and for a long time prior thereto, W. T. Davis & Co., as mortgagees, had the actual, open, and notorious possession of the property in controversy, and that the attachment, if levied, was subject to their rights as mortgagees. Second, that if there was a valid attachment,

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the lien was lost by a failure upon the part of the attaching officer to keep possession of the property.

Upon the first point, as to the possession of the property, prior to the attachment, there was a substantial conflict of evidence sufficient to have sustained a verdict on either side.

Appellant, to prove the levy of the attachment and the appointment of W. T. Davis, as keeper, relied upon the sheriff's return to the writ of attachment.

Respondent sought to show by the testimony of the sheriff that the attachment was levied, if at all, subject to the rights of the mortgagees, and that the appointment of Davis, as keeper, was made subject to his claim as a mortgagee; but this evidence was erroneously excluded by the court. The respondent claimed, in the first instance, that the testimony submitted upon his part, if believed, entitled him to a verdict. Second, that if the jury disbelieved his side of the story, and believed appellant's witnesses, then the same result would inevitably follow, because it affirmatively appeared therefrom that if there was any valid attachment (which respondent continually denied), it was lost by a failure upon the part of the attaching officer to keep the custody and control of the property. It is upon the latter theory that the instructions complained of were given. The return of the officer does not show, or tend to show, that the property attached thereafter remained in the possession of the sheriff or his keeper. There is no testimony that Davis, as keeper, turned over the possession of the property to Lopez, or to anybody else. There is no testimony that the lien of the attachment (if any ever existed) was lost by any act or agency of Davis, as keeper.

Lopez testified that he had the custody and control of the property after, as well as before, the levy of the attachment: that he ordered the mules brought down, and directed that they should be put upon the ranch owned by Moresi.

If Moresi obtained the possession by any illegal, forcible, or fraudulent means, or through any act or agency upon the part of Davis, as keeper, he would, of course, be estopped from claiming any benefit on account of such possession.

But, on the other hand, if he obtained the possession honestly, if there were no illegal, forcible, or fraudulent means used by him, or any one acting in his behalf, to secure the possession and control of the property, and he did not secure such possession through any act or agency of Davis, as keeper, then, certainly, he would not be estopped from denying the pretended lien of the attachment.

It may be admitted that some of the instructions given upon this point were, standing alone, calculated to mislead the jury; but when they are, as they should be, taken as a whole and construed together with reference to the particular facts and circumstances testified to in this case, I do not think the jury could have been misled upon the real questions at issue.

If the jurors believed that W. T. Davis, in violation of his duties and of the trusts reposed in him, as keeper, allowed the property to be surrendered either to Lopez or Moresi (or anybody else), it was their duty, under the instructions upon this branch of the case, to have found in favor of appellant.

The instructions (taken together as before stated) properly left the questions of fact for the jury to decide whether the lien of the attachment (if valid) was kept good, or whether it was lost by a failure upon the part of the sheriff to keep the possession; and if lost, whether Moresi, without any fraudulent or illegal means on his part, or any act upon the part of Davis, as keeper, legally came into the possession of the property, and had the rightful possession of it at the time of the levy of the execution.

There was sufficient testimony upon these points to sustain a verdict in respondent's favor.

Davis & Co. were *bona fide* mortgagees, and if the lien of the attachment was lost (through no agency of W. T. Davis, as keeper), they had the unquestioned legal right to sell and dispose of their interest in the property to Moresi.

The only objection urged to the fourteenth instruction is the omission to insert the word "material." Appellant has failed to point out any *immaterial* matter testified to by any

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witness, and hence has failed to affirmatively show that he might have been prejudiced by the giving of this instruction, even if it is erroneous.

In my opinion, the judgment of the district court ought to be affirmed.

[No. 917.]

THE STATE OF NEVADA, APPELLANT, v. THE CALIFORNIA MINING CO., RESPONDENT.

**A JUDGMENT FOR DELINQUENT TAXES MUST INCLUDE THE PENALTY.**—In a suit for delinquent taxes and penalties, the attorneys for the state, including the district attorney, consented to withdraw the claim for penalties from the consideration of the court, and take judgment for the amount of the tax. The judgment was so entered: *Held*, error; that it was the duty of the court to include the amount of the penalties in the judgment.

**IDEM—CONSENT OF ATTORNEY AND STATE OFFICERS VOID.**—Neither the district attorney, other counsel for the state, nor any of the state officers, are clothed with any authority to give consent to a judgment for delinquent taxes, without including the penalties.

**IDEM—RIGHT OF APPEAL.**—As no consent could be given to the entry of the judgment: *Held*, that an appeal lies, in favor of the state, from the judgment.

**SPECIAL LAW.**—Section 3 of the "act to discontinue litigation touching inequitable claims for taxes and penalties" (Stat. 1879, 143): *Held*, unconstitutional, it being a special law in violation of sections 20 and 21 of art. IV, of the constitution. (Hawley, J., dissenting.)

**IDEM.**—A law which applies only to an individual or to a number of individuals selected out of the class to which they belong, is a special law.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

*F. V. Drake*, District Attorney for Storey County, for Appellant:

I. The consent of parties did not authorize the court to enter a judgment for less than the law demanded.

The statute controls judicial officers as well as ministerial or executive officers. (Secs. 3153–3159, and 3232, 3233, 3238, 2 Comp. Laws; Cooley on Tax. 358, 359, and cases cited; *Thatcher v. Powell*, 6 Wheat. 119; *State v. C. P. R.*

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R., 10 Nev. 49; *Hobart v. Hobart*, 45 Ia. 501; *Norwegian Street*, 81 Pa. St. 349; *Cohen v. Barrett*, 5 Cal. 195; *Hills v. Chicago*, 60 Ill. 86; *Cedar Rapids R. R. Co. v. Carroll Co.*, 41 Ia. 153; *State ex rel. Ash v. Parkinson*, 5 Nev. 15; *State v. Con. Va. Mfg. Co.*, 13 Id. 289; *Murray v. State*, 34 Tex. 331; *Wearne v. Haynes*, 13 Nev. 103.)

II. The attorneys on the part of the state had no authority to compromise the cause of action. (1 Wait's Actions and Defenses, p. 436, sec. 4; *Spears v. Ledergerber*, 56 Mo. 485; *Walden v. Bolton*, 55 Mo. 405; *Maddux v. Bevan*, 39 Md. 485, 496; *Adams v. Roller*, 35 Tex. 711; *Moye v. Cogdell*, 69 N. C. 93; *Marbourg v. Smith*, 11 Kans. 554; *State v. Manhattan Co.*, 4 Nev. 318; *Holker v. Parker*, 7 Cranch, 436; *Shaw v. Kidder*, 2 How. (N.Y.) Pr. 244; *Adams et al. v. Bradley et al.*, 9th U. S. Circuit Court; *Wadham v. Gay*, 73 Ill. 415; *Stackhouse v. O'Hara*, 14 Pa. St. 88; *Bates v. Seabury*, 1 Sprague, 433; *Derwort v. Looner*, 21 Conn. 245; *Nolan v. Jackson*, 16 Ill. 272; *Doub v. Barnes*, 1 Md. Ch. 127; *Davidson v. Rozier*, 23 Mo. 387; *Vail v. Conant*, 15 Vt. 314; *Smock v. Dade*, 5 Rand. (Va.) 639; *Smith v. Dixon*, 3 Metc. (Ky.) 438; *People ex rel. Rondel v. N. S. F. H. & R. R. A.*, 38 Cal. 565; *Waters' case*, 4 Court of Claims, 389; *Parsel v. Barnes*, 25 Ark. 261; *People v. Minor*, 2 Lans. 396; *State v. Allen*, 32 Tex. 273; *Nixon v. Auditor*, 25 La. An. 433; *Preston v. Hill*, 50 Cal. 43; *Swinfen v. Swinfen*, 24 Beav. 549; *Brackett v. Norton*, 4 Conn. 517; *Lockhart v. Wyatt*, 10 Ala. 231.)

III. The judgment was entered without dismissing any part of the action, and was a judicial determination of defendant's liability of the tax. Being such determination, the delinquencies or penalties attached by operation of law, and there can be no fact in the cases for further or future investigation. The delinquencies or percentages necessarily follow the tax. The appellate court has the power to render the judgment that should have been entered in the court below. (1 Comp. L. 1400; *State of Nevada v. Con. Va. Mfg. Co.*, 13 Nev. 289; *Lane v. Kirkman*, Minor (Ala.), 411; *Campbell v. May*, 31 Ala. 567; *Wroth v. Johnson*, 4 Har. & M. 284; *Gordon v. Downey*, 1 Gill, 41; *Kennedy v. Lowery*,

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1 Binn. 393; *Darby v. Henderson*, 3 Munf. 115; *Blanc v. Sansum*, 2 Call, 415; *Mantz v. Hendley*, 2 Hen. & M. 308; *Smith v. Walker*, 1 Wash. 195; *McClure v. Lay*, 30 Ala. 208; *Emanuel v. Hatcher*, 19 La. An. 525; *O'Shea v. Kirker*, 8 Abb. Pr. 69; *Trevino v. Fernandez*, 13 Tex. 630; *Kinsey v. Stewart*, 14 Id. 457; *Gahan v. Neville*, 2 Cal. 81.)

IV. The act to discontinue litigation touching inequitable claims for taxes and penalties is unconstitutional, for several reasons:

1. The act embraces more than one subject, and the subjects are not expressed in the title. (Const., art. IV., sec. 17; 1 Comp. L. 108; Potter's Dwaris on Stats. 103-107, and cases cited; *State v. Silver*, 9 Nev. 227; *Peegle v. Mahoney*, 13 Mich. 494.)

2. It is a special law in violation of secs. 20, 21, of art. IV., and secs. 1, 2, of art. VIII., of the constitution. (*Davies v. McKeeby*, 5 Nev. 369; *Holden v. James*, 11 Mass. 396; *Simonds v. Simonds*, 103 Id. 572; *State v. Esterbrook*, 3 Nev. 173; *Toledo R. R. v. Nordyke*, 27 Ind. 95; *Williams v. Bidleman*, 7 Nev. 68; *State v. Toll Road Co.*, 10 Id. 155.)

3. Section 3 of the act discloses an assumption of judicial functions on the part of the legislature and conflicts with art. III., Con. (Sedg. on Con. of St. and Const. Laws. 138 *et seq.*, 166-170, notes and cases; Cooley on Const. Lim. 99-105; *Kimball v. Town of Rosendale*, 42 Wis. 407; *Ervine's Appeal*, 16 Pa. St. 266; *Greenough v. Greenough*, 11 Id. 494; *De Chestellus v. Fairchild*, 15 Id. 18; *Trustees v. Baily*, 10 Fla. 238; *Taylor v. Place*, 4 R. I. 324; *Denny v. Mattoon*, 2 Allen, 361; *Governor v. Porter*, 5 Humph. 165; *State v. Fleming*, 7 Id. 152; *People v. Supervisors*, 16 N. Y. 424; *Beisser v. Tell Ass'n*, 4 W. & S. 227; *Moser v. White*, 29 Mich. 59; *Butler v. Supervisors*, 26 Id. 23; *Hart v. Henderson*, 17 Id. 218; *People v. Goldtree*, 44 Cal. 323; *McDaniel v. Correll*, 19 Ill. 226; *Holden v. James*, 11 Mass. 402-405; *Picquet, Appellant*, 5 Pick. 64.)

4. It impairs the obligations of contracts. (Sedg. on Con. of St. & Const. Law, 630, 631; Pott. Dwar. on Stats. 474, 477, 478; *Rhodes v. O'Farrell*, 2 Nev. 60; Cooley on Const. Lim. 289; *Oatman v. Bond*, 15 Wis. 28.

## Argument for Respondent.

*M. A. Murphy*, Attorney-General, and *R. M. Clarke*, also for Appellant:

I. Upon the point that the act is an exercise by the legislature of judicial functions. (Sedg. on St. & Const. Law, 166-170; 4 Wheat. 558; 5 Pick. 65-70; 11 Mass. 396, 402-405; 2 Allen, 361, 376-378; 4 R. I. 324-337; 26 Mich. 22-26; 29 Id. 57.)

II. By section 3 in question the legislature attempts to ratify and confirm an unauthorized act of the district attorney in remitting a tax. The legislature have no power to remit a tax. It can not relieve a party from the payment of a tax which has been levied by the law. If the legislature can relieve a tax-payer from the payment of his taxes after they have been levied and become due, *a fortiori*, it can relieve him before the taxes have been levied and have become due. To relieve a tax-payer from the payment of his taxes, either before or after levy, would be to take the burdens of government from one and put them upon another. This would produce precisely the inequality of taxation which art. X. of the Constitution of Nevada inhibits. (Const. Nev., art. X.; Cooley on Tax. 152, 153; 3 Ohio St. 1, 14, 15; 5 Id. 589, 592; 9 Wis. 410, 420-428; 26 Mich. 26; 34 Cal. 432; 37 Id. 242, 246; 51 Id. 19, 23; 3 Nev. 179, 180.)

III. The whole act, of which sec. 3 is but a part, is invalid for the reason that it is a "special law" for the "collection of taxes," which is prohibited by sec. 20 of article IV. of the constitution of Nevada. (Const. of Nev., art. IV., sec. 20.)

It is special because it relates to particular suits only. It has no general application. It is not a rule of conduct or principle for the government of the people. It has no prospective operation. It seeks to affirm certain judgments by confirming the agreement of the district attorney of Storey county made in special cases. It has none of the characteristics of a general law, and all the characteristics of a special law. It must be pleaded, and requires evidence to give it application and effect.

*C. J. Hillyer*, for Respondent:

I. The supreme court of this state is nowhere and in no

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manner charged with the supervision of the collection of the revenue. The jurisdiction accrues solely from the fact that an appeal has been taken from a judgment in a civil action, and the determination must be in accordance with the principles which govern appeals in all civil actions. (2 Comp. L. 196 (Rev. Act., sec. 36); *Mayo v. Ah Loy*, 32 Cal. 477; *Eitel v. Foote*, 39 Cal. 439.)

II. The district attorney is appointed by law to represent the state as its attorney, and as to all matters of practice he is invested with the same authority, and charged with the same responsibility as other attorneys in other civil actions. (Rev. Act., sec. 29.)

III. The judgment was entered by consent of the attorney, and can not therefore be disturbed even if erroneous on its face. (13 Cal. 191; 22 Id. 456; 6 Id. 666; 9 Id. 277.)

IV. What the attorneys for the state really did, and all that they did, was to say that in the then pending action they would no further proceed for the collection of the penalties, and their authority to do this is, under the decisions, beyond reasonable question. (*Holmes v. Rodgers*, 13 Cal. 191; *Farmers' Bank v. Sprigg*, 11 Md. 389; *Gaillard v. Smart*, 6 Cow. 383; *Board of Commissioners v. Younger*, 29 Cal. 147.) The record does not disclose a want of special authority, and in the absence of any showing, authority will be presumed. (See 6 Cow. 383, above cited, and *Preston v. Hill*, 50 Cal. 55, 56.)

V. The order of withdrawal, even if authorized, was not void, but at most merely voidable.

The right to avoid an act of this character is lost by acquiescence, and the act is ratified without respect to time, by the acceptance and retention by the client of that which was the consideration for which it was obtained. (*Mayor v. Foulkrod*, 4 Wash. C. C. 511.)

VI. The authority to commence and defend suits whenever in their discretion the interests of the state will be thereby subserved, necessarily includes the authority to exercise their own judgment in refusing to institute legal proceedings, and by so doing, to bind the state in its relation



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Argument for Respondent.

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to parties who are misled or prejudiced, or acquire equities thereby.

VII. The act in question is not unconstitutional.

1. The title embraces but one subject. Each section of the act provides that under certain conditions there shall be no further litigation concerning a specified class of taxes or penalties.

2. The third section is not an encroachment upon judicial prerogatives.

All the decisions cited by the counsel for appellant are of cases involving the question as to how far litigation between private individuals, and respecting private rights, can be controlled by legislative action. Such cases have no relevancy to the present question.

3. The objection that this is special legislation needs no other answer than a reference to the numerous decisions of this court, upholding the constitutionality of those legislative provisions prescribing a special mode for the assessment and collection of taxes upon the proceeds of mines. (See also, *Youngs v. Hall*, 9 Nev. 212.)

VIII. The questions whether a penalty is part of a tax, and whether the legislature has the power to remit a tax or penalty, are in no way involved in the decision of these appeals. The section being considered does not purport to remit anything. It does not deal with any liability for taxes or penalties, but only with the validity of a certain class of judgments. This court has no means of knowing whether any tax or penalty was ever due from these defendants. The question of original liability has nothing to do with the question whether a judicial investigation has been so conducted that the judgment in which it resulted can be reversed.

The latter is the only question before this court. The only bearing which this section can have upon the controversy is by way of ratification of the act of the state's attorney. The legislature was asked to pass it only out of abundant caution, because it had been argued, that the consenting by the district attorney to a judgment for less than the amount claimed in the complaint, was in the nature

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of a compromise, and that the usual presumption in favor of special authority to the attorney could not be here indulged, because the client was the state.

By the Court, BEATTY, C. J.:

The complaint in this action was filed March 16, 1877. It showed by the usual averments that the taxes due from the corporation defendant, on account of the proceeds of its mine for the quarter year, ending September 30, 1876, were delinquent, and prayed judgment therefor and for the prescribed penalties and costs.

To this complaint the defendants demurred, upon grounds which are now confessed to have been without merit. Such being the state of the pleadings, the following judgment was entered by order of the court on the fifth of May, 1877:

"This cause coming on regularly for hearing by consent of parties at this day, now come said parties in open court by their respective attorneys, F. V. Drake, district attorney, and Lewis & Deal, attorneys for plaintiff, and R. S. and W. S. Mesick, attorneys for defendant, and the said plaintiff, by consent of defendant, withdraws its claim from the consideration of the court for the penalties mentioned in the complaint in said cause, and takes judgment for the sum of seventy-two thousand three hundred and fifty-five dollars and eighty-nine cents, the tax sued for, and one thousand five hundred dollars, fees for district attorney, besides cost of suit herein, taxed at forty-eight dollars and seventy-nine cents. Wherefore it is ordered and adjudged that the plaintiff have and recover in this action of and from the defendant the sum of seventy-three thousand nine hundred and four dollars and sixty-eight cents, in United States gold coin, and that plaintiff have execution therefor."

From this judgment the plaintiff appeals, and, there being no statement of the case annexed to the record, the question is, whether error appears upon the judgment roll.

It is not, and can not be, pretended that the pleadings sustain the judgment. The complaint shows that a tax of upwards of seventy-two thousand dollars was assessed upon the proceeds of the defendants' mine, taken at a valuation

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fixed by its own agents, in the sworn statement which they were required to make; it shows that this tax had become delinquent, and that a right of action had arisen thereupon before suit brought. There was but one way of putting the truth of these allegations in issue, and that was by a verified answer. (Comp. L. 3156.) But no such nor any other answer was ever filed. The complaint was never amended, and there is no trace upon the record of any sort of retraction of its allegations, or of any admission, solemn or otherwise, that it is in any particular untrue. Such being the case, we repeat, the judgment is not sustained by the pleadings; for the uncontradicted and unretracted allegations of the complaint are that there was due from the defendant at the time the action was commenced, not only the sum of seventy-two thousand, three hundred and fifty-nine dollars and eighty-nine cents, delinquent taxes, but, in addition thereto, upwards of eighteen thousand dollars—the penalty of twenty-five per cent. of the amount delinquent. The right to recover which follows, as a direct and inevitable legal consequence, from the right to recover the tax itself. It was the imperative duty of the district attorney to insert in the complaint a demand for this penalty, and it was no less the imperative duty of the court to include it in the judgment. (Comp. L. 3238.) The validity of this law has never been questioned, but on the contrary, has been expressly affirmed by this court. (*State v. California Mining Co.*, 13 Nev. 206.) And there can be no doubt as to its construction. It is mandatory in its terms and in its spirit; and the express injunction which it lays upon the court is as direct and positive as that which it lays upon the district attorney. Not only must the complaint demand but "*the judgment shall be entered for twenty-five per cent. in addition to the tax,*" etc. How then is this judgment, entered for the tax without the penalty, to be vindicated? It is not the judgment which, on the case presented by the record, the law commended the district court to enter; and it is therefore erroneous, unless it is rendered valid by the consent therein recited of the district attorney. The consent of Messrs. Lewis & Deal, who are also mentioned as

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appearing for the state, can add nothing to the force or effect of the consent of the district attorney. For under the general laws of the state (Comp. L. 3153, 3231), the district attorneys of the several counties, and they alone, are authorized to commence actions for the collection of taxes returned delinquent. In all such cases they have exclusive charge of the litigation, as representatives of the state, so long as it is carried on in the district courts. If other attorneys appear, they necessarily act in a purely advisory capacity, or, if they exercise any authority whatever, it must be derived from the district attorneys, and can never, therefore, exceed that which the statutes have conferred upon them.

What, then, was the effect of the district attorney's consent?

And first, what did he consent to?

There has been some controversy between counsel, but not a very serious one, as to the meaning of the stipulation recited in the judgment. Indeed, the matter is too plain to admit of serious controversy. It is frankly conceded by counsel for respondent that, in point of fact, the transaction was nothing more nor less than a compromise, by which the district attorney, in consideration of being allowed, without further delay, to take a judgment for the amount of the tax, and a part of his own fees, consented to waive the claims of the state as to the accrued penalty. Counsel, however, contends that the transaction, as it appears upon the record, will bear, and that this court ought to allow it, a different construction. We shall not attempt to state, or to answer in detail, the argument upon this point. We content ourselves with saying that to us the stipulation recited in the judgment appears to demand a construction strictly in accordance with the admitted fact that it was intended to be a compromise of the cause of action. The district attorney consented that the court might disregard the mandate of the law in entering judgment. He did not, as suggested, merely dismiss as to a part of the cause of action. He consented to the entry of a judgment for a part only of an entire cause of action, without reserving any right to sue for the remainder, separately; and the

effect was, if his action is sustained, to forever bar the right of the state to recover the penalty, the claim to which he then withdrew, or attempted to withdraw, from the consideration of the court. In effect, and in short, he consented to relinquish then and forever, the claim of the state for one fifth part of the sum due, in consideration of being allowed to take judgment for the balance.

Having thus ascertained what it was that the district attorney consented to, the next question is: Had he any authority to give such consent?

It is admitted that an attorney, without a special authority, can not compromise his client's demand, or, at least, that he could not do so before the passage of our statute relative to attorneys. (Comp. L. 884 *et seq.*) There seems to be a claim on the part of respondent that, under the provisions of that statute, his powers have been greatly enlarged. The language relied on in support of this view is as follows: "An attorney and counselor shall have authority: First—To bind his client in any of the steps of an action or proceeding by his agreement, filed with the clerk or entered upon the minutes of the court, but not otherwise." (Sec. 893.)

This, however, is not an enlargement of the attorney's authority, but is merely a restriction as to the method of exercising it. (*Preston v. Hill*, 50 Cal. 53.) Under the statute, therefore, as before the statute, it remains true that an attorney at law can not compromise his client's cause of action without being especially authorized so to do. It is further admitted, that the district attorneys of the several counties have no greater authority (under the statutes) in the conduct of tax suits than is ordinarily conferred by a general retainer in a controversy between private parties. It follows from these admitted propositions that, *under the law*, a district attorney has no authority to compromise a tax suit.

But it has been often held that, in the absence of proof, an attorney, who has compromised his client's cause of action, will be presumed to have been specially authorized so to do; and such is probably the general rule.

It is upon this proposition that counsel for respondent places his main reliance. He contends that in this case, as in other cases, it must be presumed that the district attorney had a special authority to make the compromise upon which the judgment was entered.

Counsel for appellant contends, on the contrary, that, although it may be proper and just, as well as convenient to the administration of justice, to presume such special authority where the client is a natural person or corporation capable of conferring it, by means of which courts can have no judicial knowledge, it is far otherwise in the case of the district attorney, who derives all his authority from public statutes, of which the courts are bound to take notice.

This argument is unanswerable. The reason why an attorney for a natural person or private corporation is presumed to have a special authority for any compromise he may make of the cause of action is that it is highly probable such authority has been given. He is in constant communication with his client, and acting under his instructions; his client may at any moment instruct him to compromise; if he compromises without authority, he exposes himself to a serious personal liability without any adequate motive, and therefore it is highly improbable he will do so. Consequently the presumption that he will not compromise his client's demand without authority, rests, like all other presumptions of fact, upon the probability of its truth.

In the case of the district attorney this reason utterly fails. To presume that he had a special authority to compromise a claim for delinquent taxes, would be to presume a fact which is legally impossible. The only means by which his client can, under the constitution, confer any authority upon the officers charged with the collection of its revenues, is a general statute; and the courts therefore know with absolute certainty that an authority, not conferred by the statutes, which they are bound to notice, does not exist.

In this case we know with absolute certainty, and the district court and the respondent and its counsel must be held to have known, that neither the district attorney, nor any other officer or person whatsoever, had any authority to com-

promise the cause of action stated in the complaint. His consent to the judgment as entered was therefore void, and the judgment is necessarily just as erroneous with his consent as it would have become without it.

That this judgment, which, as we have shown, is not sustained by the pleadings, and has nothing else to sustain it, must be reversed, unless it is cured by the act of the legislature hereafter to be noticed, seems to be a necessary consequence of the error disclosed by the record. This, however, is denied. Counsel for respondent insists that an appeal will not lie, that the remedy, and the only remedy, is a bill in equity to set aside the judgment; because, he says, two facts must be established in order to entitle the state to relief, viz.: First, that the state did not consent to the compromise, and, second, that it suffered detriment thereby.

But we have shown that there can be no question of fact in regard to the consent of the state. That it did not consent is a conclusion of law, and it would be absurd to frame an issue of fact in order to determine a question that the law has determined in advance.

And the fact that this question is so determined in advance makes all the difference in the world with respect to the remedy. Ordinarily a consent judgment is *prima facie* valid, because the party himself is presumed to have consented. An appeal therefore is no remedy, and he is driven to a separate action in order to rebut the presumption which gives a *prima facie* validity to the judgment. Here, on the contrary, there is no such presumption to sustain the validity of the judgment. It is erroneous on its face, an appeal lies to correct it, and the very fact that an appeal does lie would probably exclude any other remedy.

As to the matter of detriment to the interests of the state, that also is a conclusion of law. The judgment being shown to be erroneous, damage is presumed.

These reasons seem to us fully to sustain our conclusion that the judgment appealed from was erroneous, and that an appeal was the proper remedy for the state. We are glad to be able to add that, in a case exactly in point, the supreme court of Texas reached the same conclusion.

(*State v. Allen*, 32 Tex. 273.) No other case in point has been brought to our notice.

Another distinct ground upon which counsel for respondent contends that this appeal should not be entertained is, that it was not taken until the time for taking it had nearly elapsed, and that the governor and attorney-general, not having instituted any proceedings against the judgment during all that time, manifested their acquiescence in the compromise. There are more answers than one to this proposition. In the first place, it is at least doubtful if any proceeding could have been taken against the judgment except this appeal. In the next place the law allows a year for taking an appeal, and when an appeal is properly taken within a year, this Court is bound to entertain it. Finally, it may be said that acquiescence is only a mode of ratification, and that, since the governor and attorney-general had no authority to make the compromise, they had no power to ratify it, either directly or indirectly—by express affirmance or by acceptance of its results.

Moreover, the action of all other officers and persons in the direction of ratification becomes unimportant in view of the subsequent action of the legislature. An attempt was made, as we shall see, to ratify this compromise by law, and we shall have occasion to inquire whether the law-making power of the state was equal to the task. If it was, then no other ratification was needed; but if it was not, it is very clear that no other could be effective.

It is not strictly necessary, perhaps, to notice that portion of respondent's argument in which our censure is invoked upon the conduct of the district attorney. It is certain that the circumstance that this appeal was taken by the same person who consented to the judgment, does not affect the right of the state to be heard. The state did not deceive or mislead any one. It had never clothed the district attorney with an apparent authority to compromise its claims, and if any one was in fact deceived in regard to that matter, he was deceived only because he chose to ignore, not only the terms of the statute, but the decisions of this



court, which has more than once denied the right of county commissioners, district attorneys, etc., to compromise claims for delinquent taxes. (See 9 Nev. 88; 10 Id. 84.) This all parties must be held to have known. If they did not know it, they fell into a mistake which was their own fault, and which therefore does not preclude the state from asserting its rights; if they did know it, and acted in defiance of the law, they have even less claim to forbearance.

But, as above intimated, we find no occasion to censure any one concerned in this compromise. We have no reason to suppose that any one acted otherwise than in good faith; and we assume that all parties were simply mistaken as to the authority of the district attorney. It appears that after the entry of judgment he discovered his mistake, and he did but his duty in attempting to remedy it. He first, as is well known, commenced a separate action for the penalties, going upon the theory that this action, as far as related thereto, had been dismissed without prejudice. In the district court he recovered a judgment; but on appeal, that judgment was reversed upon the ground that his complaint showed that this action for the tax and penalties was still pending. (13 Nev. 289.)

In considering the points involved in that case, we had occasion to say (p. 295): "The question of the right of the state to recover the penalties is purely a question of law, and neither the district attorney nor any other representative of the state had any power to absolve the district court from the duty of deciding it, in an action which involved the penalties. If, without dismissing the action as to the penalties, the court was asked to ignore the state's right to recover them, it was asked to commit an error for which its judgment might have been reversed on appeal, notwithstanding the unauthorized consent of the district attorney."

It was this expression of our opinion, not lightly made, that no doubt led to the taking of this appeal; and we are even more thoroughly satisfied, after the fuller examination which we have since made of the questions involved, than we were then, that it is the proper remedy for the state in a case of this kind.

We come next to a more serious and important, if not a more difficult question:

After this case had been argued and submitted upon the points above discussed, the legislature passed an act entitled "An act to discontinue litigation touching inequitable claims for taxes and penalties" (Stats. 1879, 143), the third section of which reads as follows:

"Sec. 3. Where, in suits commenced for the recovery of taxes delinquent prior to the first day of July, 1877, a judgment has, by the consent of the district attorney, been entered for the amount of the original tax and costs, exclusive of any penalty or percentage due, or claimed by reason of default in payment at the time prescribed by law, the action of the district attorney in so consenting to said judgment is hereby ratified and approved."

There can be no doubt that the intention of the legislature in passing this act was to give validity to the judgment in this and other similar cases; and, if it is constitutional, it must undoubtedly be allowed that effect.

But a re-argument of the case having been directed, upon application of the attorney-general, he has raised various objections to the constitutionality of the act. Of these various objections we deem it unnecessary to consider more than one, as that, in our opinion, is conclusive so far as the act in question affects this and similar cases—cases, that is to say, coming within the terms of section three.

This part of the act is in plain and palpable violation of sections 20 and 21 of article IV. of the constitution. By section 20 the legislature is prohibited from passing local or special laws in certain enumerated cases; and section 21 requires that in all such enumerated cases "all laws shall be general and of uniform operation throughout the state." The assessment and collection of taxes for state, county, and township purposes is one of the cases enumerated in section 20, and it follows inevitably that a law on this subject, to possess any validity, must not be special, but must, on the contrary, be general and of uniform operation throughout the state. The only question to be decided, therefore, is whether this law is special and not general, for that it re-

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lates to the collection of taxes is not and can not be denied.

What, then, is a special law within the meaning of the provisions of our constitution above cited? We need not go beyond the decisions of this court to seek a definition sufficient for the purposes of this case. If a thorough and comprehensive and exact definition were required, it would be found, perhaps, that there were some differences of opinion to be reconciled; but whenever the question has been presented in this court or any other court, so far as our observation has extended, it has always been agreed that a law which applies only to an individual or to a number of individuals selected out of the class to which they belong, is a special and not a general law. (See opinion of Whitman, J., in *Clarke v. Irwin*, 5 Nev. 120, 121; opinion of Lewis, C. J., in *State ex rel. Stoulemeyer v. Duffy*, 7 Nev. 348; opinions of Belknap and Hawley, J.J., in *Youngs v. Hall*, 9 Nev. 217, 226; and see *Ex parte Spinney*, 10 Nev. 319.) In several of these cases the definitions of the text-writers and the decisions of other courts were thoroughly reviewed; and, to the extent to which they are here relied upon, they are undoubtedly sustained, not only by the weight of authority, but by all authority.

Assuming, then, as the accepted definition of a special law, that it is one which affects only individuals and not a class—one which imposes special burdens, or confers peculiar privileges upon one or more persons in no wise distinguished from others of the same category, we will proceed to examine the terms and effect of the act referred to.

In terms, it is a ratification of the unauthorized and illegal acts of district attorneys in consenting to a remission of the penalties imposed by the laws of the state upon delinquent tax-payers. Its effect, if held valid, would be to confer a valuable and peculiar privilege upon those individuals who, by a violation of official duty on the part of one or more of the district attorneys of the state, have been allowed to escape the penalty which the law imposes upon the class to which they belong, the individuals so favored not being distinguished in any manner from others embraced

by the terms of the general laws, except by the mere circumstance that they have been arbitrarily and illegally selected as recipients of the favor.

The general law applicable to this case is the act of March 7, 1873 (Comp. L. 3238), which puts in one category all delinquent tax-payers, the amount of whose delinquency exceeds three hundred dollars, against whom, without exception, the district attorneys are required to demand, and the district courts to enter judgment, not only for the amount delinquent, but also for a penalty of twenty-five per cent. in addition thereto. This act is supplementary to and a part of the general revenue law, the law for the assessment and collection of state and county taxes, and would have been unconstitutional and void *ab initio*, if it had not been made to operate uniformly throughout the state against every individual of the class which it defines. If the legislature had attempted, by a proviso or otherwise, to exempt from its operation any individual or individuals, in nowise distinguished from others upon whom it was left operative, either the proviso would have been held void, or the whole law would have been declared unconstitutional.

But the law itself is open to no such objection; it is what the constitution requires that it should be; it is general, and designed to be of uniform operation throughout the state. As a matter of fact, it has been generally enforced; the fact is notorious, and the proof of it is abundantly forthcoming in the records of cases decided in this court. But it is not upon the notorious fact, or the proofs alluded to, that we reply. The legal presumption is, that officers do their duty, and we must presume, in the absence of proof to the contrary, that in every case calling for the application of the law referred to, judgment has been entered for the penalty in addition to the tax—that conformity to the law on the part of public officers has been the rule, and disregard of its mandates the rare exception.

We would infer from the terms of the act under consideration that in some one or more instances one or more district attorneys of the state have disregarded the general law; and we know from the cases now on appeal to this court

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that in just four actions—two against the respondent, and two against the Consolidated Virginia Mining Company—the district attorney of Storey county gave the consent which the legislature has attempted to ratify. We know of no other instances in which this has happened, and we are bound to suppose that there are none.

It would make no manner of difference, however, if what has happened in two cases in one county of the state had happened in dozens of cases in every county. It would remain inexorably true, that the favor extended to the individuals arbitrarily selected by the district attorneys was a favor which a general law of the state denied to others of the same class. If therefore, such acts can be made valid by a retrospective law, it is because, and only because, the legislature can do indirectly through the agency of the district attorneys, what it could not do directly by statutory enactment.

Counsel for respondent admits that the legislature can not cure retrospectively what it could not originally authorize, but he asks, with great confidence: "Could the legislature, in the original revenue bill, have constitutionally provided, that in actions to collect taxes the district attorney might, where in his discretion he deemed it for the best interests of the state, consent to a judgment for a portion of the tax claimed in the complaint or for the amount of the tax without any penalty?" He adds: "I scarcely think this will be denied."

But counsel is mistaken. We do deny his proposition, and deny it most emphatically. We deny that the legislature can delegate a power which it does not itself possess. A revenue law must, as we have seen, be general, and of uniform operation throughout the state; it must have the same operation in one county that it has in every other county under similar circumstances; it must operate, not upon individuals as such, but upon defined classes. No matter how much it may be deemed to the interest of the state to exempt individuals from the operation of any provision of the law, the legislature has no power to exempt them except by defining a class which will comprise them

and exempting the whole class. In that case, not only the individuals intended, but every other individual comprised under the same definition, would be entitled to the exemption.

This is the utmost stretch of discretion allowed to the legislature itself, and it can delegate no greater power to the district attorneys or any other officers or agents. Admitting, without deciding, that the law might have constitutionally provided that, under certain circumstances, or upon certain conditions or terms, district attorneys should be authorized to remit the penalty after suit brought for delinquent taxes; still nothing would have been left to the discretion of the district attorneys. Such a law would have been held, upon a familiar principle, not merely permissive, but mandatory; and every delinquent, coming within the defined circumstances, or having performed the prescribed terms or conditions, would have been held entitled to the exemption as a matter of right; and so the operation of the law would have been uniform. But could this be said of a law which left it to the mere discretion of a dozen district attorneys in a dozen different counties, to enforce the penalty against one individual and remit it in favor of another individual comprised in the same legal classification? So far from operating with uniformity, such a law would lead to the most odious and tyrannical discriminations. In one county the penalty might be enforced against all delinquents; in another it might be remitted in favor of all; in still others it might be enforced against the enemies, political or personal, of the district attorney, and remitted in favor of his friends. To call such an engine of oppression a law, is an abuse of language. No such enactment has ever been held to be law in this court or any court under a constitution like ours. The decision referred to by counsel (*State ex rel. Mason v. Comm'rs*, 7 Nev. 392), sanctions nothing except the power conferred on county commissioners to equalize taxes. This being a judicial power, and its exercise not subject to review, except when there has been an excess of jurisdiction, it is certainly capable of being abused; but it has never been pretended that

the county commissioners have a lawful right to raise one man's assessment and lower another's under the same circumstances, or to discharge the assessment of A. and to refuse to discharge the assessment of B. on identical facts. That they might, through ignorance or corruption, do such things, is no argument. The question is, not what a court of last resort may do in defiance of law, but what the legislature may expressly authorize an officer to do, who has and can have no judicial powers.

But even if we were to admit, which we are far from doing, that the legislature might authorize the several district attorneys of the state, in their discretion, to remit these penalties whenever they deemed it of public advantage to do so, such a law—odious and oppressive and demoralizing as it would be in practice—would still, from a constitutional point of view, possess one immeasurable advantage over the act under discussion. Being prospective in its operation, every delinquent tax-payer in the state could avail himself of its provisions, to the extent, at least, of applying for relief; and every district attorney in the state, provided he thought it for the public advantage, could grant the remission without disobeying the law or violating his duty. Then, as it is possible to suppose that every district attorney would entertain the same views of public expediency, the law could be supposed (though in a most improbable contingency) capable of uniformity of operation; and upon that ground, if upon any, its constitutionality might be upheld. In order to do so, however, it would be necessary to hold, at the same time, that the legislature can delegate to subordinate ministerial officers its own high sovereign attribute of judging and determining questions of state policy.

But it is needless to pursue this line of speculation, for the act whose constitutionality we are now to determine is purely retrospective in its operation, and is thus broadly discriminated from the act supposed, by the consideration that its only possible effect is to confer an exceptional privilege on a few individuals who have been arbitrarily selected out of the class to which the law assigns them.

The law of 1873, which imposes the penalty upon delin-

quents of this class, is still in force; it has never, since its original enactment, been repealed or suspended; the legal presumption is, and the fact is, that when penalties have accrued under its provisions, the delinquents have been compelled to pay them, except in the instances brought to our notice by the appeals now pending in this court. To hold that these two corporations can, by the means resorted to, be excepted from the operation of a law which the constitution requires to be general and of uniform operation throughout the state, would be to disregard all precedent and the plainest dictates of common sense.

We shall make no extended reference to the authorities which are cited in such abundance in the briefs of the counsel for the state. We content ourselves with two short quotations, which contain the substance of a great many decisions:

"It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances, or that any one should be subjected to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted." (*Holden v. James, Adm'r*, 11 Mass. 404.)

"We can not view it in that light, for it ought not to be presumed that the legislature intended to do what by the constitution they have no authority to do, and we think it very clear that they have no authority by the constitution to suspend any of the general laws, limiting the suspension to an individual person, and leaving the law still in force in regard to everyone else." (*Picquet, Appellant*, 5 Pick. 68.) This last quotation is directly applicable; and it is observed that neither of these decisions was based upon an express constitutional provision, like that above cited from our own; but the authority of the legislature to exempt individuals from the operation of laws applicable to others in the same situation, is denied upon the ground that its existence is inconsistent with the first principles of civil liberty and natural justice, and the spirit of the constitution and laws.



In opposition to all this, counsel for respondent has nothing to urge except that this court has held valid the law for the assessment of the proceeds of the mines which he claims is exactly on a par with the act under consideration.

We can hardly suppose that this argument is seriously advanced. The distinction between the two acts is too obvious to have been overlooked. The first applies to every individual of a class of tax-payers, a class recognized and specially provided for in the constitution itself. (Art. X.) Under its provisions the proceeds only of the mines can be taxed. The yearly product of a mine can not be ascertained until the year has elapsed. The consequence is, that the mining proceeds must be assessed periodically, or their assessment must be deferred a whole year after the assessment of all other species of property for any given fiscal year. It is the constitution, therefore, not the law, which is responsible for the discrimination referred to; the latter merely recognizes and does the best it can with the conditions created by the former. The legislature found a class of tax-payers set apart from others by the instrument to which it owes its own existence; it passed a law applicable to all members of that class, and yet counsel can see no distinction between that law, and an act which attempts to suspend the operation of a general revenue law for the benefit of two or three individuals. We think that we can not only see a distinction, but that it is too plain for serious discussion.

The only question remaining to be considered is: What order is to be made concerning the judgment appealed from? The district attorney, appearing in behalf of the state, claims that we should order it modified by the addition of the penalties. But we think it very clear that we have no authority to do so. The defendant is entitled to an opportunity to answer and defend the action, if it has a defense, and we can not know that it has none.

It is therefore ordered that the judgment appealed from be reversed, and the cause remanded, with directions to the district court to overrule defendant's demurrer and allow a reasonable time for answering.

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Opinion of Hawley, J., dissenting.

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HAWLEY, J., dissenting;

In the light of the application of the legal principles decided by this court, in *Youngs v. Hall*, 9 Nev. 212, it can not consistently be said that the "Act to discontinue litigation touching inequitable claims for taxes and penalties" (Stat. 1879, 143) is a special law, in violation of sections 20 and 21 of Article IV. of the constitution.

I was, and still am, of the opinion that the conclusion reached by the court in *Youngs v. Hall*, was erroneous. But having expressed my individual views (9 Nev. 225) I have ever since considered it to be my duty to follow it, especially in sustaining laws of the same character. (*Odd Fellows' Savings and Commercial Bank v. Quillen*, 11 Nev. 109.)

In accepting that decision as the law of this state, the legislative and executive departments had the unquestioned right to believe that the act under consideration was not repugnant to these provisions of the constitution.

The act, within the reasoning of this court in *Youngs v. Hall*, does certainly apply to all persons who come within the relation and circumstances specified in section 3. It applies to all persons and all suits similarly situated. To that extent, at least, it is general and uniform in its operation. No individuals are distinguished from others in the same category.

Whether there are four cases or four thousand to which the provisions of section 3 apply, is wholly immaterial.

If laws of this character are general and uniform, it is "not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being uniform is not affected by the number of persons within the scope of their operation." (*McAunick v. The M. & M. R. R. Co.* 20 Iowa, 343.)

My attention is called to *Holden v. James*, 11 Mass. 404, and other similar cases, which, in my judgment, are not

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analogous to the case in hand. The court, in *Holden v. James*, was discussing a resolve, passed by the legislature of that state, giving to Holden the right to collect certain claims from the administrator of an estate, notwithstanding the fact that said claims were barred by the statute of limitations. No other person, or persons, having similar claims could collect their demands.

It was a law in favor of an individual, where other individuals similarly situated could not avail themselves of its provisions. To hold such laws to be general and uniform "would be to disregard all precedent and the plainest dictates of common sense."

From the views I entertain of this case, it is unnecessary to decide the question, propounded by counsel, whether the legislature could delegate the power to the district attorneys, or other officers, to remit any portion of the tax or penalty in cases where, in their discretion, the justice of the case might so require. The legislature of this state has exercised this power, to a certain extent, in the passage of the revenue law. Section 29 of the act provides that "no suit for the collection of delinquent taxes, where the amount is less than three hundred dollars, shall be commenced, except by the direction" of the board of county commissioners. (2 Comp. L. 8153.)

Now it could be said that such a law might "lead to the most odious and tyrannical discriminations;" that in one county the district attorney might be authorized to bring suit against every delinquent, while in others he might be directed not to bring suit against any; or in some counties he might be authorized to bring suit against the "enemies, political or personal," of the commissioners and not to bring suit against their friends. Such ideas are possible to the imagination, but are improbable and unreal in fact. No such result has followed from the passage of the law. If such laws are unconstitutional, it must be upon other grounds.

The fact that power, wherever lodged, may be abused, is no argument against its exercise. (*State ex rel. Ash v. Parkinson*, 5 Nev. 16; *State ex rel. Clarke v. Irwin*, 5 Id. 112; Nev. Vol. XV.—17.)

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*Phillips v. Welch*, 12 Id. 179; *Auda v. Kinkead*, 14 Id. 117.) The remedy lies with the people, not with the courts.

It is, unfortunately, true that men are occasionally found in the grand army of office-holders who violate their solemn pledges to the people and willfully betray their trust. But, in my judgment, these are rare exceptions. As a rule, the officers are governed, as they all ought to be, by higher and nobler motives; they faithfully, honestly, and impartially discharge their respective duties. It is, at least, upon this presumption, that the government, national and state, continually acts. It would indeed be difficult, if not impossible, for the people to live, or for a government to exist, under a constitution which denied the exercise of any power, upon the ground that it might possibly be abused.

The legislative, executive, and judicial departments of this state are separate and distinct. Each is sovereign within its respective sphere, and each is directly responsible to the people for its official acts.

Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives. (Gooley on Con. Lim. 129.)

The fact is, that the protection which the people enjoy against unwise and improper legislation is not derived solely from constitutional restrictions. It is derived, to a great extent, from the force of public opinion and the character of our representatives. This court has the power to keep the legislature within the terms and plain import of the constitution. There its duty ends. "Whether the power of the legislature was reasonably or unreasonably exercised; whether it was wise or unwise, expedient or inexpedient, to enact the law, are questions left exclusively to other departments of our state government to decide, and their judgment must necessarily be decisive upon these questions." (*Ex parte Spinney*, 10 Nev. 337; *Gibson v. Mason*, 5 Id. 284; *State v. McClear*, 11 Id. 39; *Dayton M. Co. v. Seawell*,

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Points decided.

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11 Id. 394; *Hess v. Pegg*, 7 Id. 24; *Evans v. Job*, 8 Id. 322.)

To the extent above expressed, I dissent from the views enunciated by the court, upon the constitutional questions discussed in the opinion of the chief justice.

I concur in the conclusions reached upon the other points.

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[Nos. 918, 919, 920.]

THE STATE OF NEVADA, APPELLANT, v. THE CALIFORNIA MINING COMPANY AND THE CALIFORNIA MINE, RESPONDENT; THE STATE OF NEVADA, APPELLANT, v. THE CONSOLIDATED VIRGINIA MINING COMPANY AND MINE, RESPONDENT; THE STATE OF NEVADA, APPELLANT, v. THE CONSOLIDATED VIRGINIA MINING COMPANY AND MINE, RESPONDENT.

A JUDGMENT FOR DELINQUENT TAXES must include the penalty.

By the Court, BEATTY, C. J.:

The cases are, in all material respects, like the case of *The State v. The California Mining Co.* (No. 917); and on the authority of that case the judgments are reversed and the causes remanded with like directions to the district court.

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[No. 1011.]

EDWARD R. CHASE, APPELLANT, v. HENRY H. CHASE, RESPONDENT.

**INJURIES TO GROWING CROPS—LAND MUST BE INCLOSED.**—Under the statutes of this state, no action can be sustained for injuries done to real estate, or to the crops growing thereon, by horses and cattle that are allowed to run at large, unless the land is inclosed with a lawful fence.

APPEAL from the District Court of the Seventh Judicial District, Elko County.

THE facts appear in the opinion.

## Argument for Respondent.

*H. C. Street and E. R. Chase, for Appellant:*

I. Plaintiff was in possession; possession alone is sufficient to maintain trespass. (*Althouse v. Rice*, 4 E. D. Smith, 347; *Smith v. Miles*, 1 Term, 480; 2 E. D. Smith, 200.)

II. The right of the owner to the possession of his property is inalienable and exclusive. (State Const.; *Jackson v. R. & B. R. R.*, 25 Vt. 150; *Walsh v. V. & T. R.*, 8 Nev. 114.)

III. The entry of the defendant was *prima facie* tortious, and throws upon him the burden of showing a right to enter. The defendant can only justify under license of law or license granted by plaintiff. License, if relied upon as a defense, must be pleaded. (15 Barb. 499.)

IV. Any statute giving a right to go upon the lands of another with cattle, is unconstitutional and void. It "would impair the rights of private property;" it would "interfere with the primary disposal of the soil." (Organic Act, Nev. Ter.; *Vansickle v. Haines*, 7 Nev. 278, 279; Schedule State Const., sec. 2.) The remedy by distress is cumulative to the common law. A man may relinquish distress, and proceed at common law. (*Colden v. Eldred*, 15 Johns. 220.) Trespass consists in the unwarrantable entry upon the lands of another, whether inclosed or not, and proof of the trespass entitles a man to damages, though none be proven. (*Entick v. Carrington*, 2 Wils. (Eng.) 275; *Parker v. Griswold*, 17 Conn. 228.)

V. This is not a case where the parties were in the exercise of their equal rights, and the question of negligence can only be fairly discussed under these inequalities. (*Woodruff & Grippen v. N. Y. C. R. R.*, 40 N. Y. 47; *Solen v. V. & T. R.*, 13 Nev. 127.)

VI. The entry upon plaintiff's land was a naked trespass; it can not be justified under the plea that plaintiff left his property in an exposed position. (44 Pa. St. 379; 29 N. Y. 390; Harm. & R. on Neg. sec. 31; *Solen v. V. & T. R.*, 13 Nev. 124.)

*Rand, Wines, and Dorsey, for Respondent:*

The appellant is not entitled to any judgment against respondent, for the reason that he had failed to protect his crops

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by a fence, or by any kind of obstruction likely to turn ordinary stock. (1 Comp. L. 3992; *Smith v. Williams*, 2 Mont. 195; *Comerford v. Dupuy et al.*, 17 Cal. 308; *Waters v. Moss*, 12 Id. 535; *Logan v. Gedney, et al.*, 38 Id. 579; *Kerwhacker v. C. C. & C. R. B. Co.*, 3 Oh. St. 172; 14 Conn. 296; 5 Gill. 130.) Upon the question of this character of negligence, we refer to the following authorities. (*Flynn v. S. F. & S. J. R. B.*, 40 Cal. 14; *Munger v. Tonawanda R. R. Co.*, 4 Const. (N. Y.) 349; *Corwin v. N. Y. & E. R. R. Co.*, 3 Kern. (N. Y.) 42.)

By the Court, HAWLEY, J.:

The appeal in this case is taken from the judgment of the district court, sustaining a demurrer to plaintiff's complaint.

The complaint alleges that plaintiff is "in the legal and undisputed possession of certain uninclosed lands and tenements situated in Clover Valley, Elko county, Nevada, known as the Chase brothers' ranch, and that on the third day of May, A. D. 1878, the defendant did wrongfully permit his horses and cattle to go, and that they did go, unrestrained, into and upon the fields and grounds above mentioned, and remain thereon, at their will, throughout the season, and until the present time; that they did break down, destroy, and depasture the crops growing thereon, trample upon and injure the soil, break down and impair the water ditches, and cause great distress, annoyance, and labor to the plaintiff, to his damage five hundred dollars."

Does this complaint state facts sufficient to constitute a cause of action against the defendant?

Is the plaintiff, under the law of this state, entitled to recover any damages to his uninclosed lands because the defendant allowed his horses and cattle to run at large and they wandered upon the plaintiff's land and damaged it?

The rule of the common law, which requires the owner of horses, cattle, and other stock, to keep them confined within his own close, is "repugnant to," and "inconsistent with," the laws of this state. (See an act concerning estrays, Stat. 1861, 22; an act to prevent the driving of stock

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from their ranges, Stat. 1861, 32; an act concerning unlawful stock, Stat. 1862, 9, and amendatory act, Stat. 1875, 146; an act to prevent the trespassing of animals upon private property, Stat. 1862, 13; an act to regulate marks and brands of stock, Stat. 1873, 99; an act to punish the willful and fraudulent killing of stock running at large, Stat. 1877, 76.)

Some of these statutes prohibit certain named stock from running at large; others permit certain stock to do so. In this respect it is apparent that the rule of the common law has been modified to such an extent that no action can be sustained for injuries done to real estate or to the crops growing thereon, by horses and cattle that are allowed to run at large, unless the land is inclosed with a lawful fence. To this effect are the decisions of the supreme court of California. (*Waters v. Moss*, 12 Cal. 535; *Comerford v. Dupuy*, 17 Id. 308; *Logan v. Gedney*, 38 Id. 579. Of Montana, *Smith v. Williams*, 2 Mon. 195. Of Kansas, *U. P. R. W. Co. v. Rollins*, 5 Kan. 175; *Caulkins v. Mathews*, 5 Id. 191; *Larkin v. Taylor*, 5 Id. 434; *Darling v. Rogers*, 7 Id. 592; of Ohio, *Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio St. 177; *C. H. & D. R. R. Co. v. Waterson*, 4 Id. 432; *M. & C. R. R. Co. v. Stephenson*, 24 Id. 56. Of Kentucky, *Wills v. Walters*, 5 Bush, 351. Of Illinois, *Seeley v. Peters*, 5 Gilm. 130; *Headen v. Rust*, 39 Ill. 186; *Stoner v. Shugart*, 45 Id. 76.)

Section 1 of the act to prevent the trespassing of animals upon private property reads as follows: "If any horse \* \* \* shall break into any grounds inclosed by a lawful fence, the owner or manager of such animal shall be liable to the owner of such inclosed premises, for all damages sustained by such trespass." \* \* \* (2 Comp. L. 3092.)

The supreme court of Montana, in *Smith v. Williams*, *supra*, in construing a statute identical in its terms with the statute above quoted (Laws of Montana 1871-1872, 373), decided that the plaintiff could not recover any damages to his crops of growing grain, without showing that his land was inclosed by a lawful fence.

There is no averment in the complaint under considera-



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tion, that the injuries to plaintiff's land and crops were caused by any stock which, under the statutes of this state, are prohibited from running at large. There is no averment that defendant was guilty of any negligence, unless it was negligence upon his part to allow his horses and cattle to run at large.

The principles which are settled by the decisions we have cited, go to the extent that the owner of the land trespassed upon does not use reasonable and ordinary care and diligence to protect his property from the intrusion of roaming stock unless he incloses it with a lawful fence.

The supreme court of Kansas, in discussing this question, in *Larkin v. Taylor*, *supra*, said: "We understand the law of inclosures in this state to be, that before a party can recover for injuries done to his crop he must protect it by a lawful fence. Failing to have such fence, he is deemed by the statute to be so negligent of his property that he can not recover damages for trespass thereon occasioned by reason of the defective fence. \* \* \* We do not intend to say that when the acts of the party are of such a character as to show a willful intent to commit a trespass, a recovery may not be had against him, even though the injured party may not have his grounds inclosed by a lawful fence. In such a case it is not carelessness or negligence that is the cause of the injury. It may include both, but something more is necessary to authorize a recovery. The object of the law of inclosure is to permit stock to run at large and graze on the prairie, and relieve the owners thereof from an action for damages, should they wander upon the land of another, unprotected by a lawful fence." Ranney, J., in delivering the opinion of the court in *C. H. & D. R. R. Co. v. Waterson*, *supra*, said: "The owner of domestic animals, in suffering them to run at large, under the limitations expressed in the statute, is in no fault, and there is, therefore, no room for the application of the doctrine which determines when a party in the wrong may, nevertheless, recover for injuries arising from the negligence of another. In other words, the owner has a perfect right to suffer his animals to go at large, without incurring any responsibility

to the owners of uninclosed grounds, upon which they may wander."

The object of the statute, in requiring a fence, is to provide security to the land inclosed, and in the absence of any statute defining a "lawful fence," the words imply that the fence must be high enough and sufficient in other respects to prevent ordinary stock from breaking into the inclosure.

There is nothing in the statute which gives, or pretends to give, any right to any person to enter upon another's land and to commit any trespass thereon, whether the land is fenced or not. The argument of appellant, upon this point, is wholly untenable. The statute does not "impair the rights of private property." It does not in any manner "interfere with the primary disposal of the soil."

The legislature has the constitutional power to regulate the relative rights and responsibilities of the proprietors of inclosed land, and the owners of stock that is allowed to run at large. (*Wills v. Walters, supra.*)

It was evidently the intention of the legislature, in passing the statute, to provide a just and reasonable protection for the rights of both the land and stock owners, and to limit the right of redress for injuries to their own compliance with the law.

The entire legislation of this state is, to quote the language of the supreme court of Ohio, in *Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio St. 180, "wholly inconsistent with the doctrine that it is unlawful for the owner of animals to allow them to run at large, and that he is liable in damages for a trespass in case they go upon the uninclosed grounds of another. Why the provision to restrain breachy and unruly animals from running at large, if it were the law of the state that the owner should allow none of his stock to be at large, whether breachy or not? And why the provision for the assessment of damages for injury by trespassing animals made to depend upon the contingency of a lawful fence? If the owner of trespassing animals were liable in damages, whether the lands of the injured party were inclosed or not, the provision making the assessment

## Argument for Respondent.

of damages to depend on the existence of a lawful fence would seem to be unnecessary, if not wholly absurd."

The judgment of the district court is affirmed.

[No. 971.]

R. SADLER, APPELLANT, v. D. B. IMMEL, RESPONDENT.

**NATIONAL BANKRUPT LAW SUSPENDS STATE STATUTE.**—The national bankrupt law suspended the statute of this state, relating to insolvent debtors.

**IDEM—COMMON LAW ASSIGNMENT.**—The mere existence of the bankrupt law does not, *ipso facto*, render a common law assignment void.

**IDEM—ASSIGNMENT VALID.**—An assignment fairly made for the benefit of all the creditors, is valid, if no proceedings in bankruptcy were instituted within six months from the date of the assignment.

**ASSIGNMENT—CONSENT OF CREDITORS.**—The assent of creditors representing debts equal to the value of the property assigned, is a valid consideration. If their debts are of less amount than the property, it gives the assignees a right to retain property to the amount of their debts.

**FINDINGS OF FACT—WHEN WILL BE PRESUMED.**—Where there is no express finding that the amount of the debts of the assenting creditors; *Held*, that it will be presumed in support of the judgment, in the absence of any finding to the contrary, that creditors having debts equal to the value of the assigned property did come in and consent.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

Geo. W. Baker, for Appellant:

I. The assignment is not made in accordance with the provisions of the statute of this state, regulating assignments by insolvent debtors. (1 Comp. L. 426-464.)

II. The state insolvent laws are in force, until proceedings in bankruptcy are actually instituted under the national bankrupt law. (*Maltbie v. Hotchkiss et al.*, 38 Conn. 80; *Reed v. Taylor*, 7 Am. Rep. 180. *In re Ziegenfuss' Case*, 2 Ired. (L.) 463.)

A. M. Hillhouse, for Respondent:

I. The bill in equity, in this action, can not be sustained.  
7 Cal. 201.

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II. The complaint does not state facts sufficient for a cause of action. It does not show that Immel is insolvent. If a person is not insolvent, he can, of course, do as he pleases with his property, and no one can complain. (12 Cal. 246.)

III. The judgment of the district court is correct, because at the time of the assignment complained of, the bankrupt law of the United States was in force, which superseded entirely the state insolvency law. (*Martin v. Berry*, 37 Cal. 208-220; *Sturges v. Crownshield*, 4 Wheat. 422; *In re Reynolds*, 8 R. I. 485, 5 Am. Rep. 615; *Griswold v. Pratt*, 9 Metc. 16.)

*John T. Baker*, for Appellant, in reply:

The national and state laws must actually come in conflict, by proceedings in court, either state or national. (*Commonwealth v. O'Hara*, 1 Bank. Reg. 86; 6 Phil. 402; 6 Am. Law Reg. 765; *In re Langley*, 1 Bank. Reg. 559; 1 L. T. B. 34; 7 Am. Law Reg. 429; *Van Nostrand v. Barr*, 2 Bank. Reg. 485; 30 Md. 128; *Martin v. Berry*, 2 Bank. Reg. 629; 37 Cal. 208; 2 L. T. B. 180; *Corner v. Miller et al.*, 1 Bank. Reg. 403; *Shears v. Solhinger*, 10 Abb. Pr. (N. S.) 287; *In re Reynolds*, 9 Bank. Reg. 50; S. C. R. I. 485; *In re Lucius Eames*, 2 Story, 322; *Bishop v. Loewen*, 2 Penn. L. J. 364; 49 Mass. 16; 13 Bank. Reg. 366; 54 N. H. 190.)

By the Court, LEONARD, J.:

Respondent, Immel, was a banker in Eureka. Being indebted to respondents, Chamblin, Bishop, and Bartlett, and other persons in Eureka county, he assigned, by an instrument in writing, all his property, real and personal, to his co-defendants in trust, to be converted into money, and that to be used in the payment, *pro.rata*, of all such creditors in said county as should come in, and by writing accept the benefits of the assignment. The trustees named accepted the trust and took possession of the property. Plaintiff was notified of the assignment and invited to accept its benefits, but he refused to do so. At the date of the assignment plaintiff was a creditor at large of Immel. He subsequently obtained judgment for the amount due him. An

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execution was issued and returned wholly unsatisfied. Thereupon this suit was brought to obtain a decree declaring null and void the said assignment as to plaintiff, and permitting him to sell sufficient of the assigned property to satisfy his judgment. It does not appear that Immel was indebted to any person outside of Eureka county.

There was no proof of any actual fraud, and the court found as facts that the assignment was made in good faith by Immel, for the purpose of securing all creditors residing in Eureka county who would accept under the trust; that creditors representing over sixty thousand dollars indebtedness accepted under the trust, and consented to assignment; that plaintiff was a resident of Eureka county; that at the date of the commencement of this suit the trustees had in their possession, and under their control, money realized from the assets of Immel, assigned to them, to the amount of twenty thousand dollars, and that the amount of the assets assigned was sufficient to pay in full the creditors who accepted under the trust. The court found as a conclusion of law that defendants were entitled to a judgment for their costs. This appeal is from the judgment so entered. The question involved is, whether the assignment is sufficient to hold the assigned property against a judgment creditor who never consented to the assignment or accepted of its benefits.

Counsel for appellant claims that the assignment is invalid at common law, because it contains no inventory or schedule of the assets, and no list of the creditors of Immel; that it is invalid because the appellant, a judgment creditor, never consented to it or accepted under it, and because it was not made under, and in accordance with, the statute of this state regulating assignments by insolvent debtors. (1 Comp. L., sec. 426, *et seq.*)

Section 464 of the statute referred to reads as follows: "No assignment of any insolvent debtor, otherwise than is provided in this act, shall be legal or binding upon creditors;" and it is not claimed that the assignment in question was made as provided in the state insolvent law.

At the date of the assignment the national bankrupt law

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was in force, and it is urged by counsel for respondents, that thereby, the state insolvent law was entirely superseded. On the contrary, it is claimed by counsel for appellant, that the bankrupt law did not supersede the state law, inasmuch as the jurisdiction of the federal court was not called into exercise; and that, even though the balance of the state law was superseded or suspended, the last section (464) remained in full force, and consequently that the assignment in question was void because not made in accordance with the state law.

Upon reason and authority, we are of opinion, that while the national law was in force, any proceedings commenced under the state law would have been null and void. (*Martin v. Berry*, 37 Cal. 222; *Sturges v. Crowninshield*, 4 Wheat. 122; *In re Reynolds*, 5 Am. R. 615; *Chamberlain v. Perkins*, 51 N. H. 339; *Cook v. Rogers*, 31 Mich. 395.)

It necessarily follows that the whole statute was suspended at the date of the assignment, unless it be true that the last section continued in force. We think, however, that that section shared the fate of the balance. The only assignment of an insolvent debtor permitted by that section would have been useless, because the law that provided for it, supported it, and carried it into effect, was suspended. The legislature did not intend to enact the last section except in connection with the other parts of the statute. It was not intended that common law assignments, fairly made by insolvent debtors, should not be valid, after the method then provided should become unavailable.

Whether the assignment in question would have been an act of bankruptcy, and whether it would have been declared void, had proceedings been instituted within six months thereafter, under the bankrupt law, need not be decided, as no such proceedings were commenced at any time. The assignment is now unaffected by the bankrupt law. ,

"If more than six months elapse after the conveyance, and before the filing of the petition, the consequence, by necessary implication, is unaffected by the bankrupt act. If originally valid, it remains valid still. From this provision (Bankrupt Act, sec 35,) it seems manifest that con-

gress intended that the bankrupt act should leave all such consequences as it found them, unless proceedings in bankruptcy were instituted within six months." (*Maltbie v. Hotchkiss*, 38 Conn. 84.)

The simple existence of the bankrupt law did not, *ipso facto*, render void a common law assignment. (*Cook v. Rogers*, 31 Mich. 392, 400; see, also, *Beck v. Parker*, 65 Pa. St. 264.)

The state insolvent law, having been suspended at the time of the assignment, by the bankrupt law, and no proceedings in bankruptcy having been instituted within six months, it must be held valid under the common law, if it was fairly made for the benefit of all the creditors of Immel. (*Burrell on Assignments*, 22, 24, 59.)

As the case stands before us, it must be considered that the assignment was an honest conveyance to proper persons, intended to secure the full payment of all creditors in Eureka county, if the property should prove sufficient, and if not, then to be distributed *pro rata* among such creditors.

It is urged as fatal to the assignment that provision was made for creditors of Eureka county alone. But the instrument itself only recites the fact that Immel was indebted to residents of that county, the language being: "Whereas, \* \* \* I am indebted to sundry and divers parties in said town and county of Eureka, including the trustees herein named, in large sums of money, aggregating the sum of twenty-eight thousand dollars, more or less; and whereas, it is my desire to secure all of my said creditors in said county who shall come in, and by writing accept the benefits of this assignment: Now, therefore, this indenture is made," etc. The assignment is made part of the complaint, and there is no allegation therein, no proof or finding, of indebtedness outside of Eureka county, and certainly there is no legal presumption that he was indebted to persons residing elsewhere.

So far as the record shows, then, he was indebted only to the persons stated, and if that is the case, equal provision was made for all creditors.

There is no force in the objection that a sufficient sched-

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*George W. Baker*, for Respondent.

By the Court, LEONARD, J.:

In 1875, by an act of the legislature of this state (Stat. 1875, 154), the town of Hamilton, in White Pine county, was disincorporated, and provision was made for the payment of its indebtedness. The board of county commissioners of that county was made a board of trustees, with certain specified powers and duties. In 1877, a supplemental act was passed (Stat. 1877, 54), providing, among other things, that whenever five hundred dollars or more shall be in the "Hamilton Debt Fund," the board of county commissioners of White Pine county "shall advertise for sealed proposals for the surrender of county indebtedness, audited and allowed by the board of county commissioners, and payable out of the Hamilton Debt Fund;" and "shall accept the lowest bid or bids for the surrender of legal evidence of county indebtedness against said Hamilton Debt Fund audited; provided, that no bid for more than its par value shall be accepted by them, nor any bid, unless accompanied with the legal evidence of indebtedness proposed to be surrendered." When any bids are accepted, it is made the duty of the county auditor "to take a description of the indebtedness to be surrendered, specifying the amount to be paid for each, the date, number, and amount thereof, and make a record thereof; and thereupon the board of county commissioners shall, by order, direct the county treasurer to purchase the warrants of indebtedness designated in the accepted bid or bids, and pay for the same out of the Hamilton Debt Fund; and all warrants so surrendered shall be canceled by the county treasurer, by writing across the face thereof, in red ink, 'Purchased and redeemed,' adding thereto the time when, and the amount paid therefor, signing the same officially. The order of the board of county commissioners aforesaid, together with the record made by the county auditor, as herein required, shall be sufficient vouchers for the county treasurer in the settlement of his accounts." On the tenth day of December, 1877, the sum of seven hundred and one dollars and seventy-two cents was in



said fund, and plaintiffs were the legal owners of a certain warrant calling for two thousand two hundred and eighteen dollars, representing a portion of Hamilton indebtedness, and payable out of said fund. A number of bids were received on the day last mentioned, according to previous notice given, among which was the bid of plaintiffs, "to surrender their said warrant, or any portion thereof, at the rate of sixty-three cents on the dollar." Bids lower than plaintiffs', to the amount of eighty-one dollars, were received and accepted, and after payment of that sum, there was remaining in the fund the sum of six hundred and nineteen dollars. Plaintiffs' bid was rejected for "lack of funds to cancel the same." It is admitted that the bid was made according to law, and that the warrant was legal. Plaintiffs thereupon filed their petition, praying the issuance of a writ of mandamus compelling the defendants herein, constituting the board of county commissioners of White Pine county, "to accept petitioners' said bid, and enter the order necessary to enable the treasurer of said county to pay them the money applicable thereto, in accordance with the statute in such case made and provided."

An alternative writ was issued and served, and, upon hearing, a peremptory writ was ordered, issued, and served upon the defendants. This appeal is taken from the order last named, and a reversal is asked upon two grounds:

First—Because the law does not contemplate the redemption of a portion of a warrant. A warrant must be redeemed in full, if at all, and taken up entirely. There was not sufficient in the fund to purchase the warrant in full at sixty-three cents on a dollar; consequently defendants' official duty was to reject the bid.

Second—Because mandamus does not lie, for two reasons:

1. The board has already acted in the premises, whether correctly or otherwise.

2. It seems to be claimed by plaintiffs that defendants exceeded their jurisdiction in refusing to accept the bid; therefore certiorari is the proper remedy.

There can be but one opinion as to the object of the legislature in enacting the statute of 1877, above referred to.

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It was, to pay the largest amount of indebtedness possible, with the money in the fund, as often as it should contain five hundred dollars or more. It was also intended that all evidence of indebtedness should be surrendered when paid. The reason for requiring paid warrants to be canceled in the manner stated, was that they might carry their own evidence of satisfaction. The statute might have required them to be burned or otherwise destroyed, and thereby the same purpose would have been accomplished: because, after cancellation as provided, they are not to be used for any purpose. They are of no use to the treasurer, because the only vouchers required by him are the order of the board directing him to purchase, and the record made by the auditor. A canceled warrant is no longer any evidence of indebtedness. Its cancellation is indisputable evidence of its surrender and payment. There was, then, no other object in requiring the cancellation of paid warrants than to preclude the possibility of a second presentation and payment; and there was no object in requiring their surrender, except that they might be canceled. The whole object of the statute requiring surrender and cancellation is accomplished, in case of partial payment, by writing across the face the words, "Purchased and redeemed in part," and stating the amount or portion satisfied; and the owner who gives up a warrant to the treasurer for partial cancellation, thereby surrenders it and all evidence of indebtedness to the extent of the redemption and cancellation, and thereafter there exists no legal evidence of indebtedness for the portion paid. True, after partial surrender and cancellation, the paper itself is returned to the owner, but the amount of the warrant so returned is only the portion unpaid, and it bears upon its face just as strong proof of a partial surrender as a full cancellation does of an entire surrender.

Besides, as before intimated, the statute makes no provision for the disposition of paid warrants. The last act required is their cancellation after surrender. There is nothing prohibiting a return to the owner of the evidence of indebtedness unpaid—nothing requiring any officer to

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keep in his possession evidence of indebtedness paid, and the interests of the county are in no manner put in jeopardy by returning a warrant partially surrendered and canceled. There may be partial payments and redemptions without doing violence to the letter of the statute even, and in so doing, only, can its spirit and intent be carried out. If the defendants and their counsel are correct in their construction of the requirements, then, there being five hundred dollars in the fund, a person holding a warrant for that amount may get par value, while a bid by plaintiffs to surrender their warrant for twenty-five cents on a dollar must be rejected. In fact, if they are correct, plaintiffs can never receive more than five hundred dollars, or the amount in the fund, although small warrants have par value. The legislature did not mean to enact a law which would result in such rank injustice, to holders of large warrants, and which might deprive the county of the only benefit intended to be conferred by the passage of the act.

We think the defendants should have accepted plaintiffs' bid and made the necessary order upon the treasurer. Those acts were specially enjoined as duties resulting from their office. The law was fully complied with by plaintiffs, and the sole duty of defendants then, was to accept their bid if it was lowest; and otherwise to proceed as commanded by the statute. They had no discretion in the premises, and in such cases mandamus lies to enforce a performance of the specific act required. (*Humboldt County v. Churchill County*, 6 Nev. 30.)

Counsel for plaintiffs does not claim that defendants exceeded their jurisdiction in refusing to comply with the statute. They only rejected a bid which they were commanded to accept. Compelling the performance of such duties is the true and only office of the writ of mandamus.

The order of the court below is affirmed.

## Statement of Facts.

[1960.]

## WELLS, FARGO &amp; CO., APPELLANTS, v. ADAM WELTER ET AL., RESPONDENTS.

AGENTS OF WELLS, FARGO & CO., STOCKBROKERS—PURCHASER OF STOCK, DEALING WITH STOCKBROKER AS AGENT OF W., F. & CO.—PROMISSORY NOTE—TRANSACTION CONSTRUED AS A CONTRACT, NOT A LOAN.—Rice & Peters were stockbrokers, R. was also agent, and P. cashier of the express and banking business of Wells, Fargo & Co. in Carson. Welter called at the banking department and asked R. how much interest W., F. & Co. would charge to buy, for him, fifty shares of Ophir stock. The interest was agreed upon, and R. agreed to order the stock that day. The stock was ordered by R. & P., through their brokers in San Francisco. The next day, W., at R.'s request, executed his note to W., F. & Co., for the amount of money it took to purchase the stock. R. stated that any name besides W.'s would be sufficient, as W. and the stock would be ample security for the amount due. This note, and another executed in its place, were taken up, and replaced by the note sued upon. W. was credited upon the books of R. & P. with the stock and the amount of money stated in the note. R. & P. received credit with W., F. & Co. for the same amount as so much money deposited. W. never received any money or stock. R. & P. failed. W., F. & Co. brought suit against W. upon the note. The question was, whether the transaction was only a loan, as claimed by W., F. & Co., or a contract to procure the stock, as claimed by W. The jury found a general verdict in favor of W., and there were forty-eight special findings. Held, upon a review of the testimony, that the evidence and special findings sustained the verdict.

NOTE.—INSTRUCTIONS.—Held, upon a review of the instructions, that if, from all the circumstances, W., as a reasonable man, believed, and from the conduct of R., as agent of W., F. & Co., was justified in believing, that he was dealing with W., F. & Co., through their agent; and if R. knew, or ought to have known, that W. so believed; and that as a reasonable man he was justified in such belief, and that he gave the note with that understanding; then if R. did not deceive him, but permitted him to execute the note in such belief, it was the duty of the jury to find a verdict in favor of W.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The instruction asked by plaintiff, and refused by the court, referred to in the opinion, read as follows: 1. "The jury are instructed, that if the defendant Welter, or John Wagner, acting as the lawful agent, in the transaction for Welter, had notice, before the giving of the note sued on,

## Argument for Appellant.

that the stock mentioned in defendants' answers had been purchased by Rice & Peters, on account of defendant Welter, and that the note in question was then given, after having such notice, the plaintiff is entitled to recover in this action the full amount of the note, principal and interest." 2. "The jury are instructed, that, if the purchase of a stock was made one day, and nothing was said concerning any note between the parties, and that the note made in October, 1876, was made on another and different day, and that nothing was then said about the stock, the jury are instructed that the two contracts are separate and independent, and Wells, Fargo & Co. are entitled to recover in this action." The other facts sufficiently appear in the opinion.

## A. C. Ellis, for Appellant:

I. The testimony and findings show, that the defendant Welter knew, or had opportunity to know, at the time he signed the note sued on, that the stock had been purchased by Rice & Peters, for his account, the price paid, the commission charged, and the expenses, and that Rice & Peters, with whom he had personally dealt, acted solely as stock broker in the transaction.

II. It was Welter's duty, imposed upon him by the law, to inform himself of the scope of the authority of Rice, as the agent of Wells, Fargo & Co., which he failed to do; and in this transaction, if Rice, as such agent, exceeded his authority and made the contract as claimed by the defendants, which we deny, then the plaintiff is not bound by such contract. (*Story on Agency*, secs. 115, 172, 436; *Silliman v. Fredericksburg R. R.* 27 Gratt. 120; *Dosier v. Williams*, 47 Miss. 647; *Rawson v. Curtiss*, 19 Ill. 456; *Fisher v. Campbell*, 9 Port. (Ala.) 210; *Reitz v. Martin*, 12 Ind. 306; *Berry v. Anderson*, 22 Id. 36; *Lee v. Monroe*, 7 Cranch, 366; *State v. Haskell*, 20 Iowa, 276.)

III. The findings are sufficient to support plaintiff's motion for a judgment on the findings.

IV. The judgment must be reversed. Inconsistent findings will not support a judgment. (*Smith v. Cushing*, 41

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Cal. 97; *Hilden v. Jordan*, 28 Id. 301; *Lucas v. San Francisco*, 28 Id. 591; *Leese v. Clark*, 20 Id. 387; *N. P. Railroad v. Reynolds*, 50 Id. 90; *Bosquett v. Crane*, 51 Id. 505.)

The plaintiff should prevail upon the findings and the pleadings, because its case is clearly made out when it shows its written contract, the note ratified as often as the note was renewed. And the most favorable view of respondents' version of the alleged contract is doubtful, for the jury find that Rice never understood that the plaintiff was to buy the stock, and that defendant Welter did so understand. Of this the defendants have the affirmative, and in a doubtful matter the negative is to "be understood rather than the affirmative." (Bouvier's Dict., "Maxims." 131.

*R. M. Clarke*, for Respondents. No brief on file.

By the Court, LEONARD, J.:

Plaintiff is a corporation, organized for the purpose of carrying on banking and express business in this and other states, and this action is upon a promissory note, executed and delivered to it by the defendants. The grounds of defense—an entire failure of consideration—are stated as follows in the answer: "The said promissory note was given in consideration of fifty shares of Ophir mining stock, which the said plaintiff agreed to purchase for, and deliver to, the defendant, Adam Welter, and for no other consideration whatever; and the defendants say, that the plaintiff did not purchase said mining stock or any part thereof for said defendant, Adam Welter, nor did the said plaintiff deliver said stock or any part thereof to the said Adam Welter, but refused and still refuses to do so." Under the court's direction, the jury found upon forty-five special issues or questions of fact, and the general verdict was for the defendants.

Upon the coming in of the general verdict and special findings, plaintiff moved the court for judgment upon the pleadings and the special findings, notwithstanding the general verdict, upon the grounds that the special findings, in conjunction with the pleadings, warranted and required judgment for the plaintiff for the full amount claimed in the

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complaint. The motion was denied and the defendants had judgment for their costs. Plaintiff appeals from the court's order denying a new trial, and from the judgment.

The record shows that H. F. Rice, at the date of the transaction (October 11 and 12, 1876), as for a long time before, and some months thereafter, was plaintiff's general agent at Carson, where the contract was entered into. He had control of both departments of plaintiff's business at that place. H. J. Peters was plaintiff's cashier. Before, and during the month of October, 1876, and as claimed, until April, 1877, Rice & Peters were partners in the business of stockbrokers in Carson, their office having been in a different building, and some distance from plaintiff's. They had a clerk who bought and sold stocks for customers, but the business was conducted according to their instructions. In October, 1876, and before and after, plaintiff loaned money and did a general banking business in its banking department at Carson, and purchased stocks upon commission, through its express department, for customers, when ordered to do so. When stocks or other things were so purchased, its custom was to require a deposit for cost and charges. Stocks were purchased through brokers. There was nothing to prevent ordering through brokers in Carson instead of those residing in San Francisco, except that in so doing two commissions had to be paid instead of one. Mr. Tickner, plaintiff's agent at the time of the trial, testified that "Wells, Fargo & Co. would not execute an express commission to purchase mining stocks without the money being paid in advance; that their rules would not allow them to do so." But he also stated, that "the express department was allowed to purchase anything, the cost price being advanced, and the charges, unless a man was known to be good;" that "if Welter had taken the exact price of fifty shares of Ophir stock to Rice, through the express department, and requested him to buy it, there would have been nothing wrong in his business."

It is plain from all the evidence, that plaintiff was willing and anxious to furnish the money, either as a loan proper to Welter, to be used by him in the purchase of the desired

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Opinion of the Court—Leonard, J.

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stocks, or by plaintiff, in procuring it. The only real contest, upon the facts, was as to the contract. Plaintiff claimed that the transaction was a mere loan, while the defendants insisted that it was in no sense a loan, but an arrangement whereby plaintiff agreed to procure the stock, which was never done, and that Welter did not in any manner receive any portion of the money mentioned in the note. That Rice, as plaintiff's agent, had power to loan or furnish the money upon such terms as were satisfactory, was not disputed; that he could have ordered the stock through brokers, had the cost price been advanced, is admitted; and that he might have ordered without an advance, if the party was "good," seems to be true. Such being the case, he undoubtedly had power to do all that the defendants assert that he did do. He was the general agent of both departments, and had control of all the plaintiff's business at Carson. He had the ability to call both departments to his aid. If he had power to loan the money, hand it over to Welter, and immediately thereafter receive it back again, in the express department, as an advance upon a commission to purchase, he certainly could make a contract to procure the stock, without the useless ceremony of paying over the money and receiving it back again—a contract which, within its scope, combined a legitimate use of both departments. We shall, therefore, dismiss the question of Rice's power to enter into the contract set up by the defendants.

The important issue for the jury's consideration was, whether the transaction was only a loan, as claimed by plaintiff, or a contract to procure the stock as alleged by the defendants. It was a question of much consequence, also, whether the giving of the note by Welter, after receiving notice of the purchase of the stock by Rice & Peters, stock-brokers, fixed his liability upon the note, notwithstanding the contract was as claimed by him.

That plaintiff advanced to Rice & Peters the money for which the note was given, admits of no doubt, and that Welter never received the stock or the money, or any part of either, is equally true. The jury must have based their



## Opinion of the Court—Leonard, J.

general verdict upon the conclusions that the contract was as alleged by defendants; that an agreement to procure the stock was the consideration of the note first executed; that the note set out in the complaint was simply a renewal of the first, and that plaintiff had wholly failed to perform the contract, which alone induced its execution. It becomes necessary to ascertain whether the verdict and the material special findings are sustained by the evidence, and whether the latter are consistent with the former. We can not doubt that the verdict would have been sustained by the evidence, had there been no special findings. Wagner and defendant Welter both testified that they went to plaintiff's office to see Rice, to get plaintiff to purchase for Welter fifty shares of Ophir mining stock, and to ascertain what rate of interest plaintiff would charge for the purchase; that they did not borrow the money, but that they asked Rice how much interest Wells, Fargo & Co. would charge Welter for buying the stock mentioned; and that one and one-half per cent. was agreed upon; that they did not contract for money; that Welter was to receive no money, but was to get fifty shares of Ophir stock. Rice agreed to order the stock that day, and it was accordingly purchased, as hereinafter stated, by Rice & Peters, stockbrokers. On the following morning (October 12) Wagner went again to plaintiff's office, and Rice there handed him a promissory note, payable to plaintiff, for two thousand two hundred and twenty-three dollars and fifty cents, with interest at one and one-half per cent. per month, and asked him to go to Empire, a few miles from Carson, and get Welter to sign it. Wagner asked Rice if he (Wagner) should sign it also. Rice told him he need not do so; that any name besides Welter's would be sufficient, as Welter and the stock would be ample security for the amount due.

Wagner took the note to Welter, together with the following memorandum of purchase:

"Rice & Peters, stockbrokers, Carson City, 12 Oct., 1876. Purchased for account of Mr. A. Welter, 50 Ophir, 44, \$2,200; com. and tel., \$23.50; \$2,223.50."

Welter could not read English, and did not then, nor un-

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til six or eight months thereafter, know the names of Rice & Peters were on the memorandum or notice. Wagner told Welter what the stock cost, the amount of the commission and telegraphing, and also that Rice said he need not get any security upon the note; that Welter and the stock were sufficient. Welter then signed the note, and Wagner took it back to plaintiff's office and gave it to Rice. Wagner was acting for both parties. The note first given was due in ninety days. At its maturity another was executed in its place, and when that became due it was replaced by the one in suit, with the name of defendant Klein added as additional security, for the reason, as stated by Welter, that the stock at that time had greatly depreciated in value. The stock was never in the hands of either Rice & Peters, plaintiff, or Welter. It was ordered by the agent of Rice & Peters, for them and in their firm name, through Cope, Uhler & Co., brokers in San Francisco, who telegraphed Rice & Peters of its purchase for them. Thereupon Rice & Peters credited Welter upon their books with the stock and the amount of money stated in the note, and received credit with plaintiff; for the same amount, as so much money deposited.

It did not appear from plaintiff's books that the stock was held as collateral to secure the note or otherwise.

Conceding that Welter received notice, before executing the note, that Rice & Peters had purchased the stock, as stated in the paper before set out, still there is no proof that he knew, or ought to have known, that they did not receive the certificate and deliver it to plaintiff as collateral. On the contrary, Welter testified that he always supposed plaintiff had the stock until some time after the failure of Rice & Peters, when he offered the amount of the note to plaintiff and demanded the stock.

That Rice, as plaintiff's agent, agreed to purchase the stock for Welter, and that its delivery, or the contract to deliver, was the consideration that induced the execution of the note, admits of no doubt, if Wagner and Welter testified to the truth. And, besides the testimony of witnesses, the conclusion that Rice was acting for plaintiff, and that Wel-

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ter had good reason so to believe, is greatly supported by several facts. He was certainly acting for plaintiff in agreeing to advance the money, and in arranging the rate of interest; and in the same connection, at the same time and place, in plaintiff's office, with Rice behind the counter and Wagner and Welter in front, the agreement to purchase the stock was made. Not until the stock had been ordered was the note presented to Welter for his signature, and with the note was sent the evidence of its purchase. It was never intended that plaintiff should pass any money to Welter; still, Rice sent for and received his note, and at the same time informed him that the stock would be held as security. In so doing he must have been acting for plaintiff, and it would have been strange, under the circumstances, if the jury had found that, in agreeing to furnish the money, in fixing the rate of interest, in getting the note and informing Welter that the stock would be held as collateral, he was acting for plaintiff, but that in stipulating to purchase the stock he was acting for Rice & Peters. If the procuration of the stock for Welter was the consideration of the note, and if it was to be held as collateral, it was plaintiff's duty to obtain a certificate and hold it, or get Welter's consent to let it remain as it was; and if plaintiff did not do so, the subsequent solvency of Rice & Peters, and their ability to produce the stock when wanted, was a subject for plaintiff's consideration only. After receiving the notice that the stock would be held as security, Welter had no right to think it was subject to his order at Rice & Peters', nor does it appear that it was so, except upon payment of the note to plaintiff, and then it would have been plaintiff's duty to deliver the stock so held. Welter testified that he never thought Rice & Peters were solvent, and therefore never left stock with them. Plaintiff or its agent had no right to mislead Welter and then ask him to bear the burden resulting from its own laches.

We are not required to decide what the rights of the respective parties would have been if Welter had not been informed that the stock would be held as before stated. Under such circumstances, it is possible that,

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after receiving notice of its purchase by Rice & Peters. Welter's duty would have been to demand it of them, or at least of plaintiff, and that, had they failed before he did so, the loss would have been his. It may be in that case the law would have said that Welter was in fault, and that plaintiff had done its whole duty under the contract. But whether that be so or not, Welter can not now be held in fault because he did not demand the stock, so long as plaintiff gave him time for payment. It is true, the proof shows, and the jury find, that plaintiff did not have the stock as collateral, but the failure to do so was its own fault, and Welter was deceived. Plaintiff could have protected itself, and ought to have done so. The general verdict is sustained by the evidence.

Does it also sustain the material special findings, and are they consistent with the verdict, or did the court err in denying plaintiff's motion for judgment thereon, notwithstanding the verdict for defendants?

We shall not undertake to examine the many special findings in detail, but those most favorable to plaintiff's claim of inconsistency with the general verdict will be considered. And as affecting this question, it is proper to state that, we regard the agreement at the bank, on the eleventh; sending the note to Welter for his signature with the information that the stock had been purchased by Rice & Peters, and that it would be held by plaintiff as security for the payment of the note, on the twelfth; the execution of the note by Welter and its return to plaintiff's bank on the same day, as different parts of one transaction.

The jury found, (14) that Welter understood from the transaction, that plaintiff was to buy or procure for him fifty shares of Ophir mining stock, and that he made the note of October 12, upon the faith of that understanding.

They also found, (15) that plaintiff or its agents understood that Wells, Fargo & Co. was to buy or procure the stock for Welter; that it made the loan and accepted the note upon such understanding; also, (16) that Welter did not understand that Rice & Peters, stock brokers, were to buy and become responsible to him for the stock; and that

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(17) Rice, as member of the firm of Rice & Peters, did understand that Rice & Peters, stock brokers, were to buy and become responsible to Welter for the stock. A comparison of the fifteenth and seventeenth findings shows that the jury considered the understanding of Rice both as agent of plaintiff and as a member of the firm of Rice & Peters.

The seventeenth special issue was outside of the case, because it was a matter of no consequence what Rice understood "as a member of the firm of Rice & Peters." The vital question was what he understood, or ought to have understood, as agent of plaintiff. If he made the contract for plaintiff, as its agent, it was neither necessary nor proper to inquire what his understanding was as one of the firm of Rice & Peters; and if he did not so make it, plaintiff was not bound by it, regardless of his understanding as a member of the firm. It was the agreement of minds between Rice, as plaintiff's agent, and Welter, that fixed the liability of the parties to this action. But since that question was asked and answered, we shall accord to the answer its proper consequences.

The jury could not have intended to find that Rice, as plaintiff's agent, understood that plaintiff agreed to buy or procure the stock, and that the note was given and accepted upon that understanding; and also that Rice, as member of the firm of Rice & Peters, understood the contract in a different way. The same person, the one who made the contract, could not have understood it one way as plaintiff's agent, and in another as a member of the firm of Rice & Peters. What, then, is a reasonable construction of the two findings?

As plaintiff's agent, if Welter did not complain, Rice had the right to procure the stock through Rice & Peters, or any other stock brokers. He probably understood that he might purchase it through his own firm; at any rate there was nothing to prohibit him from doing so. As a member of the firm of Rice & Peters, it is fair to presume that he intended to transact the business as it was done; that is to say, order the stock through stock brokers in San Francisco, in the name of Rice & Peters, without getting

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any certificate, take credit for the cost with plaintiff, and credit Welter with both the stock and money upon the firm's books. In that sense, as one of the firm of Rice & Peters, he understood that they were to buy the stock, just as the cashier of the Carson Savings Bank would have understood that that bank was to buy it, if Rice had ordered it there, instead of through Rice & Peters. Rice knew also, that if Rice & Peters should purchase it in the manner stated, and credit Welter with it upon their books, they would be responsible for it; and had they not failed, they would have been so. Plaintiff might have paid the note, and then compelled Rice & Peters to deliver it, or respond in damages for its value. But the facts above mentioned do not relieve plaintiff from liability, if the contract was as claimed by defendants and as found by the jury. The jury did not find, and from their findings and verdict they could not have believed, that Rice understood, from the transaction, that Welter was dealing with him as one of the firm of Rice & Peters, when the agreement to procure the stock was made.

The jury found that Welter executed the note, after receiving the notice or memorandum, before set out, of the purchase of the stock by Rice & Peters; and from that finding it is argued that, the making of the note after the notice, was an affirmation of the purchase by Rice & Peters, and that the note was executed in payment for the stock so purchased.

But the whole transaction must be considered; that is to say, the agreement entered into on the eleventh; the subsequent purchase; the execution of the note on the twelfth by Welter, after being informed by Wagner upon the authority of Rice, that the stock would be held as collateral to secure plaintiff's note.

It was a matter of no consequence to Welter whether Rice & Peters, or some other brokers, bought the stock. It was enough for him to know that it had been bought, the price, and that plaintiff was to take and hold it as security. From the notice given by Wagner, Welter had good reason to suppose that Rice & Peters had obtained a certificate, and that plaintiff had it, or would get and hold it, as col-

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lateral. As before stated, he testified that he always supposed plaintiff had it, and that he did not know the stock was placed in his account on Rice & Peters' books.

It was also found by the jury, that Welter did not intend to intrust Wells, Fargo & Co. with a commission, through their express department, to purchase the stock in question, and that Wells, Fargo & Co. did not agree to execute such commission through its express department. The jury meant to say that, by the contract, plaintiff was not limited to any one department, or to any particular way, in getting the stock; that Welter did not order the stock at all, or intrust plaintiff with any commission through any department; but that plaintiff agreed to purchase or procure it as it deemed best, and that such agreement, accompanied with the further understanding, that it would be held by plaintiff as collateral security, was the consideration that induced Welter to execute the first note. Counsel for plaintiff says: "The most favorable view of defendant's version of the alleged contract is doubtful, for the jury find that Rice never understood that plaintiff was to buy the stock, and that defendant, Welter, did so understand." Counsel is in error. We have already adverted to the fifteenth, sixteenth, and seventeenth findings. By the forty-second they found that Rice, by affirmative language used by him on the eleventh of October, agreed with Welter that Wells, Fargo & Co. would purchase fifty shares of Ophir mining stock for and on account of Welter. They found (42) that Rice did not, by any affirmative language, agree on that day, that plaintiff would hold the stock as collateral; but they also found (35, 36, 37, 43, and 44), that Wagner told Welter that plaintiff was to take and hold the stock as collateral, to secure the note, and that Wagner was authorized by Rice, as agent of plaintiff, to so state to Welter; and all the evidence shows that the entire understanding in relation to the collateral security was had on the twelfth, before the note was executed. The forty-second question and answer were limited to the understanding arrived at on the eleventh, while the thirty-fifth, thirty-sixth, thirty-seventh, forty-third, and

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forty-fourth refer to the understanding of the following day, before the execution of the note.

Complaint is made that the court erred in refusing the plaintiff permission to prove that Rice, as agent, had no authority to purchase mining stocks, or to agree to do so. The record fails to show such refusal. The court did refuse to submit special issues upon that subject, and we think correctly, for the reasons before stated. There was no evidence justifying such submission.

It is urged, also, that plaintiff should have been permitted to prove that Rice & Peters were solvent at the time of the transaction, and that this special issue should have been submitted to the jury as requested, to wit: "Could the defendant Welter, at any time after the purchase of said stock by Rice & Peters upon his account, and after the same had been paid for by Wells, Fargo & Co., have demanded and received the same from Rice & Peters, without further cost or charge to him, and were said Rice & Peters in condition to deliver the same up to the first of April, 1877?"

The record shows no refusal to permit the proof mentioned, nor did plaintiffs make, or endeavor to make, such proof, except to the extent found by the jury, that Rice & Peters ordered the stock as before stated, credited Welter with the same, and so held it, subject to his order.

The special issue should not have been submitted to the jury. If they could have found that Welter might have demanded and received the stock from Rice & Peters, at any time after its purchase (although the only proof of that fact was, that it was purchased in San Francisco and credited to Welter upon the books of Rice & Peters in Carson), still they could not have found that Welter could have received it upon demand, without paying the amount of the note, because there was no evidence of that fact. Nor was there any evidence of the financial condition of Rice & Peters at any time after the stock was purchased. Besides, the ability of Rice & Peters to deliver it, upon demand, was immaterial and irrelevant, if the contract and the consideration of the note were as stated by Wagner and Wel-



ter, and as the jury found, especially in view of the further fact, that the stock was to be held by plaintiff as collateral security for the payment of the note.

It is said that the court erred in allowing Wagner to testify to the conversation had between himself and Welter concerning the transaction, before entering the bank, since plaintiff's agent was not present; but no objection was made to the giving of that testimony at any time.

It is claimed that the four instructions given for the defendants were erroneous, and that the two offered by plaintiff, but refused, should have been given. Defendant's first was given upon plaintiff's theory of the contract, and is to the effect that if Welter borrowed from plaintiff the money for which the note in question was given, and if that money was not paid or credited to him, and if Welter never drew it from the bank, then the jury must find for the defendants, unless Welter gave a written or verbal order to Rice & Peters for the money, or authorized Rice or Peters to draw it from Wells, Fargo & Co. to pay it to Rice & Peters in payment for stock. Upon the facts we see no error in the instruction, but under the circumstances, it was certainly harmless, for two reasons:

1. It is evident from the verdict and findings, that the jury did not believe the transaction between plaintiff and Welter was a loan simply. They were of the opinion that the consideration of the note was the stock or an agreement to procure it.

2. By finding thirty-first, they found that it was Welter's understanding that the money should be used for the payment of the purchase price of the stock; consequently, had they concluded that the money was borrowed, as claimed, they must have found that Rice was authorized to draw it out or use it in the purchase. The second instruction for defendants is plainly correct. The third is to the effect that if Welter understood, from all the circumstances, that he was negotiating with plaintiff and with Rice as its agent, for the purchase of the stock, and if Rice did not deceive him, but permitted him to make the note of October 12, in the belief that plaintiff was to make the pur-

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Opinion of the Court—Leonard, J.

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chase; and if Welter gave the note with such understanding, then the jury must find for the defendants, unless they found that plaintiff did purchase and deliver the stock to Welter. Counsel does not suggest the point of error in that or any other instruction given or refused. It may be said, however, that the one under consideration is not as full and definite as it should have been, especially if special findings had not been asked.

If, from all the circumstances, Welter, as a reasonable man, believed, and from the conduct of Rice, as plaintiff's agent, was justified in believing that he was dealing with plaintiff through its agent; and if Rice knew, or ought to have known, that Welter so believed; that as a reasonable man he was justified in such belief; and that he gave the note with that understanding, then if Rice did not undeceive him, but permitted him to execute the note in such belief, the jury should have found for the defendants. We deem it unnecessary, however, to decide whether this instruction contains, in fact, all the limitations just stated, because if it does not, the special findings supply every possible defect.

Welter testified, and the jury found, that he understood he was negotiating with plaintiff for the purchase of the stock; that he made the note with such understanding, and that plaintiff had the same understanding. They found that Welter asked Rice, agent of plaintiff, how much interest plaintiff would charge for buying the stock, but did not ask him how much interest plaintiff would charge for the money to buy it. If those findings were correct, and there was the positive testimony of two witnesses to support them, then Rice knew, or ought to have known, that Welter, with good reason, believed that he was dealing with plaintiff through its duly authorized agent; and instead of undeceiving him, if such was not the fact, he not only permitted him to sign the note in that belief, but strengthened the grounds of his belief before its execution, by authorizing Wagner to inform him that plaintiff would hold the stock as security. In view of the special findings, our opinion is that plaintiff has no ground of complaint against the

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Opinion of Beatty, C. J., concurring.

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instruction in question. As to defendant's fourth instruction, nothing need be added to our comments and conclusion upon the first.

A review of the two instructions asked by plaintiff and refused by the court, would necessarily require a repetition of much that has been said in considering other assignments of error. The first was erroneous, especially in view of the fact that in connection with the notice that Rice & Peters had purchased the stock, Welter was also informed by Wagner, acting upon the authority of Rice, that plaintiff would hold the stock as collateral security. The second was erroneous, because the execution of the note was not a separate and independent transaction, but was only one act in a series, as before stated.

We find no error in the record, and the judgment and order appealed from are affirmed.

BEATTY, C. J. concurring:

I concur in the conclusions and judgment of the court, but wish to add that, in my opinion, all the exceptions to the rulings of the district judge, touching the question of Rice's authority, are most effectually disposed of by saying, not that any possible error therein was cured by the special findings of fact, but that the rulings were correct.

When it is once settled that Welter never received a dollar of plaintiff's money, or any other consideration for his note, except Rice's promise that plaintiff would purchase stocks to the amount thereof, and hold them as security for the payment of the same, the only material question, is whether that promise was kept. If it was not, Welter is not bound, and that is the end of the case. Whether Rice had or had not authority to bind plaintiff by such an agreement, is of no sort of consequence, unless it should be held that the principal may repudiate the unauthorized promise of his agent, and yet compel the performance of a contract, the only consideration of which was the promise so repudiated.

The extent of Rice's authority may have had some relevancy as an item of evidence bearing upon the question as

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Opinion of Beatty, C. J., concurring.

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to what the agreement with Welter actually was, but if so, that was the whole extent to which it was entitled to consideration, and the district court therefore properly refused to submit it as an issue to the jury, either by instructions or otherwise.

If Rice had no authority from plaintiff to buy stocks and hold them for its customers, it is also true (as found by the jury) that he had no authority from Welter to intrust any money of his to Rice & Peters.

What he requested was, that plaintiff should buy and hold the stocks. That it was not doing that sort of business is a good excuse for declining the request, but it is no ground for holding defendant accountable for the loss of money by irresponsible third parties, to whom he had never requested it to be paid, and who were not his agents for any purpose.

REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,  
JULY TERM, 1880.

[No. 939.]

ROBERT N. BASSETT, APPELLANT. v. THE MONTE  
CHRISTO G. & S. M. CO. OF NEVADA, RESPOND-  
ENT, AND J. E. MARCHAND, APPELLANT.

**CORPORATION—DIRECTORS MAY PERFORM ACTS OUTSIDE OF STATE.**—The directors of a corporation, unless forbidden by its charter or the laws of the state from which it derives its existence, may confer power to issue bonds and mortgage the real property of the corporation outside, as well as within, the limits of such state.

**DUPLICATE MORTGAGE—RATIFICATION UNNECESSARY.**—The original deed of trust was lost by transmission in the mail, and a duplicate afterwards executed: *Held*, that no ratification was necessary; that the original resolution authorized the execution of the duplicate deed.

**FINDINGS NOT OBJECTED TO—TESTIMONY WILL NOT BE CONSIDERED.**—Where there is no motion for a new trial, nor other objection to the findings of the court, the testimony in opposition thereto will not be considered.

**DIRECTOR OF CORPORATION—MAY EXECUTE A TRUST DEED TO HIMSELF.**—The fact that the trust deed was made in favor of one of the directors, who joined in its execution, is no objection to the validity of the deed.

**FORECLOSURE OF MORTGAGE—BONDS—STATUTE OF LIMITATIONS.**—Suit to foreclose mortgage was commenced more than four years after the date of the mortgage, or trust deed, but less than four years after the bonds secured thereby became due: *Held*, that the action was not barred by the statute of limitations.

**DEED—RECORD OF MORTGAGE—NOTICE.**—When a mortgage is duly recorded, it secures the mortgagee against third persons to the same extent that he is secured against the mortgagor.

## Argument for Appellant.

OBJECTIONS NOT MADE IN COURT BELOW WILL NOT BE CONSIDERED.—The objection that the trust deed was void for want of the requisite stamps, not having been made in the court below, will not be considered.

BONDS ISSUED TO DIRECTORS OF A CORPORATION NOT VOID—WHO CAN COMPLAIN.—Where bonds are issued and a mortgage given to a third party, though for the benefit of the agent or trustee, they are not void, but merely voidable at the election of the *cestui que trust*. A third party, who can not pretend to have been injured thereby, will not be heard to complain of it.

APPEAL from the District Court of the Sixth Judicial District, White Pine County.

The facts appear in the opinion.

*Hillhouse & Davenport*, for Appellant Bassett:

I. That part of the judgment which excludes from the decree the amount of indebtedness found due to the individuals constituting the board of directors of the corporation, is erroneous. (Ang. & Ames on Corp., sec. 297; *Twin Lick Co. v. Marbury*, 91 U. S. 587.)

II. The corporation was especially authorized to act anywhere in the United States. The board of directors being only agents, can act as such at any place. (Green's Brice's *Ultra Vires*, c. 4, appendix, 676, 677, *et seq.*, and authorities there cited; Abbott's Dig. of Corp. 280, sec 33.)

*D. E. Bailey*, for Appellant Marchand:

I. The president of the Monte Christo G. & S. M. Co. had no authority to make and execute the bonds and mortgage sued upon. The acts of the directors authorizing the issuance of the bonds and the execution of the mortgage were performed outside of the state where the company was incorporated. (*Ormsby v. Vermont C. M. Co.*, 56 N. Y. 625; *Corey v. Curtis*, 9 Nev. 325; *Miller v. Ewer*, 27 Maine, 517; 1 Bl. (U. S.) 286; 20 Ind. 492; 1 Bl. C. C. 628; 11 Allen, 65).

II. The law will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. (*San Diego v. San Diego & L. A. R. R.*, 44 Cal. 106; *Wilbur v. Lynde*, 49 Cal. 290.) The relation between directors and

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Opinion of the Court—Beatty, C. J.

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stock holders of a corporation is that of trustee and *cestui que trust*. (*Butts v. Woods*, 38 Barb. 181; 1 Edw. Ch. 84; *York Railway Co. v. Hudson*, 17 Eng. L. & Eq. 361.)

III. The plaintiff can not recover, because more than four years have elapsed since the mortgage was executed prior to the commencement of this action. The statutes of limitations can apply to a mortgage separate from the bond or note which it is intended to secure. (*Henry v. Confidence G. & S. M. Co.*, 1 Nev. 621; *Mackie v. Lansing*, 2 Id. 302; *Wood v. Goodfellow*, 43 Cal. 185.)

A. M. Millhouse, for Appellant Bassett, in reply:

Upon the point that the acts of directors, outside of the state, were valid. (*Merrick v. Santuocard*, 34 N. Y. 213; 12 Gray, 489; *McCall v. Byram*, 6 Conn. 428.)

By the Court, BEATTY, C. J.:

It appears, from the statement and record of this case, that the defendant, the Monte Cristo Gold and Silver Mining Company, of Nevada, is a corporation chartered by special act of legislature of Pennsylvania and authorized thereby to hold meetings and transact business at any place in the United States; that in February, 1869, the management of its affairs was vested in a board of thirteen directors, seven of whom met in the city of New York on the third of that month and passed a resolution authorizing the issuance of bonds of the company not exceeding fifty thousand dollars in amount and the conveyance of its real property, situated in White Pine county, in this state, in trust to secure the payment of the same.

In pursuance of this resolution said property was conveyed to plaintiff as trustee and the bonds issued and disposed of. The first deed of trust having been lost in course of transmission to this state, a duplicate was executed June 29, 1869, and duly recorded in White Pine county. In the interval between the execution of these two deeds, a meeting of the stockholders of the company was held at its office, in the city of New York, at which a resolution was adopted reducing the number of its directors from thirteen to five.

At a subsequent meeting of four directors of the company, at New Haven, Connecticut, the action of the president and secretary, in executing the duplicate deed of trust, was reported and ratified.

The object for which the bonds of the company were issued was to take up its floating indebtedness, much the larger portion of which was due to the plaintiff and three other persons who were, at the time of the transaction, directors of the company, and constituted a majority of the members present at the meeting in February, when the bonds and mortgage were authorized, and at the subsequent meeting at which the action of the president and secretary was ratified. Out of the fifty thousand dollars of bonds issued and made payable to the plaintiff or bearer, nearly four-fifths were retained by him and his fellow-directors in satisfaction of their claims against the company, and the balance (ten thousand two hundred dollars) delivered to its other creditors.

None of said bonds having been paid, this action of foreclosure was instituted by the plaintiff as trustee in behalf of the bondholders.

The defendant, Marchand, holds a judgment lien on the mortgaged premises, subsequent in point of time to the record of the trust deed; but he claims priority thereto on the grounds that it was unauthorized, fraudulent, and without consideration, and that this action is barred by the statute of limitations.

The corporation defendant makes default.

The conclusion of the district court upon the facts stated was, that the mortgage was valid as a security for the bonds issued to the outside creditors of the company, but void as to the plaintiff and his fellow-directors, by whose votes it was authorized.

The decree is for a sale of so much of the mortgaged premises as may be necessary, and the application of the proceeds to the payment. 1. Of costs, etc. 2. Of the claims of said outside bondholders. 3. Of the claims of the defendant, Marchand.



From this judgment the plaintiff and Marchand both appeal.

The first point urged in support of Marchand's appeal is, that the president and secretary of the company could derive no authority to make the trust deed and issue bonds from the resolution of the meeting of the directors held in the city of New York, and outside of the territorial limits of the state of Pennsylvania, where alone the corporation had a legal existence.

We think, however, that without regard to the fact found by the district court, that this corporation was empowered by its charter to meet and act at any place in the United States, the resolution in question was not invalid by reason of the place of meeting at which it was adopted.

It seems to be settled by the weight of authority, and especially by the more recent decisions in the courts of the United States, that the directors of a corporation, unless forbidden by its charter, or the general laws of the state from which it derives its existence, may perform all except strictly corporate acts outside of the limits of such state, as within them; and it is not pretended that the conferring of power to issue bonds and mortgage the real property of a corporation is a corporate act in the strict sense of that expression. (See a full discussion of this question and authorities cited in c. 4. appendix, Green's Brice's *Ultra Vires*, 676, *et seq.*)

There is no proof and no presumption that the laws of Pennsylvania forbid directors of its corporations from meeting and acting outside of the state; and the charter of this corporation, which is itself a statute of Pennsylvania, so far from forbidding such meetings, expressly authorizes them.

As to the right of the stockholders to meet in New York, and reduce the number of directors, we are not called upon to express an opinion. That question cuts no figure in the case, unless we should hold that the vote of ratification, passed by four directors at the meeting in New Haven, was essential to the validity of the duplicate deed of trust executed by the president and secretary, on hearing of the loss of the original. But we do not consider that any ratifica-

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Opinion of the Court—Beatty, C. J.

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tion was necessary; the execution of the duplicate deed was fully authorized by the original resolution of the February meeting in New York.

Counsel for Marchand, it is true, makes the additional point that the vote of ratification was essential, for the reason that some of the bonds were disposed of at a heavier discount than was warranted by the resolution of the seven directors at the February meeting.

If there was anything in the statement to sustain this allegation, we can not see how the fact, that a portion of the bonds were negotiated at too low a rate, could affect the validity of the trust deed or of the other bonds. The deed was executed in the first place, and on the faith of that security, several creditors of the company accepted its bonds in satisfaction of their respective claims. If some of the creditors received more bonds than they were entitled to, certainly that circumstance should not be held to invalidate the bonds issued to the others, or to impair their security. At the very most, it would be a ground of defense as to that portion of the bonds improperly issued. But in this case there is nothing to call for the slightest modification of the decree on that ground. It does not in any way appear that any of the claims, which are allowed priority to Marchand's judgment, are founded upon bonds improperly issued. The findings of the court, indeed, are to the effect that all the bonds were issued in pursuance of the authority conferred on the president and secretary, and as there was no motion for a new trial, nor other objection to the findings of the district court, the testimony in opposition thereto can not be considered.

For the purposes of this appeal, it must be assumed, in accordance with the findings, that all the bonds were issued in pursuance of the original resolution of the board.

The next objection to the validity of the trust deed is founded on the fact that Bassett—the trustee to whom the legal title was conveyed—was himself one of the directors of the corporation. It is contended that his position as trustee for the stockholders disqualified him from accepting the position of trustee for the creditors of the corporation.

No case in point is cited in support of this proposition, and the general principle relied on—that no man can serve two masters at the same time—does not seem to be applicable. The trustee under a deed of this character is always agent for both debtor and creditor; but even where he is invested with full power to dispose of the property and apply the proceeds in payment of the debt, it is not considered that his duty to one is inconsistent with his duty to the other.

Under this deed, Bassett had no power, except to hold the legal title to the property as security for those who should accept the bonds of the company. That he had interests identical with the corporation, made him none the less trustworthy and agent for it and its stockholders, and if the creditors of the company were willing to accept the security offered, with Bassett as trustee, it certainly does not lie in the mouth of the corporation, or those claiming under it, to assert his incapacity against those who were willing to trust him, notwithstanding his interests were to some extent opposed to their own.

The point that the deed was without consideration is not presented on this appeal, and it is not contended that there was any actual fraud on the part of the directors who ordered it made. The only remaining ground upon which its validity is impeached, is that upon which the district court proceeded in holding that there could be no recovery on the bonds issued to the directors of the company who participated in the meeting at which they were authorized. This point will be discussed when we come to consider the plaintiff's appeal.

It is next contended, in behalf of Marchand, that this action was barred by the statute of limitations. It was commenced more than four years after the date of the mortgage or trust deed, but less than four years after the bond secured thereby became due. It is admitted that the right to sue on the bonds was not barred, but it is claimed by Marchand that the mortgage cannot bind the estate against his judgment lien during any longer period than the notice imparted by the record of the trust deed showed it would

be bound. The deed was dated June 29, 1869, and was in form an absolute conveyance to Bassett, subject to the following conditions:

"The condition of this deed is such, that if the party of the first part shall well and truly pay their bonds that are or may be issued, to an amount not exceeding fifty thousand dollars in the whole, dated March 1, 1869, and payable to the said Robert N. Bassett, trustee, or bearer, together with the semi-annual interest thereon, at the rate of seven per cent. per annum, according to the tenor of the coupons attached to said bonds, then these presents to be void," etc.

Marchand, it is said, had no notice of the tenor of the bonds except this reference to them in the trust deed. It is claimed he had a right to presume they were due at the time the trust deed was executed, and that the statute began to run on the day it was dated, and consequently, that as to him, it did begin to run on that day.

We have not been referred to any decided case, and we are not aware of any in which the statutes of limitations or the registration laws have been construed in accordance with these views. By the former an action is only barred by the lapse after the cause of action has accrued, and it is admitted that in this case such period had not elapsed before the action was commenced. Record or actual notice is essential to the validity of a mortgage as against subsequent incumbrancers, but when a mortgage is duly recorded it secures the mortgagee against third persons to the same extent that he is secured against the mortgagor.

It has been frequently decided in California (see *Wood v. Goodfellow*, and cases cited, 43 Cal. 185), that as against subsequent incumbrances the mortgagor can not extend the time of payment, or otherwise increase the burdens on the mortgaged premises, and the correctness of those decisions is not questioned. They are not, however, applicable to this case. No attempt was made by the Monte Christo Company, or its agents, to increase the burdens upon their estate after the lien of Marchand accrued. He knew when he became a creditor that the estate was charged with the payment of fifty thousand dollars of bonds, with semi-annual

interest coupons attached. This, we think, was sufficient notice to him, if any such notice was needed, that the bonds were not then due, and sufficient to put him upon inquiry as to when they would become due, if his action was at all contingent upon the state of the case in that particular.

The last point made in behalf of Marchand is, that the trust deed was void for want of the requisite stamp.

This objection, so far as it appears from the statement and assignment of errors, is taken for the first time in this court. It can not, therefore, be considered.

Upon the whole, we are of the opinion that the district court committed no error of which the appellant Marchand can complain. The appeal of the plaintiff Bassett involves but one question. Did the district court err in deciding that he could not recover on the bonds issued to himself and his fellow-directors?

We think this conclusion was erroneous. It is true that a majority of the directors who authorized the issuance of the bonds, and the execution of the trust deed, were to be directly benefited thereby; but this does not appear from the face of the bonds or the deed, and there is no ground, therefore, for holding them void *ab initio*. On their face they are regular and *prima facie* valid. That they were voidable at the election of the corporation, or its stockholders, would seem to be clear; but neither the corporation nor the stockholders have complained, and a stranger, like Marchand, can not. There may be authority for holding, that a deed which purports to have been executed by the grantee as agent for the grantor, is absolutely void as to all the world; but where, as in this case, bonds are issued and a mortgage given to a third party, though for the benefit of the agent or trustee, they are not void, but merely voidable at the election of the *cestui que trust*. If he repudiates the transaction within a reasonable time, it will be set aside by a court of equity, upon the ground that he has been defrauded, and this, as a matter of course, without inquiring whether he has been actually injured or not. But if he chooses to acquiesce in the transaction, a third party, who can not pretend to have been injured there-

## Statement of Facts.

by, will not be heard to complain of it. (See authorities cited in notes to secs. 210, 211; Story on Agency, 8th ed.)

The cases cited by counsel for Marchand (49 Cal. 290; 44 Id. 112) are not in conflict with this view. In both instances it was the *cestui que trust* who raised the objection of fraud, and whatever expressions occur in the opinions in those cases must be understood as having been used with reference to that fact.

Our conclusion is, that the decree of the district court should be so modified as to order the sale of so much of the mortgaged premises as may be necessary, and the application of the proceeds, after the payment of the costs and expenses of the litigation and sale, first, to the payment of the whole fifty thousand dollars of bonds and interest due to the bondholders of the company; and, second, to the payment of the claim of Marchand. It is therefore ordered that the district court modify its decree accordingly.

[No. 1028.]

**CEDAR HILL CONSOLIDATED G. & S. M. & M. CO.,**  
**APPELLANT, v. JACOB LITTLE G. & S. M. CO.,**  
**RESPONDENT.**

JUDGMENT OF DISMISSAL, WHEN NO SUMMONS HAS BEEN SERVED, SHOULD  
 BE WITHOUT PREJUDICE.—When a case is not at issue, the merits can  
 not be considered.

**APPEAL from the District Court of the First Judicial  
 District, Storey County.**

This action was commenced to determine the right of possession as between plaintiff and defendant to certain mining ground, claimed by plaintiff to be in conflict with a mining claim for which respondent had applied to the United States for a patent under c. 6, title XXXII, Revised Statutes of the United States. Appellant protested against respondent's application for a patent, and a stay being granted by the proper officers, this action was commenced within the time allowed by law for the purposes above named.

## Argument for Appellant.

The complaint was filed September 29, 1877, and no steps having been taken by appellant to prosecute its action further, the district court dismissed the case for want of prosecution on the thirty-first day of January, 1880, and entered the following judgment:

The defendant in the above-entitled action having given due notice of its motion to dismiss the above-entitled cause for want of a prosecution of the same with reasonable diligence by plaintiff, at this, the January term, A. D. 1880, of the said court, and said motion coming on to be heard at the said term of the said court, to wit, on the thirty-first day of January, 1880, and said plaintiff and defendant, appearing in court, by their respective counsel, and announcing themselves ready for hearing, and said defendant offering and introducing all its evidence and testimony in support of said motion, and said plaintiff offering its testimony in opposition thereto, and the matter being argued to the court by said counsel respectively, and the court having fully considered the same, finds that no summons in said cause was ever served upon said defendant, and said defendant has never appeared in said cause except to make this motion, and that said plaintiff has not prosecuted this cause with any diligence whatever, the court ordered that the said cause be dismissed for want of prosecution thereof on the part of plaintiff, with reasonable diligence.

Wherefore, it is ordered and adjudged that plaintiff take nothing by this action, and said cause be and the same is hereby dismissed, and that defendant have judgment against said plaintiff for its costs, taxed at \$—, U. S. gold coin.

*E. B. Stonehill, Kirkpatrick & Stephens, and Lindsay & Dickson, for Appellant:*

It appears from the face of the decree in this case that the dismissal of the cause was for want of prosecution with reasonable diligence; that the merits were in no way considered. Such being the case, the dismissal should have been without prejudice. The omission of this qualification is error. (Freeman on Judgments, sec. 270; *Durant v. Essex Co.*, 7 Wall. 107.)

Opinion of the Court—Leonard, J.

*Lewis & Deal*, for Respondent:

I. The judgment was proper. This court will not review the action of the lower court in dismissing this case. (*Carpentier v. Minturn*, 39 Cal. 450; *Grigsby v. Napa Co.*, 36 Id. 588.)

II. A judgment of dismissal is a final judgment upon the merits, when the time is limited within which the action is required to be brought, and that time has expired. (Freeman on Judgments, secs. 12, 16, 30, 36; *Dowling v. Polack*, 18 Cal. 625; *Leese v. Sherwood*, 21 Id. 151.)

By the Court, HAWLEY, J.:

As no summons had ever been served upon the defendant, and the defendant only appeared for the purpose of moving a dismissal, we think the court should have dismissed the case without prejudice, instead of entering judgment on the merits. The case was not at issue, and the merits could not be considered.

The district court is directed to modify its judgment to a dismissal of the case without prejudice.

[No. 1025.]

THE STATE OF NEVADA EX REL. JAMES FARIS, RELATOR, v. A. J. HATCH, SURVEYOR-GENERAL AND EX OFFICIO STATE LAND REGISTER, RESPONDENT.

LAND LAWS CONSTRUED—WHEN PATENT WILL NOT BE ISSUED.—In construing the land laws of this state: Held, that no patent can be issued in the name of any person who has already purchased from the state three hundred and twenty acres of land.

APPLICATION for mandamus. The facts appear in the opinion.

A. C. Ellis, for Relator.

M. A. Murphy, Attorney-General, for Respondent.

By the Court, LEONARD, J.:

(On the thirteenth day of September, 1873, Joseph T.



## Opinion of the Court—Leonard, J.

Mier entered into a contract in due form under the statute of this state, entitled, "An act to provide for the selection and sale of lands that have been, or may hereafter be, granted by the United States to the state of Nevada" (Statutes of 1873, 120), for the purchase of three hundred and twenty acres of land, the same being the north half of section eight, in township thirty-two north, of range forty-six east, Mount Diablo meridian, in this state. The purchase price was two dollars and fifty cents per acre, one fifth of which was paid by Mier to the state at the date of the contract, and the residue of the purchase price with interest thereon has since been fully paid, and was paid prior to, and at the time of the filing of the petition herein. On the twenty-second day of October, 1873, Mier, for a valuable consideration, and by an instrument in writing duly signed, sealed, and acknowledged, assigned and transferred the contract to the petitioner and George W. Crum, and authorized his said assignees to receive a patent from the state for said land. After full payment, the petitioner, for himself and Crum, presented a receipt in full from the state treasurer to respondent as state land register, and demanded that a patent of the state be issued and delivered to him and said Crum in their names, upon the ground that they were *bona fide* assignees of said Mier and entitled to receive such patent.

Respondent refused, and still refuses, to issue the patent in their names, upon the ground that the petitioner and Crum, prior to the demand for a patent, had each purchased from the state three hundred and twenty acres of land under the act in question, and that it had been the custom of the state land register not to issue or deliver patents of the state in the names of persons who had previously purchased from the state three hundred and twenty acres of land. This is an application for a writ of mandamus to compel the issuance of a patent in the names of the assignees.

The act of congress, whereby these lands were granted to the state, provides "that said state shall select said lands in her own name and right, in tracts of not less than forty acres, and dispose of the same in tracts not exceeding three

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Opinion of the Court—Leonard, J.

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the time the patent was demanded, because each had previously bought the maximum amount, thereby deriving all the benefits intended by the statute to be conferred upon them.

The writ is denied.

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[No. 822.]

THE STATE OF NEVADA, APPELLANT, *v.* THE CALIFORNIA MINING COMPANY AND THE CALIFORNIA MINE, RESPONDENT.

DISTRICT ATTORNEY, HAS NO AUTHORITY TO EXTEND TIME FOR PAYMENT OF PENALTIES DUE IN A SUIT FOR DELINQUENT TAXES.—The district attorney, and other counsel for the state, entered into a stipulation that, in consideration of the payment of the tax and costs, if a judgment appealed from in this case should be affirmed as to the penalty, or any part thereof, then a stay of execution should be granted until April 1, 1879. The court granted the stay pursuant to the stipulation: *Held*, error; that neither the district attorney, nor his associates, had any power to enter into the stipulation.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

*M. A. Murphy*, Attorney-General.

*F. V. Drake*, District Attorney of Storey County, and *R. M. Clarke*, for Appellant. No brief on file.

*C. J. Hillyer*, for Respondent:

The staying of an execution is within the general authority of an attorney-at-law. (*Willard v. Goodrich*, 31 Vt. 600; 20 Me. 183; 7 Cow. 739; 3 Watts & Serg. 426.)

By the Court, LEONARD, J.:

The state recovered judgment against respondent, the California Mining Company and its mine, for the sum of seventy-two thousand eight hundred and fifty-two dollars and three cents, on account of delinquent taxes due and payable upon the proceeds of said mine, and in addition, penalties aggregating thirty-five per cent. of the original

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Opinion of the Court—Leonard, J.

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tax, for non-payment, as required by law. From that judgment defendants appealed to this court, and the cause was remanded, with instructions to the court below, to modify the judgment as stated in the opinion. (13 Nev. 223.) We held that the court erred in giving judgment for the ten per cent. penalty, but that the state was entitled to recover the tax, twenty-five per cent. penalty, and costs. On the fifth of May, 1877, after that appeal to this court had been perfected, the following stipulation was entered into by the counsel therein named:

*"State of Nevada v. The California Mining Company.*  
Stipulation of counsel. This case coming on regularly to be heard this day, by consent of parties, by their respective attorneys, F. V. Drake, district attorney, and Messrs. Lewis & Deal, for plaintiff; and R. S. and W. S. Mesick, for defendants; now, said parties expressly agree and stipulate in open court as follows, to wit: 'In consideration of the payment of the tax, and costs amounting to \$——, included in the judgment entered in the above-entitled action, and now pending on appeal in the supreme court of the state of Nevada, it is hereby stipulated and agreed by the plaintiff in said action, that if the judgment so appealed from be affirmed as to the percentage or penalty, or any part thereof included in said judgment, then, on the return of the remittitur to the district court, the defendants shall be entitled to an order of said district court, and the court shall enter such order, staying execution for the same until the first day of April, 1879.'" On the twenty-seventh day of April, 1878, upon the receipt of the remittitur from this court, the district court modified the judgment as instructed. Counsel for defendants then moved for a stay of execution according to the stipulation before made. The district attorney objected to the motion. His objection was overruled by the court, and an order was made, staying execution to, and including the first day of April, 1879. The district attorney excepted to the order of the court. This appeal is taken by the state from that order, and the question to be decided, is whether or not the district attorney had the power to enter into the stipulation;

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Opinion of the Court—Leonard, J.

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The state demands nothing but its own; it wants no more, and it has empowered no person, in his discretion, to receive less. If a tax is not legal, no part can be collected, and the district attorney's duties are performed when those facts are ascertained and declared by competent authority. If it is legal, it is the district attorney's duty to collect the whole, tax and penalty, as soon as possible; and he has no more right or power, by agreement, to deprive the state of its lawful revenues for a year than he has to accept a part in satisfaction of the whole. He may neglect his duty; he may delay collection when proceedings for its enforcement should be instituted and vigorously prosecuted; but that is no argument in favor of the validity of an agreement, the whole object and effect of which is to bind him not to do what the statute has commanded him to do.

Neither the district attorney nor his associates had power to enter into the stipulation upon which the order appealed from was made, and the court erred in staying execution thereon.

The order appealed from is reversed.

HAWLEY, J., concurring: I concur in the judgment.

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[No. 923.]

THE STATE OF NEVADA, APPELLANT, v. THE CONSOLIDATED VIRGINIA MINING COMPANY,  
RESPONDENT.

[The State v. The California Mining Company *ante*, affirmed.]

APPEAL from the District Court of the First Judicial District, Storey County.

M. A. Murphy, Attorney-General, for Appellant.

C. J. Hillyer, for Respondent.

By the Court, LEONARD, J.:

The only question involved in this case is the same as that decided in the case of *The State v. The California M. Co. and the California Mine* (No. 922), and upon the authority of that case the order appealed from herein is reversed.

## Statement of Facts.

[No. 1020.]

## WILLIAM SOLEN ET AL., APPELLANTS, v. VIRGINIA AND TRUCKEE RAILROAD COMPANY, RESPONDENT.

INTEREST TO BE RECOVERED MUST BE INSERTED IN THE JUDGMENT.—If a party claims, and is entitled to, any interest, it should be inserted in the judgment. (Hawley, J.)

INTEREST ALLOWED IN ACTIONS EX DELICTO.—Interest is allowable upon the amount of a judgment recovered in an action *ex delicto*. (Beatty, C. J., and Leonard, J.)

ACTION UPON JUDGMENT.—NECESSARY FOR.—An action upon a domestic judgment can be maintained in this state when there is no necessity for bringing the suit, except such as has been occasioned by the fault of the judgment creditor, and in such an action interest can be recovered, although no interest is specified in this judgment. (Dissenting opinion of Beatty, C. J.)

IDEM.—Neither the common law nor the practice gives to a judgment creditor an absolute right of action on a domestic judgment, unless such action is necessary, in order to enable plaintiff to have the full benefit of his judgment; he can not by his own neglect cause the necessity, and then invoke that condition in justification of the suit. (Concurring opinion of Leonard, J.)

APPEAL from the District Court of the First Judicial District, Storey County.

The conclusions of law drawn by the district court, and referred to in the opinions, are as follows:

1. Such judgment of William Solen against defendant drew no interest, for that the same was not specified therein, and for that the attorneys of said Solen waived the same by the form of judgment by them prepared.

2. The payment by defendant into court, on the twenty-ninth day of June, of the sum of fifteen thousand two hundred and forty-four dollars and sixty-five cents, satisfied, paid, and discharged the judgment of record and docket against defendant, and in favor of William Solen and his assignees.

3. That the plaintiffs have no cause of action against defendant, and it is entitled to recover costs herein against them.

## Argument for Respondent.

C. H. Belknap and Kirkpatrick & Stephens, for Appellants:

I. Under the statute of Nevada, "concerning money of account and interest" (1 Comp. L. 4), the judgment sued upon in this cause bears interest from the date of its entry at the rate of ten per cent. per annum. All money judgments bear interest under this statute, whether founded in contract or tort—whether for debt or damages.

II. It is wholly immaterial that the judgment is silent as to interest. The interest is prescribed and affixed to the judgment by the statute. The judgment bears the legal rate of interest prescribed by the statute in force at the date of its rendition. When the rate claimed is the legal rate of ten per cent. per annum, it is not necessary to specify it in the judgment.

III. Interest is recoverable by an action on the judgment. And the action is maintainable, even though the interest could have been collected by execution on the judgment. These are concurrent remedies. (Freeman on Judgments, *sec.* 432; 1 Am. L. Cases, 621, 622; *Klock v. Robinson*, 22 Wend. 157.)

B. C. Whitman, for Respondent:

I. The suit of appellants should never have been entertained by the district court; they had, or had not, a right to execution upon the judgment of *William Solen v. Virginia & Truckee Railroad* (which sounded in damages for injury to his person). If they had such right, then no suit could be maintained. If such a rule ever existed, the minute provisions of the practice act of this state has destroyed its reason. (*Pitzer v. Russel*, 4 Or. 124; *Strong v. Barnhart*, 5 Id. 499. See, also, *Wells v. Dexter*, 1 Root, Conn. 253. Dissenting opinion in *Williams v. Dennison*, 16 Conn. 28; *White v. Hadnot*, 1 Port. (Ala.) 419; *Lee v. Giles*, 1 Bailey, S. C. 449.) If appellants had no right to an execution, then certainly they had no cause of action. If it has been decided that they had no right to execution, how can the *sequitur* be avoided? (*Solen v. V. & T. R. R.*, 14 Nev. 403).

II. Appellants, Kirkpatrick, Stephens & Belknap, had no

cause of action against respondent. They each and all claim as assignees of Solen the original judgment creditor. (Free-man on Judgments, sec. 424; *Love v. Fairfield*, 13 Mo. 300; *Getchell v. Maney*, 69 Me. 442).

III. No interest can follow or flow from any judgment, except a judgment for money. That appellants are wrong in their idea, that a written contract absolutely silent, on the subject of interest, would bear any after due, is evident from the reading of the statute, that refers to the rate of interest; so if a contract in writing calls for interest, failing to specify the rate or time of commencement, ten per cent. follows after due; but interest must in any event be called for.

*C. H. Belknap, and Kirkpatrick & Stephens*, for Appellants in reply:

I. Kirkpatrick, Stephens & Belknap are proper parties. (Moak's Van Santyord's Pl. 68; *Grain v. Aldrich*, 38 Cal. 514; *Cook v. Genessee Ins. Co.*, 8 How Pr. 514.)

II. Plaintiffs could not have accepted the money paid on the twenty-ninth of June, without acquiescing in the condition on which it was paid, and abandoning all claim to interest on the judgment. Defendant might as well have kept the money in its own coffers; for, by the conditions it annexed, plaintiffs were precluded from accepting, or touching it. Plaintiffs refused to accept it, and, therefore, it could not operate as payment to them, in whole or in part. (7 Wait's Actions and Defenses, 390, 391, 405; *Hall v. Holden*, 116 Mass. 172; *Cole v. Champlain T. Co.*, 26 Vt. 87; *Tooke v. Bonds*, 29 Texas, 419.)

By the Court, HAWLEY, J.:

On the thirteenth day of December, 1876, William Solen, in an action for damages for personal injuries, recovered judgment against the Virginia and Truckee Railroad Company for fifteen thousand dollars. The judgment, as entered, was prepared by the attorneys for Solen, and did not call for any interest.

On the twenty-fifth day of February, 1878, Solen assigned

to C. H. Belknap, M. Kirkpatrick, and James A. Stephens (his attorneys), one half of said judgment.

An appeal was taken by the Virginia and Truckee Railroad Company to the supreme court, and the judgment was affirmed. (13 Nev. 106.) The remittitur from the supreme court was issued June 22, 1878.

On the twenty-ninth day of June, 1878, the defendant paid to the clerk of the district court, "as and for the use of plaintiffs, the sum of fifteen thousand two hundred and forty-four dollars and sixty-five cents, in gold coin of the United States," which payment was intended as full satisfaction of said judgment and costs, and was the full amount of said judgment and costs, exclusive of interest. The plaintiffs claimed interest on the judgment, and refused to accept the amount paid in by defendant in satisfaction thereof.

This suit was instituted July 1, 1878, upon the judgment to recover the full amount therein named, with interest thereon, from the date of its rendition. The cause was tried before the court, without a jury, and, upon the facts presented, the court rendered judgment for defendant.

It was decided in *Solen v. V. & T. R. R. Co.*, 14 Nev. 405, following the rule announced in *Hastings v. Johnson*, 1 Nev. 617, "that when the judgment of the court is silent as regards the collection of interest, it does not authorize the issuance of an execution calling for interest." Under this rule, if a party claims and is entitled to any interest, it should be inserted in the judgment. In this case the judgment, as drawn by plaintiffs' counsel, did not include interest.

No motion was thereafter made to amend the judgment in this respect.

This suit was not commenced until after the defendant had paid into court the full amount of the judgment and costs.

The conclusions of law, as found by the district court, are, in my opinion, correct.

The plaintiffs were bound by the judgment as entered.



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The defendant, upon the payment of the amount called for in the judgment, had the right to have the judgment satisfied.

This result, in my opinion, follows, regardless of the question whether the statute authorizes interest to be included in judgments founded in tort, or not.

The judgment of the district court is affirmed.

BEATTY, C. J., dissenting:

In December, 1876, the plaintiff, Solen, in an action for damages for injuries to his person, obtained a verdict against the defendant for fifteen thousand dollars.

Thereupon the clerk of the court entered and recorded a judgment in his favor, in precise accordance with the form of a judgment which had been prepared and furnished by one of his attorneys. The judgment so entered was for fifteen thousand dollars, and the costs of the action taxed at one hundred and eighty-one dollars. As to interest it was silent.

The defendant having appealed from that judgment, it was finally affirmed by this court (13 Nev. 106), and the remittitur filed in the district court June 22, 1878. On the twenty-ninth of June, and before the bringing of the present suit, the defendant paid to the clerk of the district court, for the use of plaintiffs, the full amount of the original judgment, with the accruing costs. This was tendered, as full payment and satisfaction of the judgment, but the plaintiffs, claiming that they were entitled to interest, declined the tender, and thereupon commenced this action to recover the amount of the original judgment, together with legal interest thereon from the date of its rendition. The coplaintiffs of Solen are assignees of a portion of the judgment upon which the suit is founded.

The cause was tried in the district court, without a jury, and judgment rendered in favor of the defendant, upon the ground that the original judgment in favor of Solen, failing to specify interest, was not entitled to draw interest, and was fully paid, satisfied, and discharged, by the payment to the clerk, on the twenty-ninth of June, 1878.

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From this judgment, and from an order overruling their motion for a new trial, the plaintiffs appeal.

The questions which have been principally discussed by counsel, and which are of vital importance to the decisions of the cause, are the following:

1. Is interest allowable upon the amount of the judgment recovered in an action *ex delicto*?

2. Can an action upon a domestic judgment be maintained in this state, when there is no necessity for bringing the suit, except such as has been occasioned by the fault of the judgment creditor?

The first of these questions is determined by the proper construction of sections 32 and 33 of the Compiled Laws, which read as follows:

Sec. 32. "When there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of two per cent. per annum, for all moneys after they become due on any bond, bill, or promissory note, or other instrument of writing, on any judgment recovered before any court of this territory, for money lent, for money due on the settlement of accounts from the day on which the balance is ascertained, and for money received to the use of another."

Sec. 33. "Parties may agree in writing for the payment of any rate of interest whatever, on money due, or to become due, on any contract. Any judgment rendered on such contract, shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment; *provided*, only the amount of the original claim or demand shall draw interest after judgment."

Counsel for respondent contends that the words, "on any judgment recorded in any court in this territory" (sec. 32), are qualified and restrained by the language which follows, and that, with the exception of the cases provided for in section 33, no judgment will bear interest, unless it is recovered "for money lent, money due on the settlement of accounts," or "for money received for the use of another." He claims this construction not only upon the ground that

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such is the natural import of the language of the statute, but because it had been so construed by the supreme court of California long before its adoption in this state.

The California case, which is relied upon in support of the latter proposition, is *Osborn v. Hendrickson*, 8 Cal. 31. But, as was pointed out in the later case of *Burke v. Caruthers* 31 Id. 471, the head note to *Osborn v. Hendrickson* is not a correct syllabus of the decision. It was not decided that the judgment therein bore no interest after rendition, but merely that the demand in suit bore no interest before judgment. The question here involved, does not seem to have arisen in California before our adoption of her statute; but since that time it has frequently been decided by the supreme court of that state, that all judgments—in actions *ex delicto* as well as in actions *ex contractu*—draw legal interest, unless a different rate is therein specified. (See 31 Cal. 466; 34 Id. 246; 38 Id. 548; 44 Id. 366; 45 Id. 193; 46 Id. 204, 320.)

According to these decisions, the words "on any judgment," etc., are to be read in connection with the language which precedes them—making this the sense of that portion of the section:

"Interest shall be allowed at the rate of ten per cent. per annum for all moneys after they become due on any bond," (for all moneys after they become due), "on any judgment," etc.

Independent of all considerations of policy, justice, and consistency, this reading is, we think, quite as natural as that contended for by respondent. But it is strongly confirmed by such considerations. There is no sort of reason why a judgment—which in every instance is regarded as a contract of the very highest character, imposing an obligation, and importing a promise to pay a liquidated sum—should not draw interest at the rate allowed upon other liquidated demands. If, therefore, we were without precedent to guide us, we should be inclined to construe this statute as it has been construed in California, and consequently, we can have no hesitation in following the repeated decisions of the supreme court of that state.

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Having thus reached the conclusion that Solen was entitled to have a judgment bearing interest at the legal rate entered in the former action, the next question is: What consequences follow from the act of his attorney in having a judgment entered which was silent as to interest?

One consequence, undoubtedly, was, that he could not issue execution for interest. Such was the decision of this court in *Hastings v. Johnson*, 1 Nev. 613, and that decision, settling a question of practice, we have felt constrained to follow, without reference to its correctness as an original proposition. (14 Nev. 405.)

It must be regarded, therefore, as the settled doctrine of this court, that no execution can issue for interest upon a judgment which fails to specify upon what portion thereof and at what rate interest is collectible.

This doctrine, however, and the ground upon which it rests—the old familiar maxim, that the execution must follow the judgment—are entirely insufficient to sustain the inference that judgments of the character described do not bear interest.

The right to collect interest by execution is of recent statutory origin. Before the enactment of statutes expressly conferring the right, it was always held that interest could not be levied by execution, because, and only because, the execution must follow the judgment. At the same time the recovery of interest in actions upon judgments was almost universally allowed, and, indeed, the recovery of interest seems to have been one of the principal reasons for bringing suits upon judgments, in cases where the time for issuing execution had not passed.

If, therefore, it be true, as counsel for appellants contends, that a judgment creditor has an absolute right to sue his judgment over again at his own pleasure, there is no warrant for the conclusion of the district court, that the original judgment in favor of "Solen against the defendant drew no interest, for that the same was not specified therein, and for that the attorneys of said Solen waived the same by the form of judgment by them prepared."

There is no pretense that there was any actual intention

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upon the part of Solen or his attorneys to waive the right to collect interest on the amount of his original judgment. The conclusion that there was a waiver rests solely upon the argument that every man is presumed to intend the necessary consequences of his voluntary acts, and that the necessary consequence of entering judgment without specifying interest therein, is to deprive the judgment creditor of the only means of collecting it—i. e., by execution on the judgment. If these premises were admitted, the conclusion would undoubtedly follow, that Solen waived his right to collect interest. But they are not admitted. On the contrary, the appellants insist that the right to sue on a judgment is a remedy always concurrent with the right to issue execution thereon, and that it may be resorted to at the mere pleasure of the judgment creditor, as often as he chooses, and without the allegation or proof of any circumstance tending to show that an execution would be ineffective. In opposition to this view, and in support of the conclusions of the district court, counsel for respondent contends that the right to sue upon a judgment, if it exists at all under our code of practice, is confined to those cases in which a necessity therefor has arisen without the fault of the judgment creditor.

It is assumed, in support of this proposition, that at common law the right to sue upon a judgment was a qualified right, not exercisable at the option of the creditor, but only in those cases in which ordinary process for the enforcement of the judgment had ceased to be available or was insufficient to give it full effect. And it is argued that, although a suit was formerly maintainable upon a judgment for the purpose of collecting interest, though the time for issuing execution had not expired, the statute of this state, in giving the power to collect interest by execution, has done away with the necessity, and consequently with the right, of suing for that purpose; and that the design of the statute, to supersede the remedy by suit, cannot be frustrated by the act of the party in entering his judgment so defectively that an execution for interest can not issue thereon.

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Whatever force there may be in this argument, manifestly depends upon the correctness of the assumption upon which it is founded.

If it is not correct, and if, on the contrary, an action on a judgment was maintainable at common law as a matter of course, then there would seem to be no reason why these plaintiffs should not recover according to the prayer of their complaint.

This, then, is the question to be decided: Did an action on a judgment lie as a matter of course at common law?

There is some conflict in the decisions of the courts of the United States on this point, but the decided weight of judicial opinion is in the affirmative.

Mr. Freeman, in his work on judgments (sec. 432), has referred to most of the cases in which it has been directly adjudicated, and they unquestionably sustain his statement, that "at common law a party has a right of action upon his judgment as soon as it is recovered. This right is not barred nor suspended by the issuing of an execution; nor because, from having the right to take out execution, the plaintiffs' action seems to be unnecessary."

In addition to the cases cited by Mr. Freeman, I call attention to the following:

In *Headley v. Robey*, 6 Ohio, 524, the court say: "It is one of the first principles we learn in relation to the action of debt, that it may be sustained on a record of judgment, and when the judgment is obtained, and the record made up, the right of action is complete. \* \* \* The right to issue execution on a judgment, is a remedy cumulatory only; and I know of no law which would deny to the party a right of action on the judgment, if he chose that remedy, because he could issue execution." To the same effect are *Davidson v. Nebaker*, 21 Ind. 334, and *Greathouse v. Smith*, 3 Scam. 541. (See also *Scofield v. White*, 29 Vermont, 330; *Tarbell v. Downer*, Id. 339; *Clark v. Goodwin*, 14 Mass. 237; *Thomson v. Lee County*, 22 Iowa, 210; *Klock v. Robinson*, 22 Wend. 157; *O'Neal v. Kittridge*, 3 Allen, 470; *Linton v. Hurley*, 114 Mass. 76; *Wilson v. Hatfield*, 121 Id. 551.)

In Connecticut, the point had been decided both ways in

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the superior court, and when, in 1822, it came before the supreme court of that state, it underwent a very thorough discussion. The whole court agreed that at common law an unqualified right to sue on a judgment followed necessarily from the implied promise of the debtor to pay it, and it was held that the common law rule was in force in that state. On the latter point, one justice dissented, but this circumstance only gives additional weight to the unanimous opinion of the court on the principal question. (See *Denison v. Williams*, 4 Conn. 402.)

In opposition to this strong current of authority, I find a *dictum* of the supreme court of Alabama (*White v. Hadnot*, 1 Porter, 419), which was in effect repudiated by the decision in a later case (*Kingsland v. Forrest*, 18 Ala. 519), a decision of the supreme court of South Carolina (*Lee v. Giles*, 1 Bailey, 449), in which an attempt was made to show that, at common law, suit upon a judgment was only allowed after the expiration of the year and a day within which execution could be issued, and a decision of the supreme court of Oregon (*Pitler v. Russell*, 4 Oregon, 124), in which an opinion, mistakenly attributed to Baron Comyn, is made the ground of an inference, that the action at common law was allowed only as a means of collecting interest. A reference to the English cases, and text-writers cited in these opinions, will, I think, show very clearly that they give no countenance to the doctrine, that the *right* to sue on a judgment was subject to any sort of condition or qualification. The right to sue, and the necessity for suing, are two very distinct things, and the absence of the latter by no means implies the absence of the former. In respect to judgments the theory of the law was, that they implied a promise on the part of the debtor, to pay, and from that theory the right of action necessarily followed. But the right was not often exercised, except when other means proved ineffective.

By reference to the cases above cited, however, it will appear that in this country actions have been frequently brought on judgments where there was no necessity for bringing them, and undoubtedly the same thing must have

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Opinion of Leonard, J., concurring.

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happened frequently in England. Still, no English case has been found in which the right to maintain the action was denied on any such ground, and the English text-writers (Selwyn, Tidd, Chitty) all say without qualification that the action of debt lies upon a judgment. To this it might be answered, that in England the necessity always existed in order to collect interest on the judgment; and the answer would be sufficient if it were not for the fact that actions on judgments were frequently maintained in England in cases in which no interest was recoverable. (See cases cited by Judge Cowen in *Klock v. Robinson*, 22 Wend. 162.)

Upon the great weight of authority, I think, it must be held that the right to sue upon a judgment was absolute at common law; and that the common law rule prevails in this state I do not understand counsel to make any serious question. The proposition is conceded in *Pitzer v. Russel*, *supra*, that the creation of a new remedy for a private grievance (as the right to issue execution for interest) does not by implication abolish an existing right of action (p. 120), and it is not pretended that the common law right, whatever it was, has been expressly legislated upon in this state.

That the right to sue, instead of issuing execution on a judgment, is capable of being abused for purposes of oppression, is certainly true, and so is it true of other kinds of actions, and notably so of attachments, but the remedy for such abuses lies with the legislature, and not with the courts.

For these reasons, I think the judgment and order appealed from should be reversed, and the cause remanded.

LEONARD, J., concurring:

I fully agree with the reasoning and conclusion of Chief Justice Beatty upon the first question discussed in his opinion, that is to say, Solen was entitled to have judgment entered in his favor in the first action, specifying that the amount of damages recovered should bear interest until paid, at the rate of ten per cent. per annum. And although, in my opinion, the decision in *Hastings v. Johnson*, 1 Nev. 613, was wrong, still it must be regarded as the settled law



of this state, and it follows therefore, that interest can not be collected by execution upon the original judgment. I also agree that the only consequence of Solen's failure to insert a direction for interest in the judgment in the first action is, that he was thereby deprived of the right to collect it by execution; and further, that thereby he deprived himself of the right to claim that this action is necessary in order that he may receive interest. If it is true, under the law and the facts disclosed, that he could have maintained an action upon the original judgment, and recovered judgment thereon with interest, if a direction for interest had been inserted, then he can do so now; although the original judgment is silent as to interest.

There is also no room for doubt that, at common law, when interest was recoverable only by an action upon the judgment, a party had a right to an action upon his judgment, although he could have had execution for the collection of the principal sum. And I think, from the weight and number of authorities, that he had such right *within*, as well as *after*, a year and a day from the date of his judgment, during which period execution for the collection of the judgment, without interest, could have been issued and enforced.

I am aware, too, that in many states it has been, and is held; that the common law right of action upon judgments continues, notwithstanding no necessity exists therefor, and although the judgment creditor acquires no rights or benefits thereby which he cannot have and enforce by the issuance of an execution. I can not subscribe to that doctrine unless the law compels me to do so. I think, under our statute, that all actions upon judgments, except for good cause, are vexatious, oppressive, and useless. They should not therefore, be entertained by courts, unless the law is plainly written that they may be.

It is true, that at common law, actions upon judgments in personal actions were maintainable, as a matter of course, but it is just as true that a good reason always existed therefor. A judgment creditor was always entitled to claim interest in an action upon a domestic judgment at least,

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and it was competent to the jury to allow it as damages to the amount due.

The reason mentioned for permitting the action at common law has been removed by statute, and here, no reason exists why it should now be allowed as a matter of course, nor is any suggested, except that at common law the action was maintainable, and that the same rule and right continue in this state.

If it is true that, the common law rule had its origin and justification in necessity, which was that, without it, judgment creditors could not otherwise recover their rights, then I can not hold that the action may be maintained in this state except in those cases; where, without his fault, the creditor, by an action, can avail himself of some benefit to which he is entitled, but which he can not have by execution upon the judgment already obtained and in force. It seems to me that to hold otherwise is going beyond the common law. And, outside of authority, I am impressed with the thought that, a law which derived its force and authority from the universal consent and immemorial practice of a just and intelligent people, the evidence of which depends upon the general practice and judicial adjudications of courts, must have been based upon just principles, and designed for some benefit; and that naturally, whatever became a part of that law was demanded by the necessities and well-being of the people as they were then situated.

"A great portion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received from time to time the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice and of cultivated reason to particular cases. In the just language of Sir Matthew Hale, the common law of England is 'not the product of the wisdom of some one man or society of men in any one age, but of the wisdom, counsel, experience, and observation of many ages of wise and observing men.'" (1 Kent's Com. 471.)

Now, the reason for permitting the bringing of actions, for supplying remedies, has always been the same. Under

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the common law it was, and under statutes it has been and is, to enable the plaintiff, through the courts, to obtain something to which he shows himself entitled, but which the defendant withholds from him, or to which he denies plaintiff's alleged right; something which he has not when the action is commenced, and which the court can give. It is preposterous to ask a court to award the same thing over and over again; still that is just what it is said may be demanded as a right, because, at common law, judgment creditors could institute fresh actions so long as their judgments remained unsatisfied. No plaintiff should be permitted to occupy the time of the court, unless with a show of right, he can, at least, claim relief which he has not when the action is brought. It would be no more senseless or useless to permit repeated actions upon judgments in ejectment, than is the rule claimed in this case in relation to money judgments.

Under our statute, a party recovering judgment for any sum, may, by execution, collect the amount awarded, with interest and costs; and he can do no more at any time, no matter how many actions he may bring, nor can he at last enforce payment or satisfaction except by execution. What he may do at first he must do at last. Why should a party be allowed thus to fritter away the time of a court? Why should he be permitted thus to torment an unfortunate debtor? He says to the court: "I now have all the relief I can possibly get under the law; I have a judgment for all that is due, which I can collect with interest and costs out of the debtor's property, and I can be no better off if I get another judgment like the one I now have; still, I demand that the judgment be repeated as often as it suits my caprice or vengeance to have it done, until the judgment is paid." Aside from the common law rule as it is claimed to be, it would not be urged, except under a statute, that such practice would be upheld. Courts would not thus occupy their time, and they would not permit tribunals instituted for the purpose of protection to become instruments of oppression. They would say to judgment creditors claiming no additional relief: "You have received every right and benefit

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that the law can give you—all the relief that you can claim or now ask; if you can not collect your money now, neither can you after receiving anew what you already have, and we will not entertain your action.” It has been said that the debtor may satisfy the judgment, and thus save himself further annoyance and expense. That is not a sufficient answer. So far as courts are concerned, it is no answer; and as to the debtors, it may be replied, that if they have property subject to execution, it may be seized and sold in satisfaction of the first judgment as well as the last, and if they have it not, it is wrong and inhuman to further increase burdens which are already beyond the power of debtors to bear.

What has been said concerning the impropriety of permitting repeated actions upon judgments independently of the common law, was equally true under that law, if it is certain, as claimed, that they were allowed, simply because judgments were the highest evidence of indebtedness, and not because, thereby, some additional right could be given and acquired; that is to say, under the common law, the creditor named in a domestic judgment, in a personal action, for a year and a day subsequent to its date, could acquire by execution on the first judgment, all the benefits that he could have at any time by other actions, except interest subsequent to the date of rendition; that had to be recovered by an action in the form of damages for detention, or not at all; and if the reason for the rule allowing actions like this, was not that, thereby, the creditor might recover what he was entitled to receive, and what he could not otherwise obtain, then the common law rule—always regarded as harsh and oppressive—was established for no better reason than exists here for its continuance.

The foregoing is not said for the purpose of justifying any departure from the common law as it was in fact, and as it is in this state, when considered in connection with our statutes in relation to the collection of interest upon judgments; but to show the improbability of the establishment of a rule allowing actions like this, except in cases

where some further right, not obtainable under the first judgment, might be acquired thereby.

As before intimated, there was a good reason why actions upon domestic judgments were permitted at common law, as a matter of course, and why they were necessary; which was that, in an action upon the judgment, interest was always claimable; and generally, if not always, it was collectible as damages, and in no other way. And if it is true that, there were cases where interest was not allowed, finally, as damages in actions at law upon domestic judgments—although I am unable to find them—still it is sufficient to sustain the position I am endeavoring to establish, that interest was *always claimable*, since the general rule was, that upon such judgments, interest could be recovered, and there was no established rule that it could not be collected, except in cases where the original debt carried interest.

But let us consult authorities. In the first place, by the only form given by Mr. Chitty for a declaration in debt upon a judgment, the pleader is required to "insert a demand for damages sufficient to cover interest." (2 Chitty on Plead. 483.)

In *Stewart v. Peterson's Executors*, 63 Pa. St. 231, the court said: "At common law, where a party had recovered a judgment in a personal action, and suffered a year and a day to elapse without taking out execution, he was driven, in order to reap the fruits of it, to a new action of debt upon the judgment. The statute of Westminster 2, 13 Edw. I., st. 1, c. 45, first gave a writ of *scire facias* in such a case, as was the law previously in real actions." \* \* \*

The right to resort to the former action still remained, and it seems to be the settled doctrine, that it might be maintained as well within the year as afterwards; so that, even though the party might issue execution, he could still sue an original in debt." \* \* \* (Citing English and American authorities.) "It is not valid objection to the action, that at the time it was commenced, the plaintiff could have proceeded by execution upon the original judgment." (Citing several American cases.)

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"The reason for this was, that at common law, the plaintiff could have execution only for the amount of the judgment without interest. In order to recover that, he must resort to a new action. Hence our Act of 1700 (1 Smith's Laws, 7) provided that, 'lawful interest shall be allowed to the creditor for the sum or value he obtained judgment for, from the time the said judgment was obtained till the time of sale, or till satisfaction be made.' There exists no reason why the same rule, which, as we have seen, obtains in actions of debt on judgment, should not apply to proceedings by *scire facias*, which have so completely and so properly taken their places in this state. Indeed, a *scire facias*, on a judgment has, with us, all the qualities and incidents of an action. The judgment in it is *quod recuperet*, not as elsewhere, merely an award of execution. \* \* \* It bears interest on the whole amount recovered, including interest on the original judgment, while in England, on the contrary, in a *scire facias*, no damages are recoverable, and of course, no interest. \* \* \* And though the reason for bringing a new action, that in that way only can interest be recovered, does not exist in Pennsylvania, yet there may be another and equally good reason for it here, which is that it is necessary to secure a new, or continue the old, lien upon the land of the debtor. \* \* \* The Act of Assembly \* \* \* explicitly declares that 'no order or rule of court, or any other process or proceeding thereof, shall have the effect of obviating the necessity of a revival by *scire facias* to continue the lien of judgment,' and specifies particularly \* \* \* 'an execution issued within a year and a day from the rendering of such judgment.' The record before us exhibits a *scire facias post annum et diem*, to revive and continue the lien of a judgment, and if the plaintiff below had a valid judgment against the defendant, he had a right to prosecute such writ in order to obtain a new judgment which would attach as a lien to the defendant's lands, even though he might have been entitled to an alias *fi fieri facias* grounded upon the *fi fieri facias* which appears to have been issued."

If I understand the language quoted, it means that, the

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reason why the judgment creditor could maintain an action upon the original judgment at common law, was because he could have execution for the amount of the judgment only, without interest, and in order to recover that he was driven to a new action. And the reason why the judgment upon *scire facias* was sustained (since the original judgment bore interest under the laws of that state, which could be collected by execution) was because there existed *another* sufficient reason for the new action.

I quote also from Bacon's Abr. vol. 2, 356: "It seems clearly agreed that an action of debt may be brought upon a judgment in B. R., notwithstanding a writ of error brought in the exchequer chamber; for though the writ of error be a supersedeas to the execution, yet the duty remains upon record, and it is but reasonable the party should have this remedy for his damages for forbearance." (See also *Pitzer v. Russell*, 4 Or. 130.)

In *Creuze v. Hunter*, 2 Ves. Jr. 161, Lord Chancellor Loughborough, in reply to counsel, said: "You argue upon the effect of a judgment at law; but would carry a master's report farther; as upon a judgment at law no interest subsequent to the judgment can be recovered. You may bring a fresh action upon it as a new cause of suit; but you can not levy for it, or charge the land under the *elegit* with the intermediate interest from the date of the judgment." (See further, to the same effect, page 166, and *Watson v. Fuller*, decided in 1810, 6 Johns. 284.)

In *Entwistle v. Shepherd*, 2 T. R. 79, Buller, J., used the following language: "It has been said that if this rule (to show cause) were made absolute, the plaintiff would be deprived of interest on the judgment pending the writ of error in parliament; it is a question for the jury to say whether or not they will give interest on the judgment in the name of damages. For interest may be recovered in an action on the judgment, if it be not the practice of the court to allow interest in the costs." (See, also, *Frith v. Leroux*, Id. 59.)

In *Hillhouse v. Davis*, 1 Maule & Selwyn, 169, it appears that under an act of parliament, at the assizes in Bristol,

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Opinion of Leonard, J., concurring.

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before Wood, B., the plaintiff was awarded certain damages by a jury, as compensation for injuries done to his property in constructing certain works and improvements authorized to be made by parliament for improving the port of Bristol. Judgment was given by Baron Wood for the amount of the award, which sum was demanded, but not paid. Thereupon an action was brought to recover the same, with damages for non-payment. The trial was held before Chambre, J., at the assizes, in Bristol, who directed the jury that they might give damages for the detention of the debt, and that the natural criterion of those damages was interest on the sum awarded by the jury. A verdict was found accordingly, and a rule *nisi* was obtained in the court of king's bench, for reducing the verdict to a sum exclusive of interest, on the ground that the jury were not authorized to give interest, but only nominal damages.

At the hearing, it was suggested by Le Blanc, J., that there was no judgment; that a judge of assize could not pronounce judgment under the award. Lord Ellenborough, C. J., replied that if the assessment did not amount to a judgment, it became, at least, a liquidated debt from the time of its ascertainment, and by the rule of common law, it was within the general province of a jury to give damages for the detention of the debt. Separate opinions were pronounced.

Le Blanc said: "The jury having given interest, we can not set their verdict aside, without being satisfied that they have done what they were not warranted to do by law. But there is no positive rule of law against their giving interest on a sum ascertained. The rule of law is affirmative, that where a sum is ascertained, and judgment afterwards pronounced thereon, in a court of record, if an action of debt be brought on the judgment, the jury may give interest by way of damages for the detention of the debt. The only question is, whether this may be assimilated to the case of an action on a judgment; and I think it fairly may. \* \* \* From the time of the ascertainment of the jury and the sanction of the judge, it seems marked out as a stage of the proceedings corresponding with that of a judgment recovered in an



action, and therefore, by analogy to that, it should seem that the sum ascertained will bear interest."

Bayley, J., said: "I can not say the jury have done wrong; on the contrary, I think they were right. It is an assessment of damages before a judge of assize, who afterwards gave judgment upon it, and that comes as near to what is properly a judgment as possible."

In *McClure v. Dunkin*, 1 East, 436, plaintiff brought *assumpsit* on a judgment recovered in Ireland, and obtained a verdict for the amount of the judgment and interest. The original was upon a bond with a specified penalty, and upon a rule to show cause, before the court of king's bench, why the verdict should not be reduced to the amount of the penalty of the bond and costs, the sole question was, whether the plaintiffs were entitled to recover interest on the judgment beyond the penalty of the bond and costs of the judgment. The court held that, if the action had been upon the bond, the objection that judgment could not be recovered beyond the penalty of the bond, would have been good; "but after judgment recovered, *transit in rem judicatum*, the nature of the demand is altered; and this being an action on the judgment, it was competent to the jury to allow interest to the amount of what was due. In this respect I see no difference between a foreign judgment and a judgment in a court of record here."

"There are two propositions which, I suppose, can hardly be questioned. The first, that at common law, and independently of our act of 1815, no interest could be collected upon an execution under a judgment. The second, that interest might be recovered in an action of debt on a judgment." (*Pinckney v. Singleton*, 2 Hill, S. C. 343.)

"It is true, that by the act of 1815, the legislature provided that the interest on contracts which bore interest, might, after judgment, be collected by execution; but this was not intended to alter the common law rule, that in an action of debt on a judgment, interest shall be recovered by way of damages for the detention of the debt. It was the creation of a new and additional remedy whereby the creditor might, in one class of judgments, recover his in-

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Opinion of Leonard, J., concurring.

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terest without being driven to an original action." (*Harington v. Glenn*, 1 Hill S. C. 78.)

The last case was an action on a judgment, and the original demand did not bear interest. Consequently it was not affected by the act of 1815, and it was decided upon common law principles, that the plaintiff should recover interest in the form of damage.

*Bodily v. Bellamy* was an action of debt brought in the court of king's bench, in 1756, upon a bond given at Calcutta, where the interest allowed was nine per cent., which was also the rate payable by the conditions of the bond. Plaintiff recovered judgment, and at that time, the penalty of the bond was sufficient to satisfy the whole debt, interest and costs, then accrued. But the defendant, having caused great delay and expense by different methods, the penalty of the bond alone, became insufficient to answer the debt, interest, and costs, finally incurred. Defendant then obtained a rule for the plaintiff to show cause why, upon payment of the whole penalty, together with the costs in the court of king's bench, and the costs of the writ of error, execution should not be stayed, and satisfaction entered upon the record. I quote one paragraph from Lord Mansfield's very able opinion:

"The plaintiff having been kept out of his money by a writ of error brought after verdict, is entitled to a satisfaction for this damage under the statute of Car. II., which obliges the plaintiff in error to give security as well for damages as costs; or he may bring an action of debt on the judgment, and have damages *pro detentione debiti*." Lord Mansfield said: "The justice of the case is plain, and the law is agreeable to it;" and Mr. Morton, for the defendant, said: "The defendant had better acquiesce in paying plaintiff what was justly and fairly due him, voluntarily and without further litigation, than to render himself liable to the costs of another action."

In *Thomas v. Edwards* (court of exchequer), 2 Anst. 558, referred to by Mr. Justice Cowen in *Kleek v. Robinson*, 22 Wend. 162, as "a specimen of the English cases," the defendant moved a stay of proceedings on payment of the

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Opinion of Leonard, J., concurring.

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money due on the judgment upon which the action was brought, and costs. Plaintiff objected, claiming interest for seven years since judgment. The court said: "If you proceed in your action you can not get interest," and the proceedings were stayed. Subsequently, however (see 3 *Anst.* 804), there was a reference to a master to compute what was due for debt and costs. He refused to allow interest, and plaintiff obtained a rule for defendant to show cause why the matter should not be referred back to the master, with directions to allow interest. Defendant showed that, "almost the whole sum due on the judgment, was for costs, the allowing interest on which was questionable (14 *Vin. Abr.* 458, c. 9); at most it was discretionary in the court, and that discretion exercised by the former order."

The court, however, held that the whole debt due on the judgment, carried interest. *Hodgdon v. Hodgdon*, 2 N. H. 171, was decided in 1820, and there it was said: "It has been decided that the payment of interest upon a judgment can not be coerced by an execution." (*Watson v. Fuller*, 6 Johns. 283.) But a judgment creditor has a most unquestionable right to forbear to collect the whole amount of the judgment, in order to enable him, by an action of debt upon the judgment, to recover the interest. Nor can this right be defeated by a tender of the balance due upon the judgment, and upon the interest of that balance. A judgment creditor is entitled to receive the amount of his judgment, and interest, until it is paid, and a tender of anything short of this, is no bar to an action of debt upon the judgment." (See, also *Sayer, et al. v. Austin et al.*, 3 Wend. 497; *Berryhill v. Wells*, 5 Biney, 58, and note (1) to *Creuze v. Hunter*, 2 Ves. Jr. 168.)

The foregoing authorities establish the following conclusions satisfactorily to my mind:

1. The principal reason for the rule that actions upon domestic judgments were maintainable as of course, at common law, was, that thereby and by such means only, a judgment creditor could collect what he was entitled to claim and receive. This conclusion has the sanction of the high-

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Opinion of Leonard, J., concurring.

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est authority, and is the only one that is supported by the dictates of reason and justice.

2. Under the common law, and according to the practice of the English courts, after as well as before the declaration of American independence, the general rule was that, interest was recoverable in the form of damages in an action at law, upon the original judgment, if that was wholly or in part, unpaid; but it was not recoverable if the judgment had been entirely satisfied before suit brought. It necessarily follows that in order to collect interest an action upon the judgment was a necessity. It may be that the application of the rule was sometimes capricious, although my research has failed to convince me of that fact; but the rule itself was as certain as any other which allowed damages in any class of cases. But, at any rate, every creditor named in a domestic judgment had the right to claim interest as damages, and generally, if not always, he recovered it; and the right to claim it, and to have a jury pass upon it, was as complete justification of the rule as an affirmative, inflexible rule would have been.

It is said in *Klock v. Robinson*, *supra*, that the English cases are conflicting, but that, in the opinion of Justice Cowen, the balance of opinion was against allowing interest on a judgment, unless the original demand carried interest.

Excluding actions upon foreign judgments and cases in the high court of chancery, where, according to its practice, the allowance of interest was discretionary with the court, when the cause came on for further direction after the master's report (see note (1) to *Creuze v. Hunter*, *supra*), my research has brought me to an opposite conclusion.

The following cases are cited by Judge Cowen: (*Thomas v. Edwards*, 2 Anst. 558, and 3 Id. 804; *Butler v. Stoveld*, 1 Bing. 368; *Atkinson v. Lord Braybrooke*, 4 Camp. 380, and *Doran v. O'Reilly*, 3 Price, 250.)

In the first, as we have seen, interest was finally allowed upon the whole judgment, although it was mostly for costs.

In the second, decided in the court of common pleas in 1823, a judge at chambers held that the plaintiff had no right to interest on the judgment, and ordered a stay of

proceedings upon payment of the judgment and costs. The plaintiff accepted those amounts, and afterwards moved for a rule to discharge the order, contending that interest was due on the judgment, when the court referred to *Doran v. O'Reilley* (an action upon a foreign judgment), for the rule that interest was allowed only when the original debt carried interest. Cross, for plaintiff, claimed that, at any rate, the party had a right to try the question before a jury, but the court said: "The plaintiff should have refused the sum tendered at the judge's chambers if he meant to persist in his claim for a larger sum;" and that was the whole decision.

If the court intended to decide, or if it had been true, that the plaintiff could not have interest upon his judgment because the original demand did not carry interest, it would naturally have said so, and based its decision upon that ground. But, at all events, it was not so decided, and it is plain that Judge Cowen did not think the court was of that opinion, because he says: "As late as 1823, we find that the justices of the common pleas doubting whether interest might not be allowed even where the original demand did not carry interest. (*Butler v. Stoveld, ut supra.*)" Besides, in the very case in hand, he decided that it might be collected as damages, in the action of debt on a judgment for damages.

The case cited from 4 Camp. and the one from 3 Price were actions upon *foreign* judgments; and it is patent that there were good reasons for bringing actions upon such judgments, outside of the question of interest. So should it be admitted that the rule was well settled, that upon *them*, actions could be maintained, although interest could not be recovered, still, those facts would not militate against my conclusion in relation to actions upon domestic judgments.

But, as we have seen, in *McClure v. Dunkin*, the court of king's bench, in 1801, held that, in actions of *assumpsit* upon foreign judgment, the jury could allow interest; and Graham, B., in *Doran v. O'Reilley*, said: "Had the plaintiff below brought *assumpsit*, he might have recovered interest in the shape of damages."

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Opinion of Leonard, J., concurring.

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It would be in bad taste for me to criticise, unfavorably, the decisions rendered in different states, wherein it has been held as stated by the chief justice; but it is proper to say that, in none of them was there an attempt to discover the reason for the common law rule, except, possibly, in *Denison v. Williams*, 4 Conn. 404; and in most of them the question now under discussion was summarily disposed of, by saying, in substance, that at common law an action upon a judgment was sustainable at any time after rendition, although the creditor was entitled to an execution; that the remedy by execution was merely cumulative, and did not take away the common law right of action, and consequently, that the *right* to the latter remedy was unquestionable; all of which conclusions, except the last, I freely concede to be correct, and that is true in a modified sense.

But I insist that, if, under the common law, there was always a necessity for the action, which was the reason why the rule was adopted, it then follows that, the common law rule in fact was and is, that this action may be maintained when a necessity, not caused by the fault of the creditor, exists therefor, and in that case only; and adopting the language of the court in *Pitzer v. Russel*, *supra*, that "the common law reason for the practice is inapplicable in a state where every judgment bears interest collectible by execution, and where interest can be obtained equally well without an action. It is a part of the common law that where the reason of the rule fails, the rule falls with it."

A hasty glance at the decisions supporting these views must suffice.

In *Pitzer v. Russel*, the court discussed the precise question here presented, and came to the conclusion to which I have arrived. Referring to *Clark v. Goodwin*, 14 Mass. 238, decided in 1817, the court did erroneously attribute to Chief Baron Comyn language which was used by the court in the Massachusetts case, and not by Baron Comyn; but the only result of the error is, that *Clark v. Goodwin* becomes the authority for the doctrine announced, instead of Comyn. It is still high authority. The conclusion of the court in *Pitzer v. Russel* is, that "the plaintiff can not claim

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Opinion of Leonard, J., concurring.

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a strict right to sue his judgment as often as he may choose without showing any necessity for such course. \* \* \*

We conclude, from all the authorities presented, that neither the common law, nor the practice in the various states of the republic, nor anything inherent in the subject, based on sound reason, gives to a judgment creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment."

It is true, also, that in *Lee v. Giles*, 1 Bailey (S. C.), 452, the court was inclined to the opinion, that at common law, actions upon judgments could not be commenced until after a year and a day, but the decision did not depend upon that conclusion. This is what the court said: "But the whole matter depends on the question, whether a judgment is operative for a year and a day at common law; for if it is, why within that time have any other remedy? No sensible reason can be given why there should be, whilst it can not escape observation that it would be uselessly oppressive if there were. I can never sanction the idea that a new action should be permitted by way of punishing the debtor for not paying his debt. There is something barbarous in it, and wholly inconsistent with the mild, benignant and just spirit of the common law. As long as the judgment is operative, the creditor has the means of enforcing payment, and if the debtor can pay, an execution is as effectual as another suit, and more expeditious. \* \* \* Here the judgment and execution, on which the action was brought, were in full operation, and, therefore, the action was improperly brought. The plaintiff had her remedy, and was not entitled to the further aid of another tribunal, and a nonsuit, therefore, was properly ordered."

And referring to *Lee v. Giles*, in *Vandiver v. Hammet*, 4 Richardson's Law R. 510, it is said: "The principle of this case is, that no action will lie on a judgment which can be enforced, for the plaintiff already has an enforceable execution, and that is all he would get by his new action." (See, to the same effect, *Shooter v. McDuffie*, 5 Richardson's Law 66, and *Parnell v. James*, 6 Id. 372).

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Opinion of Leonard, J., concurring.

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But it is urged by counsel for appellant, that inasmuch as interest can not be collected by execution in this case, because it was not specified in the judgment, therefore, an action upon the judgment became a necessity, and should be maintained. That position would be tenable, had it not been appellant's fault that a direction for interest was not made, thus enabling its collection by the ordinary method. If it is true, that actions upon domestic judgments can not be maintained, when the creditor can derive no substantial advantage thereby—unless a necessity exists for the action—it must be admitted that appellants can not, by their own neglect, cause the necessity, and then invoke that condition, in justification of the suit. It was the law of this state, at the time the original judgment was entered, that interest could be collected under execution, by the insertion of a direction therefor in the judgment, and that without such direction, it could not be so collected. (*Hastings v. Johnson, supra.*) It appears that appellants prepared the judgment as it was entered, and, knowing the law, caused the condition that is now claimed to be a sufficient justification of this action; and the result is, that they are in the same situation that they would have been in had they inserted a direction for interest in the original judgment, and then instituted this action thereon. (*Pitzer v. Russel, supra.*)

In my opinion, the third conclusion of law, stated by the court below, is correct; that is to say, "that plaintiffs have no cause of action against the defendant," and that the judgment is correct and should be affirmed.



## Argument against the Motion.

[No. 1018.]

REESE GOLD AND SILVER MINING COMPANY,  
RESPONDENT, v. RYE PATCH CONSOLIDATED  
MILL AND MINING COMPANY, IMPEADED WITH  
OTHERS, APPELLANT.

APPEAL—HOW TAKEN.—In order to take and perfect an appeal, the appellant should first file his notice of appeal, next serve it, and, within five days of the filing of the notice, file an undertaking on appeal.

IDEM.—Held, upon a review of the facts, that appellant was not excused for failing to follow the rule above prescribed.

MOTION to reinstate appeal.

The facts sufficiently appear in the opinion.

*Paul Neumann and Crittenden Thornton*, for the motion:

I. The right of appeal should be liberally construed. (1 Comp. L. 1391, 1392, 1402, 1409; *Conant v. Conant*, 10 Cal. 254; *Knowles v. Yeates*, 31 Id. 87; *Houghton's Appeal*, 42 Id. 52; *Lawton v. Commissioners*, 2 Caine, 179; *Rex v. Commissioners*, 2 Keble, 43; *Rex v. Morley*, 2 Burr, 1042.)

II. The filing of an undertaking on appeal within five days after the filing of the notice, irrespective of the time of service of the notice, provided the service of the notice be within sixty days of the order appealed from, is a literal compliance with the provisions of the statute, and is, therefore, sufficient. The filing of an undertaking within five days of the service of the notice of appeal, irrespective of the time of the filing of the notice, provided all these acts be performed within sixty days of the date of the order appealed from, is a substantial compliance with the provisions of the statute when fairly and liberally construed, with the intent to effect their reasonable intent and purpose.

III. The filing of an undertaking for costs on appeal, within five days after the filing of a notice of appeal, is jurisdictional. (*Elliott v. Chapman*, 13 Cal. 383; *Dooling v. Moore*, 19 Id. 81; *Gordon v. Wansey*, 19 Id. 82.)

*Lewis & Deal*, against the motion;

The filing and serving a notice of appeal, and the filing

an undertaking, are the acts by which the supreme court obtains jurisdiction of the case; as much so, as the service of a summons, is the act by which a *nisi prius* court obtains jurisdiction of a party defendant. If so, there can be no doubt but all acts required to be performed must be strictly followed. But whether they be jurisdictional or not, this court has often held, that they must be regularly performed. (*Lyon Co. v. Washoe Co.*, 8 Nev. 177; *Peran v. Monroe*, 1 Id. 484; *Lambert v. Moore*, 1 Id. 344; *Johnson v. Badger M. & M. Co.*, 12 Id. 261; *Aram v. Shallenberger*, 42 Cal. 275.) As bearing upon the same question, we refer to the following cases: 24 Cal. 96, 229, 609; 22 Id. 650; 26 Id. 263; 19 Id. 82; 10 Id. 32; 15 Id. 383; 42 Id. 406.

By the Court, BEATTY, C. J.:

The notice of appeal in this case was filed October 30, 1879, but not served until November 7. An undertaking on appeal was filed on the day the notice was filed, and another similar undertaking on the day it was served. On motion of respondent, the appeal was dismissed, on the ground that neither undertaking was sufficient to perfect it.

This is a motion by appellant to vacate the order of dismissal, in support of which it is contended: First, that the appeal was duly and properly taken and perfected, and that the *ex parte* order dismissing it was unadvisedly made; and second, that the failure to serve the notice of appeal in time (if it should be held not to have been in time) was excused by the circumstances set forth in the affidavits filed in support of the motion.

We will first inquire whether, upon the facts presented by the record, the appeal was duly perfected?

It is not denied that the provisions of section 341 of the civil practice act are mandatory. On the contrary, it seems to be conceded that, whatever its requirements are, they must be strictly complied with or the appeal is wholly ineffectual.

But counsel makes an elaborate and ingenious argument to prove that, in one respect, it is not to be understood in its literal sense. He contends that it does not really mean

that the undertaking must be filed within five days after the notice of appeal is filed, but only that the filing of the undertaking must be within five days after the appeal is made by the filing and service of notice. Upon this construction of the act he claims that his second undertaking, filed November 7, was in time to perfect his appeal.

Without pretending to follow out the line of argument by which counsel attempts to sustain his proposition, we content ourselves with saying, that it does not appear to us to present any valid reason for construing the statute otherwise than according to its plain terms. We think that an undertaking on appeal, filed more than five days after the filing of the notice is void, and consequently that the second undertaking filed in this case was of no effect.

As to the first undertaking, that was equally void, because it was filed before the notice of appeal was served.

This court, following the repeated decisions of the supreme court of California, construing a similar statute, has held that the filing of notice of appeal must precede or be contemporaneous with service on the respondent (*Lyon County v. Washoe County*, 8 Nev. 177), and that service of the notice must precede or be contemporaneous with the filing of the undertaking. (*Johnson et al. v. Badger Co.*, 12 Nev. 261.)

It follows from these decisions and the terms of the practice act (sec. 341) that, in order to take and perfect an appeal, the party desiring to do so should first file his notice of appeal, next serve it, and within five days of the filing of the notice, file an undertaking, which of course implies that the notice must be served within five days after it is filed.

There ought to be no difficulty in understanding this rule, and none in following it; and even if we were to concede that, as an original proposition, the statute might well have been construed to mean something else, there would be no reason for adopting such a construction at this late day. We have a rule of practice which has been settled by a line of decisions in California and in this state, and which ought to be, if it is not, well understood by the profession.

If it should now be set aside in favor of that contended for by counsel, we would simply have a new and unfamiliar rule, sustained by no surer construction of the statute, and not a whit more convenient than the old one.

For these reasons we would not feel justified in setting aside our former decisions upon the matter in question, even if we were better satisfied than we are that our construction of the statute rests upon implications too far-fetched and reasons too insubstantial. In matters of practice like this there must be some rule, and even a poor rule uniformly maintained is better than no rule at all, or a rule subject to continual changes.

Having thus determined that, on the facts disclosed by the record, there was a failure to perfect the appeal, we come next to the question, whether the affidavits filed in support of the motion, show any excuse for the failure on the part of appellant to take the proper steps within the proper time.

It is at least doubtful whether, under any circumstances, an appeal can be taken without a compliance with every requirement of the statute; but for the purposes of this case it may be conceded that an appellant will be excused, if by the act of the respondent, and without any negligence on his part, compliance is rendered impossible. It is attempted, by the affidavits in this case, to show that service of the notice of appeal prior to November 7, was rendered impossible by the absence of respondent's attorney from his office and residence. The showing is, however, wholly insufficient. It appears that the attorney was absent from his office and residence from October 30 to November 7, and that during all that time his office was locked up; but it does not appear that any attempt was made to serve the notice at his residence, as provided by the statute in such case (Pr. Act, sec. 496). On the contrary, the attorney for appellant testifies, that knowing of the absence of respondent's attorney from the county, and being informed and believing that his wife had accompanied him, and that he had no other family, he made no attempt to serve him at his residence. This, we think, was a fatal mistake. If the

## Points decided.

information relied on had been correct, it still would not have justified the inference, that no person of suitable age and discretion was to be found at the attorney's residence. But it happened that the information upon which appellant's attorney acted was false. The attorney for respondent, during his absence from the county, left his house in charge of no less than three adult members of his family, including his wife, and so the service of the notice was perfectly feasible. Besides, there were other attorneys of record in the case, who might have been served by mail, and, moreover, there was abundance of time after the seventh of November, to file and serve a new notice of appeal, the time for appealing not having expired by forty-two days, when the attorney for respondent returned to the county.

Upon this state of facts, we think there was no sufficient excuse for failing to follow the established rule in taking this appeal, and the motion to vacate the order of dismissal is denied.

[No. 1014.]

THE STATE OF NEVADA, RESPONDENT, v. GEORGE W. McLANE, JR., AND FRANK McINTIRE, APPELLANTS.

**INDICTMENT FOR MURDER—CHARACTER OF WEAPON USED NEED NOT BE STATED.**—An indictment for murder, charging that defendants killed the deceased, "by then and there shooting him," is sufficient, without stating the character of the weapon used in the commission of the offense.

**SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT.**—Held, upon a review of the testimony, that the evidence was sufficient to sustain a verdict of murder in the first degree, against both of the defendants.

**SEPARATE TRIAL—WHEN MUST BE DEMANDED.**—A defendant, jointly indicted with another, who intends to demand a separate trial, must make his motion before the formation of the jury is commenced.

**IDEM—GOOD CAUSE MUST BE SHOWN.**—Defendant McLane moved for a separate trial, upon an affidavit stating: "That the theory and grounds of defense of the said G. W. McLane, Jr., are entirely incompatible and in conflict with the theory and grounds of defense of McIntire, each with the other." Held, that this affidavit was too indefinite to disclose the real merits of the application; and that the court did not err in denying the motion.

**ADMISSIBILITY OF TESTIMONY—STATEMENTS OF DEFENDANTS.**—After the death of the deceased, each of the defendants made statements in re-

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Argument for Appellant McLane.

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IV. The court erred in denying defendant's motion in arrest of judgment. The indictment is defective. (*People v. Hood*, 6 Cal. 236; *People v. Lloyd*, 9 Id. 54; *People v. Saviers*, 14 Id. 29; *People v. Logan*, 1 Nev. 110.)

V. The court erred in refusing to give the instructions asked by defendant.

1. It was error in not giving the instruction, that McIntire's statements were not admissible against McLane, unless made in his presence. (*People v. Bonds*, 1 Nev. 33; *State v. O'Conner*, 11 Id. 416.)

This instruction presented a correct principle of law, and should have been given. (*People v. Williams*, 17 Cal. 142; *People v. Ramirez*, 13 Id. 172; *Davis v. State*, 10 Ga. 101; *Waterman U. S. Dig.* 615, sec. 280.)

2. It was error to say that "no single instruction is to be considered by itself." This instruction was ambiguous, and calculated to mislead the jury. (*State v. McGinnis*, 5 Nev. 337; *People v. Maxwell*, 24 Cal. 14.)

3. The instruction as to reasonable doubt assumed the guilt of the prisoner, and was erroneous. (*People v. Duffy*, 6 Nev. 138; *People v. Williams*, 17 Cal. 142; *State v. McGinnis*, 5 Nev. 337.)

4. The court erred in commenting upon the contradictory statements of the defendants. (*Waterman U. S. Dig.*, sec. 369; *State v. Ah Tong*, 7 Nev. 148.)

5. The instruction, that the jury might disbelieve the testimony of either defendant, was erroneous. (*State v. Kennedy*, 7 Nev. 374; *State v. Ah Tong*, 7 Id. 148; *Wat. U. S. Dig.*, sec. 359.)

VI. It was error to admit the declarations made by the defendant, McIntire, as to the killing of Wallbaum, such declarations, as to other conspirators, were no part of the *res gestae*. (1 *Greenl. Ev.*, sec. 111; *Roscoe Cr. Ev.* 417, 418; 2 *Archbold Cr. Pr. & Pl.* 1845; *Browning v. The State*, 30 Miss. 656; *State v. Daubert*, 42 Mo. 242.)

VII. The testimony of witnesses as to the declarations of McIntire was inadmissible for any purpose against defendant McLane, and should have been excluded. (*State v. Soule*, 14 Nev. 453; *State v. Ah Tom*, 8 Id. 214; *Browning*

## Argument for Appellant McIntire.

v. *State*, 30 Miss. 656; *State v. Daubert*, 42 Mo. 242; *Clawson v. State*, 14 Ohio St. 234; *Strady v. State*, 5 Cald. (Tenn.), 300; *Hightower v. State*, 22 Tex. 605; *People v. Moore*, 45 Cal. 19.)

VIII. When illegal testimony is allowed to go to the jury, the error is not cured by an instruction to the jury to disregard it. (*State v. Daubert*, 42 Mo. 242; *State v. Wolff*, 15 Id. 168; *D. & M. R. R. Co. v. Van Steinburg*, 17 Mich. 99; *Knox v. Hunt*, 18 Mo. 174.)

*M. Fuller*, for Appellant McIntire:

I. The demurrer to the indictment should have been sustained. The indictment does not conform to the requirements of the statute. It does not state the character of weapon used in the commission of the offense. (Cr. Pr. Act, secs. 234-236; *People v. Logan*, 1 Nev. 110; Arch. Cr. Pr. & Pl. 87; *People v. Lloyd*, 9 Cal. 55; *People v. Wallace*, 9 Id. 31; *People v. Aro*, 6 Id. 208; *People v. Hoqd*, 6 Id. 236; *People v. Dolan*, 9 Id. 576.)

II. The court erred in denying the motion of defendant, McIntire, for an autopsy of the body of the deceased. (Whart. Am. Cr. L. 652; 1 Greenl. on Ev., sec. 82, note 1.)

III. The court erred in admitting testimony of witnesses as to the declarations of the defendant, McLane, exculpating himself and inculcating the defendant, McIntire. (3 Greenl. on Ev., secs. 94, 110, 111; Whart. Am. Cr. L. 703, 705, 706; Whar. U. S. Dig. 227, p. 610.)

IV. The evidence is insufficient to sustain the verdict against the defendant, McIntire. The judgment as to him should be reversed upon this ground. (*People v. Lewis*, 36 Cal. 531; *People v. Strong*, 30 Id. 151; *State v. Van Winkle*, 6 Nev. 348.)

V. The charge of the court is ambiguous, contradictory and irreconcilable as a whole. In discussing the alleged errors in the indictments, counsel cites: 3 Greenl. on Ev. 43; *People v. Ybarra*, 17 Cal. 168; *People v. Williams*, 17 Id. 142; *People v. Maxwell*, 24 Id. 14; *People v. Strong*, 30 Id. 151; *People v. Campbell*, 30 Id. 312.)

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Argument for Respondent.

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*M. A. Murphy*, Attorney-General for Respondent:

I. The indictment is sufficient. (*People v. Stevenson*, 19 Cal. 275; *People v. Dolan*, 9 Id. 583; *People v. King*, 27 Id. 509; *People v. Judd*, 10 Id. 313; *People v. Colt*, 3 Hill. 432.)

II. The court did not err, in refusing defendants a separate trial. Where several persons are jointly indicted for a felony, they can not claim separate trials, as a matter of right, although they sever in their pleas; but the court, in its discretion, may allow them to be tried separately. (*Hawkins v. The State*, 9 Ala. 137; *U. S. v. Marchant*, 4 Mason, 158; *Commonwealth v. Manson*, 2 Ashmead, 31; *State v. Wise & Johnson*, 7 Rich. L. R. 412; *State v. Conley*, 39 Me. 78.)

A separate trial can not be demanded, as a matter of right, after the jury have been sworn, even if the statute gives the right, when properly claimed. (*Lawrence v. State*, 10 Ind. 453; *McJunkins v. State*, 10 Id. 140.)

III. Where there is any evidence to support the verdict, it will not be disturbed. (*State v. McGinnis*, 6 Nev. 109; *State v. Glover*, 10 Id. 24; *State v. Huff*, 11 Id. 17; *State v. Raymond*, 11 Id. 99; *State v. Crozier*, 12 Id. 300; *State v. Mills*, 12 Id. 403.)

IV. Instructions given upon a criminal trial must be read and construed together and taken as a whole. No single sentence is to be selected from the body of any one instruction and held up as being erroneous, while the balance may be good and explain the error away. (*State v. Donovan*, 10 Nev. 36; *State v. Raymond*, 11 Id. 98.)

V. No error was committed by the court in refusing to give the instruction asked for by the defendant, McIntire, because it had already been given by the court of its own motion, and the giving of the one asked for by McIntire would be likely to mislead the jury. (*People v. Varnum*, 53 Cal. 630; *State v. Ferguson*, 9 Nev. 106; *People v. Bond*, 1 Id. 33; *State v. Rover*, 13 Id. 17; *State v. Hamilton*, 13 Id. 386.)

VI. The affidavits for a change of venue were insufficient; they merely set forth the opinions of affiants that the defendant, McLane, could not have a fair trial, owing to the



popular prejudice against him. (*People v. McCauley*, 1 Cal. 379; *People v. Shuler*, 28 Id. 490; *People v. Mahoney*, 18 Id. 180; *People v. Congleton*, 44 Id. 93.)

VII. The granting and refusing of separate trials to parties jointly indicted is a matter that is discretionary with the district court, and this court will not disturb the ruling of the lower court without it is made affirmatively to appear that the discretion has been abused. (Comp. L., sec. 1984; *People v. Stockham*, 1 Parker, 424; *U. S. v. Gibert*, 2 Sumner, 19; *State v. McLendon*, 5 Strob. 85; *Commonwealth v. Eastman*, 1 Cush. 189; *State v. Conley*, 39 Me. 78; *State v. Soper*, 16 Id. 293; *United States v. Marchant*, 12 Wheat. 480.)

The defendant, McLane, can not now complain, because his motion was not made in time. It should have been made before the parties commenced to impanel the jury. A separate trial can not be demanded after the jury has been impaneled. (*McJenkins v. State*, 10 Ind. 140; *Lawrence v. State*, 10 Id. 453.)

VIII. The motion for a continuance made upon the affidavit of McLane was properly overruled, after the district attorney had agreed, that if the witness was present, he would testify to the facts as set forth in the affidavit, and that the said facts were true. (*People v. Diaz*, 6 Cal. 249; *State v. Brette*, 6 La. An. 652; *People v. Vermilyea*, 7 Cow. 369; *Brill v. Lord*, 14 Johnson, 341.)

By the Court, BEATTY, C. J.:

The defendants were jointly indicted, tried together, and both found guilty of murder in the first degree. They unite in appealing from the judgment and from the order denying their motion for a new trial.

Each is nevertheless represented here, as he was throughout the proceedings in the district court, by his own special counsel, and each relies upon one or more assignments of error, based upon exceptions in which the other did not join. For this reason the case must be treated as if there were two separate appeals, though some points, common to both, will require to be noticed but once.

And, first, as to the indictment. The defendant, McIntire, demurred, and both defendants moved in arrest of judgment, on the ground that it was fatally defective in failing to describe the weapon used in the commission of the alleged offense.

The indictment charges: "That the said George W. McLane, Jr., and Frank McIntire, at the said county of Lincoln, in the said state of Nevada, on the thirteenth day of December, A. D. 1879, or thereabouts, without authority of law, willfully, feloniously, and with malice aforethought, killed Frederick Wallbaum, by then and there shooting him, the said Frederick," etc.

The substantial form to be followed in an indictment for murder is prescribed in section 1859 of the Compiled Laws, and in that form the words "by shooting him" are followed by the words, "with a pistol (or with a gun or other weapon, according to the facts)."

Judged by this section alone, this indictment would seem to be defective. But by the very next section (1860), it is expressly enacted that: "It shall not be necessary to set forth in the indictment the character of weapon used, nor that any weapon was used in the commission of the offense, unless the using of such weapon is a necessary ingredient in the commission of the offense."

The meaning and application of this provision is plain. In such offenses as assault with a deadly weapon, drawing and displaying a deadly weapon, etc., the character of the weapon used is an essential ingredient, and in charging such offenses, the necessity of setting this forth in the indictment is readily perceived. But in murder it is not essential that a weapon of any sort should be used, and in such cases the law has wisely dispensed with the necessity of describing a weapon.

The stricter rule, which formerly prevailed with reference to this matter, rested upon two grounds of supposed necessity. It was thought necessary to make the charge in the indictment as specific as possible, in order, first, that a judgment thereon might be an effectual bar to a second prosecution for the same offense; and, second, to afford the

defendant a reasonable guide in the preparation of his defense.

But as the record of a conviction or acquittal, unaided by parol testimony, is not in itself sufficient to sustain a plea of former conviction or acquittal, it is clear that, for this purpose, the difference between charges more or less specific is a difference of degree merely, not of kind, and that the simplification of the charge, although it might, in some rare instance, subject a defendant to greater trouble in sustaining such a plea, does not deprive him of any right guaranteed by the constitution.

As to the second ground, it was long ago discovered that the tendency of the rule requiring the defendant to be informed by the indictment of the exact particulars of the charge against him, was greatly to facilitate the escape of the guilty without materially contributing to the protection of the innocent; and the courts accordingly proceeded to correct the evil, not by a direct abrogation of the rule; but by resorting to a clumsy expedient by which its effects were neutralized. They sanctioned the practice of charging, in separate counts of the indictment, the use of as many different means of producing death as the pleader might think the uncertainties of his case demanded, thus preserving the rule in form, while abandoning the ground upon which it was supposed to rest; for it is clear that an indictment, which charges the use of every possible means of producing death, is exactly as indefinite as one that charges the killing in the simplest and most general terms.

The present case serves very well to illustrate the foregoing observations. It would have been easy to charge the shooting to have been done with a pistol, in one count of the indictment; with a gun and pistol in another, with two pistols in another, and so *ad infinitum*. But supposing the defendants to have been innocent, how could they have prepared their defense against such a charge, better than against the simple allegation that they killed Wallbaum by shooting him? The difference would have been in this respect a difference of form merely, not of substance, and it can not, therefore, be pretended that the legislature has ex-

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ceeded its powers in prescribing the simpler in place of the more cumbersome form.

It is only necessary to say, with respect to the cases cited by counsel for appellants, to prove that this indictment is bad, that they all have reference to the rule of pleading in force prior to the adoption of our statutory rule. (Comp. L. 1860). We think the district court did not err in overruling the demurrer and motions in arrest of judgment.

In order to a proper understanding of most of the remaining points urged in behalf of the appellants, it will be necessary to make a statement of some of the more important facts developed by the testimony adduced at the trial.

It appears that the deceased, Frederick Wallbaum, resided on a ranch in Pahranaagat valley. He was unmarried, and had no one living with him except the defendant McIntire, who for some months prior to Wallbaum's death was employed by him as a vaquero. His nearest neighbor was George H. McLane, Sr., father of the other defendant, who resided on a ranch five miles distant.

That Wallbaum was murdered at his ranch on the twelfth or thirteenth of December, 1879, was very clearly proved. On the eighteenth of December his body was fished out of a well on the premises, where it had been thrown and held down by a pile of stones. Death had evidently been produced by two gunshot wounds, one in the back of the head, and the other in the side of the head, and the evidence all tended to show that these wounds were inflicted by one or the other, or both of the defendants, not earlier than the twelfth nor later than the thirteenth of December. McIntire was at Wallbaum's ranch on both the twelfth and thirteenth. McLane was there only on the thirteenth. They left the ranch together early on the fourteenth, going first to the ranch of the elder McLane, and thence to the town of Hiko, where they spent that night. The next day, the fifteenth, they started home, and went as far as Pierson's ranch, which was about a half mile from the elder McLane's. McIntire remained at Pierson's that night, but McLane went home, and, rousing up his father, informed him that McIntire had told him, on their return from Hiko, that

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he had murdered Wallbaum. By his father's advice he started back to Hiko early in the morning, procured a warrant and an officer, and had McIntire arrested. After this he assisted in the search for Wallbaum's body, which, as above stated, was found in the well on his own premises, on the morning of the eighteenth of December. Up to the time he was informed of the finding of the body, McIntire made no countercharge against McLane, although he knew he had been arrested at the instance of the latter. On the contrary, he continued to tell the same story he had been telling since the morning of the thirteenth, when McLane went with him to Wallbaum's ranch—i. e., that Wallbaum was away from home; that he was out in the hills looking after his cattle, and was not expected back for ten days or two weeks. As soon, however, as he was informed of the finding of the body, he made a statement to the effect that McLane, on arriving at Wallbaum's ranch on the thirteenth, had been ordered by the latter not to enter the house; that he pretended to leave, but shortly afterwards slipped up to the door and shot Wallbaum in the back of the head, shooting him a second time in the side of the head, after he had fallen to the floor. He then, McIntire says, compelled him, by threats and intimidation, to assist in carrying the body to the well, and in hurling the stones that were thrown upon it, after which he searched the premises for valuables, and took from among the papers of the deceased a check for one hundred and twenty dollars.

The result of McIntire's statement was, that McLane also was arrested. His statements, made both before and after his arrest, were to the effect that he met McIntire at Pierson's ranch on the afternoon of the twelfth of December, and, being informed by him that Wallbaum was absent from home, agreed to persuade two Indian women to go with him to the ranch the next day; that on the morning of the thirteenth McIntire came to Pierson's ranch with Wallbaum's wagon, and took the squaws home with him in that conveyance, McLane following on horseback, and arriving at the ranch at the same time with the others. He says that, on his arrival, he noticed a number of things that he

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knew Wallbaum would not have left behind him if he had really been out in the hills with his cattle, and he also noticed, as a very singular circumstance, that McIntire, instead of drawing water from the well near the house, went to the creek, two hundred yards away. What he observed induced him to suspect that McIntire had murdered Wallbaum and put his body in the well, and this suspicion was confirmed by McIntire's explicit statement to that effect, made on their way back from Hiko. Each of these statements was consistent enough of itself and with most of the surrounding circumstances, but each was contradicted, in important particulars, by the testimony for the state.

McIntire was contradicted by proof that he had said over and over again, and to a number of different persons, between the twelfth and eighteenth of December, that Wallbaum was away from home, and that he persisted in telling this story after he knew McLane had accused him of the murder and when he was in no possible danger of violence from McLane. His pretense that he was afraid of McLane is also contradicted by the whole tenor of his conduct during the fourteenth, fifteenth and sixteenth of December, and by the fact that he voluntarily returned with him to the vicinity of his father's ranch, instead of denouncing him to the authorities at Hiko, and putting himself under their protection.

The check, also, for one hundred and twenty dollars, indorsed by the payee, and identified as the property of Wallbaum, which, he says, was taken from among the papers of the deceased by McLane, appears to have been in his own possession before the time when he says McLane delivered it to him. He pretends that he received it from McLane at the time the latter was starting to have him arrested, on the morning of the sixteenth, but it was shown that as early as the fourteenth, when he was drinking at Hiko, he was boasting of the amount of his funds, and threw a paper on the counter, which he said was a check, and which he put back in his pocket in consequence of something said to him by McLane in a language not understood by those present. If he had a check at that time, it

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must have been the check for one hundred and twenty dollars, for he had none other.

McLane's story was less improbable in itself and less seriously in conflict with surrounding circumstances than McIntire's, but two witnesses testified to a fact fatally inconsistent with his theory that Wallbaum had been murdered, thrown into the well and covered with stones before he arrived at the ranch. They testified that when they arrived at Wallbaum's ranch, on the seventeenth of December, their attention was called by McLane to the tracks of a wagon going from the front of the house to a heap of stones, from which the top had recently been removed, and thence to the brink of the well. They were searching for the body, and McLane expressed his belief, founded on the condition of the stone heap and the position of the wagon tracks, among other things, that the body was in the well and had been covered with stones.

This surmise, if surmise it was, proved to be correct; but the witnesses to whom the tracks were pointed out, swore that they followed them up from the brink of the well, where the wagon was then standing, and found the wheels of the wagon resting in the identical tracks they had made in coming from the well. They and others also testified that the condition of the dirt and fragments of rock in the bottom of the wagon showed that it had never been used after the stones were hauled. If this testimony was true—and of that the jury was to judge—it proves that this wagon, which was the same one in which the squaws were brought to the ranch on the morning of the thirteenth, had been used after that time for hauling the stones—that is to say, that it was so used after the arrival of McLane at the ranch; for he arrived there with the squaws, according to his own statement. It was shown, moreover, that McLane did at one time have the check for one hundred and twenty dollars in his possession, and when it was taken from McIntire, after his arrest, it was found inclosed in a letter envelope in which McLane had received a letter through the mails, and bearing his address. He accounts for these facts by saying that McIntire had requested him to take care of his

papers while he was drinking at Hiko, as he had no pocket-book and was afraid of losing them. He did not, however, offer any explanation of his supposed admission to McIntire to put the check in his pocket at the time he first displayed it in Hiko.

But the important evidence against McLane was that in regard to the wagon tracks on the seventeenth of December. The testimony on the latter point was, it is true, not very positive, but as to the tracks, two witnesses swore positively that, on the seventeenth of December, the wheels of the wagon still rested in the identical tracks they had made in coming from the well. The force of this testimony can only be obviated by arguing that the witnesses were mistaken; that their failure to call the attention of the other persons present to what they say they observed, proves that they attached but slight importance to it at the time, and consequently, that they could not have made their observations with the amount of care they would otherwise have bestowed on a circumstance so important. As an argument to the jury, this was entitled to serious consideration, but it can have no influence here. We have no jurisdiction to decide upon the credibility of witnesses. If their evidence, taken as true, warrants the verdict, it is conclusive in this court in favor of correctness of the finding.

We can not say, in this case, in view of the facts above stated, and the numerous minor details from which they gain color and consistency, that the verdict against either defendant was unwarranted by the evidence.

The next point to be noticed, is the alleged error of the court in refusing to allow the defendants separate trials.

Our statute provides (Comp. L. 1984) that: "When two or more defendants are jointly indicted for the same offense, they shall be jointly tried, unless for good cause shown by the prosecution or defense, the court shall otherwise direct."

This section does not by itself materially change the common law rule (1 Bishop Cr. Pr., sec. 1018). But by another section (1944) it is provided that: "When several



persons, jointly indicted, are tried together, they are not allowed to sever their challenges, but must join therein."

A similar provision in the law of California was held to apply to peremptory challenges (*People v. McCalla*, 8 Cal. 301), and it follows that no such challenge can be insisted on, as matter of right, unless all the defendants on trial unite in making it. This is an essential change of the old rule, which, in such cases, secured to each defendant his full number of challenges (1 Bishop Cr. Pr., sec. 1028), and it may be that one result of this change is greatly to abridge, if not entirely to take away, the discretion of the district court to refuse separate trials where it is made to appear, at the proper time, and in the proper way, that the defendants, on account of the antagonism of their position, can not join in their peremptory challenges.

That the defendants in this case each relied for his exculpation upon establishing the guilt of his co-defendant is plainly apparent from the statement of facts above given, and if either had moved for a separate trial at the proper stage of the proceedings, and upon a sufficient showing of facts, we should have been strongly inclined to the opinion that the denial of his application would have been error.

But the defendant, McIntire, never, at any stage of the proceedings, asked for a separate trial, and we know of no authority for holding that it was the duty of the court, of its own motion, to order separate trials. The time to determine whether defendants jointly indicted are to be tried separately or together, is before the formation of the jury is commenced, and at the time the court knows nothing of the line of defense the defendants expect to take, or of any other facts constituting good cause for ordinary separate trials. The statute is plain, to the effect that separate trials are not to be ordered, unless good cause therefor is shown either by the prosecution or defense, and this implies that the party desiring a separate trial must apply for it and support his application by a sufficient showing of facts. Even where the right to a separate trial is absolute if demanded, it may be waived by failure to demand it before

commencing the selection of the jury. (*People v. McCalla, supra.*)

It would appear from the record of this case, that McIntire elected to be tried together with his co-defendant, and as to him, therefore, it is clear that the action of the court in this respect was not erroneous. The case of McLane is different. His counsel, before the formation of the jury was commenced, read an affidavit, upon which he announced he would, at the proper stage of the proceedings, move for a separate trial. His impression was that the proper time for moving was after the completion of the jury. He discovered his error in time, however, to make his motion before the jury was sworn or completed. Even this, we think, was too late to be regular. A defendant who intends to demand a separate trial, especially in a case like this, ought not to embarrass his co-defendant and delay the court by taking part in the impaneling of a jury by which he does not intend to be tried. But it is not upon this ground that we rest our conclusion that the district court did not err in denying the motion. The statute requires the motion to be sustained by good cause shown, and, we think, the affidavit in support of McLane's motion was scarcely sufficient. It merely states, in general terms, "that the theory and grounds of defense of the said G. W. McLane, Jr., are entirely incompatible and in conflict with the theory and grounds of defense of McIntire, each with the other. Wherefore," etc.

This was too indefinite to disclose the real merits of the application. It should have been explicit to the effect that each defendant had accused the other of the murder, and that, under the circumstances, neither could be acquitted, except upon the hypothesis that the other was solely guilty. Nothing like this could be inferred from the terms of the affidavit, and in the absence of a sufficient statement of the facts, we do not think the court erred in denying the motion.

The next assignment of error relates to the rulings of the court touching the admissibility of testimony. The ex-

ceptions to these rulings were very numerous, but they involve only one question.

After Wallbaum's death, each of the defendants made more than one statement in regard to the homicide, exculpating himself and imputing the crime to the other. On the trial, these statements were proved by the prosecution. When evidence of McLane's statements was offered, McIntire objected to it, on the ground that it was incompetent as to him, and when his own statements were called out, McLane made a similar objection. Undoubtedly these statements were incompetent, except as against the parties by whom they were respectively made; and if they had been offered and admitted generally as against both defendants it would have been a most glaring error. But in fact they were not so admitted. It is true, that when the first offer was made to introduce evidence of one of these statements, the court inquired whether the prosecution expected to prove a conspiracy, and on receiving an affirmative answer, admitted the testimony, apparently upon the theory that, upon proof of a conspiracy to commit the murder, the declarations of each defendant, though made after the accomplishment of the joint purpose, would be evidence against both. But almost immediately the court perceived the error of this view, and from that moment to the end of the trial it was declared over and over again by counsel and the court that the statements of the defendants were not received, and were not to be considered as evidence, except as against the party making them.

That they were admissible to that extent, and under the limitations declared by the court, there can be no doubt. The fact that each defendant charged the crime upon the other makes no difference as to the admissibility of his statements as evidence against himself. Of course, if it were true, as claimed by counsel for appellants, that their respective statements contained no evidence against themselves, there would be good ground for charging misconduct upon the prosecution and error on the part of the court, in offering and admitting them to the consideration of the jury. But such was far from being the case. Every-

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statement made by either defendant showed that he was aware of many circumstances connected with the homicide, and proof of such knowledge had a tendency at least to prove participation; it made out part of the state's case, which was completed to the satisfaction of the jury, by showing that the conduct of the defendants was inconsistent with that part of their respective statements exonerating themselves.

If they had been tried separately, no one would venture to deny that McIntire's statements could have been proved against him, and McLane's against him; and it is equally undeniable that the statements of each showed too intimate a knowledge of the circumstances of Wallbaum's murder, and the disposition of the body, not to require a consistent and truthful explanation, in order to rebut a reasonable presumption of guilty participation therein. That the testimony was admissible there can be no doubt, and the prejudice resulting to the defendants from their mutual recriminations, if any such did in fact result, was an unavoidable evil necessarily incident to their joint trial. In such trials, evidence of this character must often be admitted, and the best the court can do, to prevent prejudice, is to declare at the time, and afterwards instruct the jury, under what limitations it must be applied. (*Commonwealth v. Ingraham*, 7 Gray, 46.)

There is nothing in any of the cases cited by appellants inconsistent with this view. All that was decided in *State v. Ah Tom*, 8 Nev. 214, and in *State v. Soule*, 14 Id., was, that the statements of one defendant, not being competent evidence against a co-defendant, it was error to admit them against the defendants generally and without limitation.

In this case there is no such ground of complaint. The purpose for which the testimony in question was offered, and the extent to which it could be considered, were plainly and repeatedly declared to the jury. The court, therefore, did not err in admitting it.

The next series of assignments of error relates to the charge of the court, and the instructions asked by the defendants, and refused by the court.

The defendant, McIntire, asked the following: "The jury are instructed that, in your deliberations upon the testimony given in the trial of this case, you are not to take into consideration at all, in passing upon Frank McIntire's case, any testimony given before you as statements of third parties made to the witnesses on the stand that was not made in the presence of the said Frank McIntire."

An instruction worded somewhat differently, but in substance the same as the above, was requested by the defendant, McLane.

Both instructions were refused, for the reason, among others, that the court has already charged the jury of its own motion as follows: "The jury is instructed that in determining the guilt or innocence of the defendant, McIntire, you will not consider, either for or against him, any testimony which has been given by any of the witnesses of the statements made by the defendant, McLane, to such witnesses of what McIntire told him, McLane.

"In this connection you are also instructed, that in determining the guilt or innocence of the defendant, McLane, you will not consider either for or against him, any testimony which has been given by any of the witnesses, of statements made by the defendant, McIntire, to such witnesses.

"No man should be convicted of any offense except upon sworn testimony. Testimony as to circumstances such as the condition of the wagon-body, the point of entrance and of exit of bullets, the course of the wagon tracks, etc., becomes, when sworn to, as in this case, what is called 'sworn testimony,' but the 'statements' made by McLane anywhere but in this trial, of what McIntire told him (McLane), were matters related as in ordinary conversation, or, if under oath, as was the case before the coroner, McIntire was not present and had no opportunity to cross-examine him, and therefore they amounted to no more than conversations, and are in no sense testimony, which you can consider against McIntire. This same rule applies in favor of McLane, who can not be found guilty by you upon the strength of any 'statements' made by McIntire to Dodge,

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Heath, Moore, or others, as these statements of his were made in McLane's absence, and while McIntire was not under oath.

"You will bear in mind that the counsel for the commonwealth when these various statements were admitted in evidence, disclaimed that they were intended to operate against any but the defendant who may have made them to the witnesses who have reported them here, and the only purpose for which you can consider them is to determine whether such '*statements*' are consistent with the *facts* which you may find have been established to your satisfaction. For instance, if you find that McLane told a witness that McIntire had admitted certain things to him (McLane), you can consider such statement as having been made by McLane, and can determine whether such statement is consistent with McLane's conduct. The same rule as to the '*statements*' which you may find that McIntire made of what McLane *did*. You are to weigh such statements and see if they are consistent with what you believe to have been, not McLane's conduct, but altogether with respect to the consistency of McIntire's."

These instructions given by the court of its own motion covered the whole ground of those which were asked by the defendants; they were as clear and favorable and much fuller, and therefore the court did not err in refusing to repeat them. (*State v. O'Connor*, 11 Nev. 425.)

In the charge of the court to the jury the following language occurs: "No single one (of the instructions) is to be considered by itself, but you are to consider them *all* as one, and reconcile what you find in one with the contents of all of them. Therefore, you will not apply any single one to any single fact, but apply them all in consideration of every fact."

The appellants complain that this language implies that, in the opinion of the court, no single instruction given at their request was perfect in itself, and that it must have had the effect of depriving them of the benefit of specific instructions applicable to particular facts.

We do not think the jury can have been misled by this

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part of the charge of the court. It does not, in our opinion, necessarily imply that none of the special instructions was perfect in itself, but merely conveys to the jury a salutary caution not to give an unlimited application to any instruction until they have first compared it with other portions of the charge, to see how far, if at all, it may be qualified thereby.

The court, at the request of the parties, gave several instructions on the subject of reasonable doubt, and thereupon added the following:

"The wisdom and charity of the law provides, that if a jury entertain a '*reasonable doubt*' of a defendant's guilt, such defendant is entitled to be acquitted. In this case, much has been said about this thing called '*reasonable doubt*,' and I have, at the request of the counsel, given you several instructions wherein I use the words '*reasonable doubt*.' The meaning of that term, as I have used it, and wherever it occurs, either in these instructions, or in the law books, is *not* that if the jury entertain a mere *possible* doubt they should acquit. There is no fact depending upon testimony, but that a *possible* doubt may arise or suggest itself to the mind concerning it, and it is not upon doubts of this *possible* character that the law says a defendant shall be acquitted. Further, in explanation of this term, '*reasonable doubt*,' I charge you to dismiss any prejudice or feelings you may entertain, carefully weigh and compare and consider all the testimony in this case, and if, after such comparison and consideration, you verily believe that what you consider as the *facts* all point to the guilt of the defendants, or either of them, and further, that such facts are inconsistent with any other reasonable conclusion than such guilt, and at the same time from such facts you feel an abiding conviction of such guilt, then there can not be said to be any such '*reasonable doubt*' in your minds as is meant by the use of that term in these instructions, nor such as will entitle a defendant to an acquittal."

We see no error in this instruction. It may contain some expressions which, separated from the context, are open to criticism; but, taken as a whole, it gives a correct statement

of the meaning of "reasonable doubt"—as correct and definite, that is, as the subject admits.

Counsel contend that the expression used by the court, "this thing called reasonable doubt," must have been understood by the jury as a contemptuous or disparaging reference to the doctrine contained in their instructions, but we do not think it could have been so understood. Neither do we see that any sinister meaning was imparted to any portion of the charge by the underscoring of words. We have copied the instructions literally, underscoring and all, and it appears to us that the words underscored are such as would naturally have been emphasized in reading them to the jury.

If, as counsel contend, the court erred in instructing the jury, that one or both of the defendants might be found guilty of manslaughter, it is a matter of no consequence. The error, if error there was, was in favor of the defendants, and the verdict shows conclusively that the jury found no occasion to apply the doctrine of the instructions complained of.

In referring to the testimony of the defendants, as witnesses in their own behalf, the court told the jury that they could not believe them both, because they were wholly inconsistent as to the principal fact in the case.

This was no transgression of the statutory and constitutional prohibition against charging juries as to matters of fact. Courts may state the testimony, as well as declare the law, to juries. (Const., art. VI., sec. 12.)

In this case the defendants did contradict each other as to the principal fact in issue, and the court had a right to state that contradiction to the jury. That two conflicting accounts of the same transaction can not both be believed at the same time, by the same persons, is not a fact peculiar to this case or any case, but is a principle of logic universally applicable, and certainly the statement of it must always be harmless and it would seem superfluous.

There are, in addition to those we have discussed, a number of less important exceptions to the charge of the court, which need not be noticed in detail. They involve a very



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extended and minute criticism of various passages, which counsel suppose may have been understood in a sense injurious to the appellants. We think, however, that although the charge may contain expressions here and there which are liable to criticism, it is free from anything like positive and material error; and, on the whole, is a fair and correct statement of the law applicable to the questions to be determined. We have copied those portions which are most complained of, and, without further discussion, leave them to speak for themselves.

As to the omission of the court to charge, of its own motion, upon certain points (the law touching accessories after the fact, for instance), we have only to repeat what we have frequently said heretofore, that such omissions are not error. And they can always be supplied—as in this case they actually were—by preparing special instructions and presenting them to the court for allowance.

The foregoing are all the points common to both appeals, but each of the appellants has one or two assignments of error peculiar to his own case.

It appeared from the testimony of the first witness examined on the part of the state, that Wallbaum's death was caused by two gunshot wounds, one in the back of the head, the other in the side of the head; that the first was smaller than the second; that the bullet entering at the back of the head had passed out at the mouth, and that the other remained in the head and was never extracted. At a later stage of the trial, it was shown that at the time of the homicide the defendants had pistols of different caliber; that of McIntire being the larger of the two. It would seem that it was part of the theory of the state that the wound in the back of the head was caused by a bullet out of McLane's pistol, and the other by a bullet from the larger pistol belonging to McIntire. At any rate, whether this was a part of the theory of the prosecution or not, counsel for McIntire seems to have anticipated that it would be, and he caused McIntire to make an affidavit, stating his belief that the production of the bullet, still remaining in the brain of the deceased at the time he was

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buried, would show that both wounds were made by bullets of the same size, and would greatly tend to acquit him of the charge laid in the indictment. He thereupon moved the court to order an examination of the body of the deceased, which motion the court overruled.

There is no doubt that the size of that bullet was a material fact. If it had been extracted and had proved to correspond to the caliber of McLane's pistol, it might have been argued with great force in behalf of McIntire that the smaller wound in the back of the head could not have been made with his pistol, which was larger than McLane's; and his statement that McLane alone did the shooting would thus have received material support.

But it does not follow from the fact that the testimony was material, that the court erred in overruling the motion. We know of no law that empowers the district court to order any person to make the kind of examination suggested. There is no person subject to the orders of the district court for any such purpose. Undoubtedly the court might have granted a continuance or adjourned the proceedings to enable the defendant to procure the examination of the body of the deceased, if a proper application supported by a sufficient showing of facts had been made. But the motion was not for a continuance or adjournment, and even if it could be so regarded the affidavit was insufficient to support it. A motion of that character, coming in the midst of a trial, ought to be very strongly supported, by a showing that the evidence was then for the first time discovered, or that it was rendered material by some unexpected turn of the proceedings that could not reasonably have been anticipated. The affidavits should also show the necessity of the adjournment or continuance, and the ability of the party to procure the evidence in case his motion was allowed. On all these points the affidavit filed in support of this motion was silent, and therefore, if it were treated as a motion for a continuance or adjournment, it could not be said that the court erred in overruling it.

But, as above stated, the motion was of a different charac-

ter; it was simply an application to the court to make an order that some person should dig up the body of the deceased, extract the bullet, and produce it in court. It was a sufficient reason for denying this application that the court had no power to comply with it.

With reference to the principal argument, by which counsel supports this assignment of error, viz., that the size of the bullet was the best evidence of the size of the pistol by which the wound was produced, and therefore, that it was the duty of the court to order an autopsy—it need only be said that the rule which requires the production of the best evidence, merely enables a court to exclude secondary evidence of a fact, and thus indirectly to compel a party to produce the best. The party who wishes to avail himself of the rule, must, therefore, object to the secondary evidence when it is offered, otherwise he loses its benefits. In this case, however, there was no room for such an objection. The size of the pistol or pistols with which Wallbaum was shot, was not an essential part of the case against McIntire, and even if it had been, the size and appearance of the wounds, though less conclusive and satisfactory than the production of the bullet which remained in the head, was still primary evidence of the fact to be proved, differing in degree, but not in kind, from the bullet itself. We have no means of knowing to what extent, if any, the prosecution relied upon the testimony, as to the character of the wounds, to prove that one of them was caused by a bullet from McIntire's pistol, but in so far as that was a part of the theory of the state, he had the undoubted right to claim the strongest inference in his favor from the failure of the state to produce the bullet, and under the instructions of the court the jury must have allowed him the benefit of every doubt arising out of such failure.

But the truth is, the case against McIntire rested to a very slight extent upon the character of the wounds upon the body of the deceased. What convicted him was the proof that for days after he pretends to have seen McLane murder his employer and appropriate his valuables, he con-

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tinued voluntarily to associate with him on the most intimate and confidential terms; that he was found in possession of the only thing of value taken from the person of the murdered man; that he continued to deny the fact of the killing even after his arrest at the instance of McLane, and persisted in such denial until informed of the discovery of the dead body; that he then told a story evincing a perfect knowledge of the details of the crime and the efforts made to conceal it; that he endeavored to account for his conduct at and subsequent to the killing, by the false pretense that he was afraid of McLane, and that he gave a false account of the time when and the manner in which he got possession of the check—the fruits of the crime. In view of these circumstances, the most positive proof that the shooting was done by McLane alone would scarcely have invalidated the case against McIntire.

The only remaining point in McIntire's appeal arises as follows: When the case was called for trial, McLane moved for a continuance on the ground that one Uphire would, if present, testify to certain facts. The state, to prevent a continuance, admitted that the facts were as stated in McLane's affidavit, and thereupon the trial proceeded.

The facts stated in McLane's affidavit were in corroboration of his statement and the contradiction of McIntire's statement as to the occurrences at Wallbaum's ranch on the thirteenth of December, in the afternoon, and subsequent to the murder of Wallbaum.

The bill of exceptions shows that, in the course of the trial, McLane's affidavit was read to the jury; but it does not show that McIntire objected, that the court made any ruling, or that any exception was taken. Neither does it show that it was ever stated to the jury that the facts set out in the affidavit were admitted by the state to be true.

Under these circumstances—no objection having been made in the district court to the reading of the affidavit—it is unnecessary to consider what would have been the result if the court had overruled an objection interposed at the proper time. It is clear that the objection can not be raised here in the first instance.

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With respect to certain affidavits copied into the transcript, but not forming a part of the record, it need scarcely be said that they can not be considered. We allude to the affidavits suggesting misstatements in the original record remaining in the district court, and unfairness on the part of the counsel for the state, in his closing argument to the jury.

Our conclusion upon this review of all the points urged in behalf of the defendant, McIntire, is that the record discloses no error injurious to him, and that as to him the judgment of the district court must be affirmed.

We come, finally, to the separate assignments of error made by McLane.

He complains that the court erred in denying his motion for a change of the place of trial. The motion was supported by affidavits of his counsel, his father and himself. His counsel testified that he was personally acquainted with a majority, and had conversed with a large number, of the citizens of Lincoln county; that he believed from those conversations that there was an almost universal prejudice against the defendant; that he had heard the opinion almost universally expressed, that defendant ought to be hanged, even without process of law, and in one instance had heard the opinion expressed, that if he should be acquitted he would never leave the town of Pioche alive; that the feeling against the defendant had been excited and kept alive by highly injurious and prejudicial accounts of the offense with which he was charged, published in the Pioche Record, the only paper published in the county; that for these reasons he thought any jury impaneled in the case must inevitably be overawed by the state of feeling prevailing in the county, and that a fair and impartial trial could not be had.

Defendant and his father testified to their belief in the existence of the same state of feeling in the county, and to the fact that they feared at one time that he would fall a victim to popular violence on his way from his place of commitment to the county jail.

Upon this showing we can not say that there was any

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abuse of discretion on the part of the court in denying the motion. The affidavits contain little beyond the expression of opinion. That of counsel for defendant states more facts than either of the others; but the facts, as stated, are not very convincing. He states that he has had numerous conversations, but does not state how numerous; they were, either absolutely or relatively, to the population of the county, and the injurious accounts of the offense which he alleges were published in a local paper, are not set out, and the court had no means of judging whether they were of such character or frequency as to excite undue prejudice. There seems to have been no difficulty and there was very slight delay experienced in obtaining a jury free from exception.

On the whole, we think the application in this case for a change of venue, was not materially stronger than that in the *Case of Millain*, 3 Nev. 433, where the order overruling the motion was affirmed by this court. It is not shown in this case, any more than in that, that the parties threatening violence to the defendant were either numerous or influential; and we do not understand that the mere prevalence of a belief in the guilt of a prisoner, however widely diffused, is a circumstance from which it must be inferred that a jury would be intimidated or overawed.

His motion for a change of the place of trial being overruled, McLane next moved for a continuance to enable him to procure the attendance of one Upshire, as a witness in his behalf. It is conceded that his affidavit made a clear case in support of the motion. But the district attorney, to obviate a continuance, offered to admit the truth of all that it was claimed the witness would testify to if present at the trial, and thereupon the court overruled the motion.

It is settled law in this state, that nothing short of an unqualified admission of the truth of the proposed testimony will justify the refusal of a continuance where, as in this case, the affidavits fully support the motion. (*State v. Salge*, 2 Nev. 325.) The doctrine seems to be that the defendant has an absolute right to the attendance of the witness, or an unqualified admission of the truth of every material fact to which he will testify. The admission must

be such as to place the facts beyond controversy, and not only to authorize but to require the jury to treat them as incontrovertibly true in all their deliberations.

The question is, whether McLane had the benefit of such an admission in this case. So far as it lay within the power of the state to do so, the admission was clearly made; but it is a peculiarity of this case that the issue was not exclusively between the state and the defendants. Each defendant was, in a certain sense, prosecuting the other, and the circumstances against McIntire were such that he had no chance of acquittal, unless he could induce the jury to believe his statement to the effect that McLane alone had committed the murder on December 13, and had then compelled him, by threats and force, to assist in concealing the crime.

It happened that Uphire came to Wallbaum's ranch on the afternoon of December 13, and remained there till next morning. McIntire had stated before the trial, and on the trial testified that McLane, after killing Wallbaum, took upon himself the entire control of the ranch, domineering over everybody, ordering and directing everything; and that, when Uphire arrived and asked permission to stay all night, McLane gave the permission, issued directions for his entertainment, and next morning received payment therefor. What McLane proposed to prove by Uphire was, that all this was the exact reverse of the truth; and it is evident that if he could have done so to the satisfaction of the jury it would have completely broken down McIntire's testimony, which, to whatever extent it was credited, tended much more strongly to convict McLane than any other testimony in the case. It is also clear, as an independent proposition, without reference to the statements and testimony of McIntire, that it was very important for McLane to show what he was doing at Wallbaum's during the afternoon of December 13, and what his apparent relations to McIntire were at the time. To do this, he was entitled to the presence of Uphire, or to such an admission as would put the facts proposed to be proved by him, beyond all controversy before that jury. No such admission was or could,

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under the circumstances of this case, be made by the state. The state could not admit away McIntire's defense, nor could he be deprived of the privilege of testifying in his own behalf, and thus putting in controversy all that the state proposed to admit. As a matter of fact, he did so testify, and did contradict everything alleged in McLane's affidavit. His testimony was submitted to the jury, and they were instructed, in effect, to weigh and consider it fairly and impartially, and give him the benefit of it, so far as it appeared to be credible. Under these circumstances, it appears to us that McLane could not have had any benefit from the state's admission. The jury could not have given full credit to the admission, and at the same time have weighed and considered the testimony by which it was flatly contradicted; and they could not have avoided considering the contradictory testimony without disregarding the instructions of the court and the undoubted rights of the defendant, McIntire.

The case was unfortunately in such a position that error injurious to one or the other of the defendants was inevitable. If the court had refused to instruct the jury to consider McIntire's testimony, it would have been error injurious to him, and the giving of the instruction just as clearly had the effect of destroying the state's admission in favor of McLane. If McLane had demanded an instruction to the jury that they were to accept as incontrovertibly true the fact set out in his affidavit, it could not have been refused without error as to him, nor given without error as to McIntire. No such instruction having been asked or allowed, McIntire has no ground of complaint, but it was error as to McLane to submit to the consideration of the jury testimony in direct negation of facts which he was entitled to have treated as incontestable.

It is, therefore, ordered that the judgment of the district court as to the defendant, George W. McLane, Jr., be reversed, and the cause remanded for a new trial, and that the judgment as to Frank McIntire be affirmed, with directions to the district court to appoint a time for carrying its sentence into execution.



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Opinion of Hawley, J., dissenting.

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HAWLEY, J., dissenting:

In my opinion, the court did not err in overruling the motion of the defendant, McLane, for a continuance. The facts which he expected to prove by the witness Uphire, as set forth in his affidavit, are as follows: "That he will prove by said witness that on Saturday, the thirteenth day of December, A. D. 1879, the day on which the defendant, McIntire, alleges in his statement that the alleged murder of Fred. Wallbaum was committed, on the afternoon of that day, a stranger, whose name affiant has learned is Joseph Uphire, came up to Wallbaum's house and asked to stay all night; that Frank McIntire replied 'he did not know that he could,' as the owner of the place was out with stock at Cain Springs; that he, said Uphire, replied 'he had no grub with him, and if he could stay he would pay whatever the bill was,' that he thereupon unsaddled his horse and stayed all night, Frank McIntire having told two squaws, who were at the place to prepare his supper, that the said Uphire will further prove that on the said night of December 13 he saw the said McIntire take two rossetes from Walbaum's blind-bridle and put them on a riding bridle which McIntire claimed to be his own; that the said Uphire left Wallbaum's shortly after sunrise, but before starting he asked McIntire what his bill was; that McIntire replied that it was two dollars; that Uphire then gave McIntire five dollars in gold, and McIntire returned him three dollars in silver in change; that McIntire then told Uphire he would probably see Wallbaum at Coyote Springs, Uphire having intimated that he was traveling in that direction; that the said Uphire will prove that all this conversation and all the arrangements about stopping all night, and about the supper and the payment of the two dollars for said supper, and the handing the five dollars to McIntire, and the return of the three dollars in change, took place between the said Uphire and McIntire; and that the affiant had no act, part, or participation in said conversation, or anything that related to the aforesaid acts that occurred between the said Uphire and McIntire, and that the entire

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statements of McIntire in relation to what he states as having occurred between the said Upshire and this affiant is entirely untrue and without the slightest foundation in fact."

The record shows that, when this affidavit was presented, the attorneys for the state "admitted that if the witness Upshire were present he would testify to the facts set forth in the affidavit, *and that such facts are true.*"

With this admission, it is apparent that the defendant, McLane, had the full benefit of all the facts set forth in his affidavit. In considering his case the jury were bound (notwithstanding the testimony of the defendant, McIntire, in his own behalf to the contrary) to accept the testimony that Upshire would have given, if present, as absolutely true. What more could the defendant, McLane, ask? It is easy to see that a qualified admission, that if a witness were present he would swear to certain facts, is not calculated to have the same force and effect as if a credible and respectable witness were present in court swearing to the same state of facts. (See *State v. Salga*, 2 Nev. 325; *People v. Diaz*, 6 Cal. 249; *State v. Brette*, 6 La. An. 653; *People v. Vermilyea*, 7 Cow. 369.)

But it is difficult, if not impossible, to determine how a defendant could be prejudiced in a case where the admission is absolute and unequivocal that the testimony which the absent witness would give is true. In the latter case the defendant could read his affidavit as evidence—as the defendant, McLane, did in the present case—and the state would be precluded from offering any testimony tending to affect the credit or to contradict or impeach the testimony of the absent witness. (*Willis v. The People*, 1 Seam. 402; *Dominges v. The State*, 7 S. & M. 478; *Browning v The State*, 33 Miss. 71.)

"Under the admission," to quote the language of the court in the case last cited, "the prisoner was entitled to treat the facts stated in his affidavit as absolutely true, according to their force and effect, as stated, and supposing that he stated the facts not more nor less strongly than the truth, it is not to be presumed that he was prejudiced by their admission." See also, *Pannell v. State*, 29 Ga. 681;

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*State v. Mooney*, 10 Iowa, 506; *Carmon v. State*, 18 Ind. 451.)

The fact that the issue in this state "was not exclusively between the state and the defendant;" that "each defendant was prosecuting the other," did not deprive the defendant, McLane, of the benefit of the unqualified admission made by the state.

If the witness Upshire had been present at the trial, his testimony would, as McLane claimed, have contradicted the testimony of the defendant, McIntire, and it would then have been the province of the jury to decide whether the witness Upshire, or the defendant, McIntire, had sworn falsely. The defendant, McLane, could only have asked, in that case, that the jury should believe the testimony of Upshire to be true. The admission was certainly as favorable to the defendant as if the witness had been personally present. It was more favorable. It deprived the attorneys for the state from arguing against the credibility of the witness Upshire, or the truth of his testimony, as they might have done if the witness had been present. It is begging the real question at issue to say that, under the peculiar circumstances of this case, "the state could not admit away McIntire's defense," nor deprive him "of the privilege of testifying in his own behalf."

Of course the state could not, as against the objection of the defendant, McIntire, admit that Upshire's testimony was absolutely true; for, as before stated, that would prove that McIntire's statement, relative to the facts that Upshire would testify to, was false.

The defendant, McIntire, had the unquestioned legal right to have that question submitted to the jury. But in this connection it must be remembered that it is one of the peculiar circumstances of this case that he made no objection to the admission of the truth of McLane's affidavit for continuance, nor to the reading of said affidavit as evidence. He is not, therefore, in a position to complain. The defendant, McLane, can not take advantage of any error that was solely prejudicial to the defendant, McIntire.

It may be that, by the admission, the defendant, McIntire,

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was deprived of the full force of the instructions given to the jury, to the effect that it was their duty to weigh and consider the testimony of each defendant fairly and impartially, and give to each the benefit of it so far as it appeared to be credible. This only furnishes an additional reason why the defendant, McIntire, would have been entitled to a new trial if he had made his objections in the lower court at the proper time. It has no force whatever as applied to the case of the defendant, McLane. There is nothing in the admission made by the state, nor in the instructions, that deprived the defendant, McLane, of any benefit that he was entitled to.

The admission was made in such a manner as required the jury, "in all their deliberations," to consider the facts set forth in McLane's affidavit as "established beyond all controversy." It is a self-evident proposition that it might have prejudiced the defendant, McIntire, but it could not possibly have prejudiced the defendant, McLane. If either of the defendants is entitled to a new trial, upon this ground, it is the defendant, McIntire, not McLane.

From the state of the facts as elicited at the trial, it clearly appears that the defendants were entitled to a separate trial, if a sufficient showing had been made, and a severance asked for at the proper time.

It is, however, well settled, that if a defendant fails to make a motion or an objection, when required by the rules of practice or the principles of the law, he can not thereafter take any advantage of his own omission of duty in that respect.

In my opinion, the action of the court in refusing to grant the defendant, McLane, a separate trial, is sustainable, upon the ground that the motion was made too late. The motion should have been made before the court commenced to impanel the jury.

I concur in the conclusions reached by the court upon all of the other points.

It necessarily follows from the views I have expressed, that, in my opinion, the judgment of the district court should be affirmed against both defendants.

## Argument for Appellant.

[Nos. 1016, 1017.]

THOMAS EWING, RESPONDENT, v. ISAAC JENNINGS,  
APPELLANT.

**JUDGMENT BY DEFAULT—AUTHORITY OF CLERK TO ENTER JUDGMENT.**—In a suit upon a judgment, the defendant appeared and filed a demurrer. The defendant's attorney subsequently filed with the clerk a written withdrawal of the demurrer: *Held*, that defendant, by withdrawing his demurrer, without obtaining leave of the court to file an answer, left his case in a position to have his default noted at any time, upon the request of the plaintiff, and that the clerk was authorized to enter judgment against him, by default.

**COMPLAINT ON JUDGMENT—SUFFICIENCY OF.**—A complaint upon a judgment is sufficient if it describes the court in which the alleged judgment was rendered, the place where it was held, the names of the parties, the date at which it was entered, and the amount of the judgment.

**DEFAULT SHOULD NOT BE SET ASIDE FOR MERIT TECHNICAL DEFENSE.**—A judgment entered by default should not be set aside upon affidavits, and an answer which failed to show that the defendant had a good and meritorious defense to the action. The judgment should not be set aside to enable the defendant to raise some technical objection.

**JUDGMENT NUNC PRO TUNC.**—Whenever a clerk fails to enter a judgment ordered by the court, it is within the power of the court to order such judgment to be entered *nunc pro tunc*.

**ITEM—EVIDENCE TO AUTHORIZE ORDER FOR JUDGMENT.**—A judgment roll containing an agreement and order for judgment, and the minutes of the court directing a judgment to be entered in accordance therewith, is competent evidence tending to establish the facts necessary to authorize the court to enter the judgment *nunc pro tunc*.

**APPEALS** from the District Court of the Sixth Judicial District, Lincoln County. The facts sufficiently appear in the opinion.

*Thompson Campbell, Geo. S. Sawyer and T. W. W. Davies*, for Appellant:

[No. 1016.]

I. The judgment appealed from is void. The clerk was not authorized to enter the same. (*Providence Tool Co. v. Prader*, 32 Cal. 634; *Wilson v. Cleveland*, 30 Id. 192; *Kelly v. Van Austin*, 17 Id. 564; 1 Comp. L. 1213). A demurrer is an answer within the meaning of the statute. (*Oliphant v. Whitney*, 34 Cal. 25.)

II. The complaint does not state facts sufficient to constitute a cause of action; and hence any judgment by de-

## Argument for Respondent.

fault based upon it can not be sustained. (Freeman on Judgments, sec. 456; 1 Comp. L. 1122; *Keys v. Grannis*, 3 Nev. 548; *Young v. Wright*, 52 Cal. 407.)

III. When the party shows that he is not in fault, and that he has a legal defense upon the merits, the application to set aside the judgment by default should be granted.

IV. A judgment by default is appealable when the judgment is either void or irregularly entered. (*Livermore v. Campbell*, 52 Cal. 77; *People v. Greene*, 52 Id. 577; *Kidd v. The Four Twenty M. Co.*, 3 Nev. 381.)

## [No. 1017.]

I. To prove the rendition of a judgment at a prior term of court, so as to allow of its entry *nunc pro tunc*, there must be some entry or memorandum on or among the records of the court. It must be in some book or record required to be kept by law in that court. The data for the entry must be found in the technical record, which is the judgment roll. (*Hahn v. Kelly*, 34 Cal. 421; *Croswell v. Byrnes*, 9 Johns. 290; Freeman on Judgments, secs. 76, 82; *Sharp v. Daugney*, 33 Cal. 505; *Spanegel v. Dellinger*, 34 Id. 476; *Hobbs v. Duff*, 43 Id. 485.)

II. The respondent lost all rights, if any he ever had, by his laches.

*A. B. O'Dougherty, and Kirkpatrick & Stephens, for Respondent:*

## [No. 1016.]

I. The clerk had authority to enter judgment by default after the withdrawal of defendant's demurrer. (Civil Pr. Act, 172; 20 Cal. 116; 49 Id. 346.)

II. The testimony in support of defendant's motion to set aside the entry of default and judgment does not show any merits, and is, therefore, insufficient. (Freeman on Judgments, sec. 108.)

## [No. 1017.]

The court had power to enter the judgment *nunc pro tunc*. (Freeman on Judgments, secs. 61-63; 6 Florida, 721; 15 Pa. 272; 7 Gray, 172; 9 Id. 209.)

By the Court, HAWLEY, J.:

In 1871 the plaintiff commenced an action against the defendant, in the district court of Lincoln county, upon a promissory note.

In 1872, after issue joined, the case was set for trial, and upon being called, it was, as the minutes of the court show, agreed in open court, by and between the respective attorneys, that the plaintiff should take judgment against the defendant in accordance with the prayer of the complaint, and for costs of suit. The agreement specifies the precise amount for which judgment is to be entered. In pursuance of this agreement, the court ordered judgment to be entered in favor of plaintiff. No judgment was regularly entered in the judgment book by the clerk. A judgment roll was prepared, which contained a copy of the agreement and order for judgment, as set out in the minutes of the court.

In 1877, the plaintiff commenced an action upon said judgment. The record shows that a necessity existed for the commencement of this suit, nearly five years having elapsed since the entry of said judgment. The defendant, in the month of June, 1877, appeared and interposed a demurrer to the complaint. No further action was taken until the sixteenth of June, 1879, at which time the defendant's attorney filed with the clerk a written withdrawal of the demurrer. Thereafter, on the eighth day of August, 1879, the clerk of the district court entered judgment against the defendant by default. The defendant, subsequently, moved the court to set aside this judgment, and to allow him to answer the complaint. On the day this motion came up for hearing, the plaintiff moved, in the action brought in 1871, for judgment *nunc pro tunc*, as of May 31, 1872.

The court granted plaintiff's motion, and denied the motion of defendant. The appeal in case No. 1016 is taken from the order of the court, denying defendant's motion to set aside the default and judgment, and the appeal in No. 1017 is taken from the order of the court, granting plaintiff's motion for a judgment *nunc pro tunc*.

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Opinion of the Court—Hawley, J.

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It is contended by appellant's counsel, that the clerk had no authority to enter the judgment by default. If the defendant had failed to appear in the case within the time prescribed by statute, the clerk would undoubtedly have been authorized to note his default and enter judgment against him. (1 Comp. L. 1213.)

This is not denied; but it is argued that, upon the filing of the demurrer, the clerk ceased to have any authority to act without an order of the court. This position is untenable. When the demurrer was withdrawn, the case stood in the same condition as if no demurrer had been filed. If the defendant desired to file an answer, he should have obtained an order of court granting him time to do so. By withdrawing his demurrer, without obtaining leave of the court to file an answer, he left his case in a position to have his default noted, at any time, upon the request of plaintiff. There was no exercise of any judicial functions by the clerk in entering the default. His act was purely ministerial and was authorized by the statute.

The complaint states facts sufficient to constitute a cause of action. It describes the court in which the alleged judgment was rendered, the place where it was held, the names of the parties, the date at which it was entered, and the amount of the judgment. This is all the certainty that is required by the authority cited by appellant. (Freeman on Judgments, sec. 456.) If there was not in fact any such judgment, that was a matter of defense. By his default the defendant admitted all the material averments of the complaint, and they are sufficient to support the judgment.

The court did not abuse its discretion in refusing to grant appellant's motion to set aside the judgment and allow him to answer. Appellant's affidavit alleging misconduct on the part of his attorney in withdrawing the demurrer, is fully denied by affidavit of the attorney. It fails to show that he had a good and meritorious defense to the action. The verified answer accompanying the affidavit presents only a technical defense. It is based upon the theory that the judgment sued upon was not regularly entered by the clerk. The statute should only be em-



Points decided.

played in furtherance of justice. It should not be used for the purpose of enabling a defendant to raise some technical objection. (Freeman on Judgments, sec. 108; *Jones v. San Francisco Sulphur Company*, 14 Nev. 172).

This disposes of the appeal in case No. 1016.

It follows from the conclusions reached, that appellant would not be benefited, save as to the costs on appeal, if the order rendering judgment *nunc pro tunc* was reversed. But we are of opinion that the court did not err in ordering the judgment to be so entered. Whenever a clerk fails to enter a judgment ordered by the court, it is within the power of the court to order such judgment to be entered *nunc pro tunc*. Courts have a continuing power over their records, and can amend the same, or supply any defect or omission therein, if there is anything in the record to amend by.

The judgment roll containing the agreement and order for judgment, and the minutes of the court, was competent evidence tending to establish the facts necessary to authorize the court to enter the judgment *nunc pro tunc*. (Freeman on Judgments, sec. 68, and authorities there cited.)

The orders and judgments appealed from are affirmed.

[No. 948.]

## SOUTHERN CROSS GOLD AND SILVER MINING COMPANY, RESPONDENT, v. EUROPA MINING COMPANY, APPELLANT.

**MINING CLAIM.—SUFFICIENT MARKING OF BOUNDARY LINES.**—Where stakes and stone monuments were put at each corner of the claim, and at the center of each of the end lines: *Held*, to be a sufficient marking of the boundaries.

**IDEM.—RECORD OF CLAIM, WHEN NOT NECESSARY.**—A record is not, under the laws of congress, essential to the validity of a mining claim, unless made obligatory by local regulations.

**IDEM.—NOTICE OF LOCATION.**—A notice of location, which called for stone monuments at each corner of the claim, and described it as being bounded by four other well-known claims: *Held*, sufficiently definite, as to the locus of the claim.

Opinion of the Court—Beatty, C. J.

**ASSAYS OF ROCK TAKEN AFTER LOCATION OF CLAIM—COMPETENT EVIDENCE TO PROVE EXISTENCE OF MINERAL VEIN.**—Assays of rock which was taken from a mining claim, long after the date of its location, are competent evidence, as tending to show that the locators had discovered a vein at the time of the location.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

*Lewis & Deed*, for Appellant.

*Kirkpatrick & Stephens*, for Respondent.

By the Court, BEATTY, C. J.:

This is an action to recover possession of a mining claim. The defendant, appealing from the judgment and order denying its motion for a new trial, contends that the district court erred in finding as a fact that there was a sufficient marking of the boundary lines of the location under which the plaintiff claims the ground in controversy.

We think there was abundant evidence to sustain the findings of the court on this point. It showed that stakes and stone monuments were put at each corner of the claim and at the center of each of the end lines. This was much more than the marking held to be sufficient in *Gleeson v. Martin White Company*, 13 Nev. 462; and as much as has ever been required under the most stringent construction of the mining law.

Next it is contended that no sufficient record of plaintiff's claim was proven.

Record is not, under the act of Congress, essential to the validity of a mining claim. (*Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 323.) It is only necessary when made obligatory by local regulations, and there was no proof in this case of any such local rule. It was, however, proved that plaintiff's notice of location was recorded in the district records, and we think that the notice contained enough in itself to satisfy the law. It called for stone monuments at each corner of the claim, and described it as

## Points decided.

bounded by four other claims. If it were necessary, in order to support the findings of the court, we would presume that these other claims were well known and defined by permanent monuments. If they were so defined, there can be no question that the plaintiff's notice was sufficiently definite as to the *locus* of its claim, and it is not pretended that it was deficient in any other respect.

Lastly, it is said the district court erred in permitting an assayer to testify to the results of assays of rock taken from plaintiff's claim long after the date of its location.

The object of this testimony was to prove that the locators had discovered a vein at the time of the location, and appellant contends that it had no such tendency, and was therefore immaterial and irrelevant.

We think the evidence had a distinct tendency to prove the fact at issue. It proved the existence of mineral-bearing rock in the claim at the date of the assays, and since veins do not grow and become mineral-bearing in a year or two, it proved that the vein was there at the date of the location, and proof of the existence of a vein is an essential step in proving its discovery.

The record discloses no error in the proceedings of the district court, and the judgment and order appealed from are affirmed.

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[No. 951.]

THE STATE OF NEVADA, RESPONDENT, v. THE  
NORTHERN BELLE MILL AND MINING COM-  
PANY, APPELLANT.

APPEAL FROM JUDGMENT—SUFFICIENCY OF EVIDENCE NOT CONSIDERED.—

Where the appeal is from the judgment alone, the question of the sufficiency of the evidence to sustain the findings will not be considered.

SUFFICIENCY OF COMPLAINT—GENERAL DEMURDER.—Where the only fault

in the complaint is an ambiguity in stating the amount of tax at a less sum than the assessed value of the property: *Held*, that a general demurrer was properly overruled.

EXISTENCE OF A DELINQUENT LIST NOT ESSENTIAL TO THE RIGHT OF ACTION

FOR TAXES.—The court refused to permit the defendant to introduce evidence tending to show that the tax sued for had not been entered on the delinquent list before the action was commenced: *Held*, that the

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evidence offered was immaterial, and that the court did not err in excluding it.

**SECOND ASSESSMENT VALID.**—The assessor first made an irregular and insufficient assessment, and afterwards made one in conformity to law: *Held*, that the second assessment was valid.

**ASSESSMENT ROLL—TIME FOR COMPLETING IT DIRECTORY—DEFENSE WHEN TAXPAYER HAS BEEN INJURED.**—The provision of the statute as to the time for completing the assessment roll is merely directory, and any irregularity in that respect is a defense in an action for the taxes, only to the extent that the taxpayer has been injured thereby.

**TAX ON PROCEEDS OF MINES—DEDUCTION OF FIFTEEN DOLLARS PER TON ON FREIBERG PROCESS NOT ALLOWED IN ADDITION TO ACTUAL COST.**—A mining company working ores under the Freiberg process is not entitled to an exemption of fifteen dollars per ton in addition to the actual cost of working the ore. (*State v. Eureka Cons. M. Co.*, 8 Nev. 15, and *State v. Northern Belle M. & M. Co.*, 13 Nev. 250, affirmed.)

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

The facts appear in the opinion.

*Garber & Thornton*, for Appellant.

*M. A. Murphy*, Attorney-General, for Respondent.

By the Court, BEATTY, C. J.:

This is a suit for delinquent taxes; plaintiff had judgment; defendant appeals. There was a motion for a new trial in the district court, but the appeal being from the judgment alone, we can not consider any of the questions argued by counsel touching the sufficiency of the evidence to sustain the findings. Aside from these questions there are but two assignments of error to be noticed.

1. It was not error to overrule the demurrer to the complaint. The demurrer was general—that the complaint did not state facts sufficient to constitute a cause of action—but the only fault pointed out in the complaint is an ambiguity. The amount of tax alleged to have been levied and to have become delinquent was only a little over three thousand dollars, when, according to the assessed value of the property, it should have been upwards of five thousand dollars. This may have been ground for special demurrer.

but there can be no doubt that the complaint stated a good cause of action for the amount demanded and recovered, and the general demurrer was properly overruled.

2. The court refused to permit the defendant to introduce evidence tending to show that the tax sued for had not been entered on the delinquent list before the action was commenced.

The delinquent list offered in evidence was in due form, and purported to have been made at the proper time, which was long before the commencement of this suit. Such being the case, it is very doubtful whether parol evidence, tending to falsify the officer's return, would have been admissible, even if it had been material under the pleadings. (Cooley on Taxation, 195, 196.) But aside from this question, it is clear that in this case the evidence offered was immaterial. It is settled, in this state, that the existence of a delinquent list is not essential to the right of action for taxes that ought to have been returned delinquent. (4 Nev. 338, 10 Id. 78.) It may affect the right of the district attorney to prosecute the suit, but if so, his want of authority is the ground of a preliminary motion to dismiss the action—not of defense to the merits. (10 Nev. 78.)

The testimony, then, which was excluded by the court, if offered for the purpose of securing a dismissal of the action, on the ground that it was commenced without authority, came too late when the case was on trial, and if offered to sustain any issue made by the pleadings, it was immaterial.

There was no issue of fact as to the regularity of the assessment, or the non-payment of the tax sued for. The answer did, it is true, deny, on information and belief, that there was any assessment; but its positive averments in regard to the matters relied on as a defense to the action, were wholly inconsistent with this qualified denial. What clearly appears from the allegations of the answer is, that the assessor, having first made an irregular and insufficient assessment, afterwards made one in conformity to law, and the question presented is, whether such second assessment was valid. If it was, and if the action of the board of equalization, in attempting to reduce it, was void, as the

court found it was, then there was no question as to the right of the state to recover.

We think the second assessment was valid on the facts stated in the answer.

The first assessment failed to show the cost of extracting, transporting, and reducing ore, and afforded no means of ascertaining the net proceeds. The second assessment was according to the form prescribed by the statute. (Comp. L. 3246.)

It stated the whole number of tons, the gross yield, the actual cost of extraction, transportation, and reduction, and the resulting net yield or taxable value. This exceeded the first valuation by a sum equal to fifteen dollars per ton on the whole amount of ore reduced, thus proving by the facts which the assessor is required to ascertain and set down on the assessment roll, that his former valuation was the result of an erroneous construction of the provision relating to ores worked by the Freiberg process. (Comp. L. 3245.)

We see no reason why the second and regular assessment should be deemed invalid on account of the first and irregular assessment for the same quarter. They were not at all inconsistent as to the facts which an assessment should show. Taking them both together, the true assessable value of the ores was plainly evident, and the only discrepancy they exhibited was fully explained. We think the assessor not only had the power, but it was his imperative duty to make an assessment, showing the facts which the law requires him to set down, notwithstanding a previous irregular assessment which failed to exhibit the facts. If it be claimed that the answer showed the second assessment to have been made after the time prescribed by the statute, this objection is fairly met in the opinion of the district judge. The provision as to the time for completing the assessment roll is merely directory, and any irregularity in that respect is a defense in an action for the taxes only to the extent that the taxpayer has been injured thereby. (*Hart v. Plum*, 14 Cal. 155; 4 Nev. 338.) In this case it is clear that there was no injury. The second assessment was

## Points decided.

correct, and the defendant had an opportunity, of which it availed itself, to appeal to the board of equalization. That body attempted to reduce the assessment back to its original amount by again deducting fifteen dollars per ton from the ascertained net value. The district court finds that this attempt by the board was wholly void, and we would be bound to presume that the finding was sustained by the evidence, even if the allegations of the answer, with the annexed exhibits, did not show of themselves that what the board of equalization undertook to do was, not to correct valuations, but to exempt from taxation property which, under the law and the constitution, could not be exempted. (8 Nev. 22, 24; 13 Id. 250.)

Our conclusion is that, under the pleadings, the delinquent list was immaterial, and the evidence to impeach it equally so. The district court, therefore, did not err in excluding such evidence, and its judgment is affirmed.

[No. 959.]

PETER LIGHTLE, RESPONDENT, v. F. BERNING, ET AL., APPELLANTS.

**UNDERTAKING—STATUTE OF FRAUDS.**—An undertaking, executed to the sheriff, and agreeing to satisfy any judgment that plaintiff in a certain action might recover, is not a "special promise to answer for the debt, default, or miscarriage of another."

**IDEM—CONSIDERATION OF, NEED NOT BE EXPRESSED.**—Such an undertaking is not void, because the consideration is not expressed therein.

**OBJECTION—GROUND OF, MUST BE STATED.**—The particular ground of an objection or exception taken to the admission of evidence must be stated.

**FINDINGS SUSTAINED BY THE EVIDENCE.**—Upon a review of the evidence: *Held*, sufficient to sustain the findings of the court, that the property mentioned was attached by the sheriff and taken into his possession and so kept until the undertaking sued on was delivered.

**RELEASE OF ATTACHED PROPERTY—SUFFICIENT CONSIDERATION FOR UNDERTAKING.**—The release of property from an attachment constitutes a sufficient consideration for the undertaking.

**UNDERTAKING—TITLE OF COURT WHERE ACTION WAS PENDING.**—The undertaking in this case did not state in what court the action mentioned was pending. The complaint averred the facts which were not denied in the answer: *Held*, that defendants were not injured by the admission of the undertaking in evidence.

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Opinion of the Court—Leonard, J.

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COMMON LAW BOND.—*Held*, that the undertaking sued on is a valid common law obligation for the payment of money.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The facts are stated in the opinion.

*R. M. Clarke*, for Appellants:

I. No attachment was ever levied. The sheriff was never in possession. There was no consideration to support the promise of the undertaking. (*Laveaga v. Wise*, 13 Nev. 296.)

II. The paper in suit is not an undertaking to release attached property. It is not so recited in the paper. It does not run to the plaintiff. It was not made upon the order of the court or judge discharging the attachment. (1 Comp. L. 1200, 1201.) It is a simple promise to pay to the sheriff a sum of money therein named, if Lightle should recover judgment against Smith; for what consideration, is not recited, and for what consideration, must appear from some other source than the instrument.

*Wells & Stewart*, also for Appellants:

The court erred in not allowing defendants to traverse the return of the sheriff, by oral testimony. (*Ritter v. Scannell*, 11 Cal. 238; *Mitchell v. Hackett*, 14 Id. 661; 6 Nev. 352; 21 Pick. 187; 6 N. H. 393; *Drake on Attach.* 210.)

*A. C. Ellis, and Moses Tebbs*, for Respondent:

The bond is not a statutory bond; but it may be recovered upon as a common law bond. (*Palmer v. Vance*, 13 Cal. 553; *Garretson v. Reeder*, 23 Iowa, 21; *Cook v. Boyd*, 16 B. Mon. 556; *Aud v. Magruder*, 10 Cal. 282.) Although the court, in which the action of *Lightle v. Smith* was pending, is not named in the bond, still this might have been explained by evidence, and was so explained and shown by the pleadings and proofs. (*Palmer v. Vance*, 13 Cal. 553.)

By the Court, LEONARD, J.:

Plaintiff recovered judgment against defendants upon the following undertaking, to wit:



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Opinion of the Court—Leonard, J.

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“CARSON RIVER, Douglas County, Nevada.

“We, the undersigned, agree to pay to P. H. Roan, sheriff of said county, the sum of five hundred and eighty-two dollars and sixty-two cents (\$582.62) to satisfy any judgment not exceeding that amount, in the case now pending of *Peter Lightle v. C. E. Smith*. F. BERNING.

“September 16, 1875.

JOHN S. CHILDS.”

Plaintiff is the assignee of Roan, the promisee named in the undertaking.

This appeal is taken from the judgment and from an order overruling defendant's motion for a new trial.

Upon the pleadings and evidence, the court found as facts, that “on or about September 15, 1875, P. H. Roan, mentioned in complaint as sheriff of and for said Douglas county, levied upon, took in possession, and had under his control, under and by virtue of the writ of attachment mentioned in plaintiff's complaint, thirty-three head of cattle and seven head of horses, belonging to C. E. Smith, defendant in said writ of attachment; that afterwards, and on said fifteenth day of September, 1875, said defendants herein, upon the consideration that said sheriff would relinquish his said attachment and return said property to the possession of said Smith, made and delivered to said sheriff the undertaking mentioned in said complaint; that upon receiving said undertaking, and in consideration thereof, said sheriff did relinquish the said attachment, and did return all of said property to the possession of said Smith, and accepted said undertaking; that on or about April 2, 1877, said sheriff, in consideration of his liability to said Peter Lightle, by reason of said attachment, and the surrender of said property, sold, assigned, transferred, and delivered said undertaking to this plaintiff; that plaintiff has never sold, assigned, or parted with the same, and that no part of said undertaking has been paid.”

The answer admits that the case of *Lightle v. Smith* was commenced in the second judicial district court, in Douglas county, Nevada; that in said action plaintiff recovered judgment against defendant for five hundred and eighty-

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Opinion of the Court—Leonard, J.

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four dollars and sixty-two cents, with interest and costs; that no portion has been paid, and that plaintiff, Lightle, caused execution to issue against the defendant, Smith, which was returned wholly unsatisfied, prior to the commencement of this action.

The answer denies that the sheriff, Roan, attached the property mentioned, or any part thereof, and alleges want of consideration to support the undertaking.

It is not claimed by counsel for defendants, that the contract, or undertaking in question is within the statute of frauds—that is to say, that it is a “special promise to answer for the debt, default, or miscarriage of another,” and from the following authorities it seems not to be so. (*Allen v. Thompson*, 10 N. H. 33; *Mercein v. Mack*, 10 Wend. 461; *Farley v. Cleveland*, 4 Cowen, 434; *Williams v. Leper*, 3 Burrow, 1886; *Barrell v. Trussell*, 4 Taunt, 116; *Randle v. Harris*, 6 Yerg. 508; *Slingerland v. Morse*, 7 Johns. 463; *Olmstead v. Greenley*, 18 Johns. 12; *Bampton v. Paulin*, 4 Bing. 264; *Packard v. Richardson*, 17 Mass. 127.)

We shall, therefore, treat the undertaking as one not affected by the statute of frauds. Such a contract must be supported by a sufficient consideration, but it need not be in writing, and it follows, of course, that the undertaking in question is not void because the consideration is not expressed therein.

The consideration alleged in the complaint is the same as that found by the court, above stated. It is claimed by appellants that the evidence does not support the findings, “because it does not appear therefrom, that the sheriff ever took the property claimed in the complaint to have been attached, into his possession.” The sheriff’s return upon the writ of attachment is, in substance, that he received the writ on the fifteenth day of September, 1875, and that, on the following day, he “levied upon, and took possession of, thirty-three head of cattle and six or seven head of horses and colts, being at the time of the levy in the possession of defendant; that defendant gave security by the undertaking of two sufficient sureties in an amount sufficient to satisfy the demand, and which undertaking he took.” The return

of the sheriff, and the other papers and records, in the case of *Lightle v. Smith*, were offered and admitted in evidence, without any sufficient objection to their admission. No ground of objection or exception was stated. (*Sharon v. Minnock*, 6 Nev. 382.)

Roan, the sheriff, testified that he levied upon and took into his possession, the horses and cattle mentioned in his return, the same having been at the time, upon Smith's ranch; that he drove the stock up together and counted the animals, and kept them in a bunch for three quarters of an hour; that he was in sight of them all the time from seven A. M., until three or four o'clock P. M.; that defendant, Childs, said he had a bill of sale of the property attached, and claimed it as his own; that Childs tried to drive the stock away, but he would not permit him to do so, until the undertaking in question was executed and delivered to him; that the undertaking was given in consideration of his surrender of the property attached, to Smith, and a release of the attachment, and that upon its execution he released the attachment and gave the property up to Smith.

There was no evidence contradicting Roan's testimony or his return. Defendant, Childs, testified that he told Roan, at the time of the levy, that the stock belonged to him; that he showed Roan a bill of sale of the animals, and that he had them in his possession; but there was not the slightest evidence tending to show that the sheriff's return was untrue; or that, when testifying, he did not state the exact truth. The court's finding that the property mentioned was attached by the sheriff, and by him taken in possession, and so kept until the undertaking was delivered, is amply supported by the evidence, and the release thereof was a sufficient consideration for the contract entered into by the defendants. (See authorities above cited.)

It is further urged, that the court erred in admitting in evidence the undertaking sued on, for the reasons that it does not show any consideration, and it does not appear therefrom in what court the case of *Lightle v. Smith* was pending. The first reason given has been sufficiently considered. It was not necessary to insert the consideration.

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As to the second reason, it is enough to say that it was alleged in the complaint, and not denied in the answer, that the case of *Lightle v. Smith* was brought, and judgment obtained in the district court of the second judicial district in Douglas county, in this state. The execution and delivery of the undertaking and its assignment to plaintiff were admitted.

There was, therefore, no necessity of introducing the undertaking in evidence, but there was no error in admitting it, and certainly, in consideration of their admissions just mentioned, defendants could not have been injured thereby.

It is said the court erred in not allowing defendants to traverse, by oral testimony, the sheriff's return.

The statement does not show, either, that defendants offered to do so, or that they were denied that privilege, except in the assignment of errors, where, it is said, the court erred, as above stated. But even there it does not appear that an exception was taken to the court's ruling, if it was as claimed.

The paper sued on is not a statutory undertaking for the release of attached property, but it is a valid common law obligation for the payment of money. "A bond taken by the sheriff is not void for want of conformity to the requirements of the statute, which, while prescribing one form of action, does not prohibit others; and a bond given voluntarily upon the delivery of property, is valid at common law." (*Palmer v. Vance*, 13 Cal. 556; *Garretson v. Reeder*, 23 Iowa, 24; *Cook v. Boyd*, 16 B. Mon. 559.)

The record discloses no error, and the order and judgment appealed from are affirmed.

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[No. 969.]

L. P. COSCIA, APPELLANT, v. C. A. KYLE, RESPONDENT.

ACT TO PROTECT THE WAGES OF LABOR—SECTION THREE CONSTRUED—NOTICE TO WHOM GIVEN.—In construing section three of the act to protect the wages of labor (Stat. 1873, 76): *Held*, that notice of the laborer's claim must be given to the debtor and creditor as well as to the sheriff. (Hawley, J., dissenting.)

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Opinion of the Court—Beatty, C. J.

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ITEM—TIME FOR COMMENCEMENT OF ACTION UPON DISPUTED CLAIM.—The action upon the claim, if disputed, must be commenced within ten days after the presentation of the claim to the officer who levied the writ. (Hawley, J., dissenting.)

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts are stated in the opinion.

*W. S. Bonnifield and Geo. G. Berry*, for Appellant:

I. It is not claimed that Huntington, Hopkins & Co., or their attorneys, or the Humboldt Mill & Mining Company, gave any notice to the lien claimants that the indebtedness was denied, or that the demand of the lien claimants was disputed. The notice, if any was given, was given by the sheriff. Notice must be given by the party, or his attorney. (Bouvier's Law D., "Notice.") If there is any ambiguity in a notice, the construction must be against the party giving it. (*Carpentier v. Thirston*, 30 Cal. 198.)

II. The laborer's lien law for the protection of wages of labor should be literally construed by the courts. (*Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219.)

*S. S. Grass*, for Respondent.

By the Court, BEATTY, C. J.:

The defendant in this action was sheriff of Humboldt county, and as such, levied an execution upon certain personal property of the Humboldt Mining Company, a corporation, to satisfy a judgment in favor of Huntington, Hopkins & Co. The plaintiff and his assignors were mechanics and laborers holding claims against the corporation for services and labor rendered and performed within ninety days preceding the levy of the execution. The sheriff was notified before the sale of the property of these claims, and of the intention of the holders to demand priority of payment out of the proceeds of the sale. (Comp. L. sec. 143.) He refused, nevertheless, to pay any portion of said claims, although the proceeds of the sale were more than sufficient to satisfy them in full. This action was thereupon com-

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Opinion of the Court—Beatty, C. J.

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menced by plaintiff to recover from the sheriff the full amount of said claims.

The cause was tried before a jury, who found a verdict for the plaintiff.

Afterwards the court granted a new trial, upon the ground, among others, that the verdict was contrary to the evidence in this, that the evidence shows that the claims sued on were disputed, and no suit was ever brought thereon as required in such case by the provisions of the act under which priority of payment was claimed.

This appeal is from the order of the court granting a new trial.

The law under which the plaintiff claims to recover in this action is entitled "An act to protect the wages of labor," and contains the following provisions:

"Section 3. In all cases of executions, attachments, and writs of similar nature, against the property of any person or persons, or chartered company, or corporation, it shall be lawful for such miner, mechanic, salesman, servant, clerk, and laborer, to give notice of their claim or claims, and the amount thereof duly certified and sworn to by the creditor or creditors making the claim, to the officer executing either of such writs, at any time before the actual sale of property levied on; and such officer shall pay to such miners, mechanics, salesmen, servants, clerks or laborers, out of the proceeds of the sale, the amount each is justly and legally entitled to receive for services rendered within ninety days next preceding the levy of the writ of execution, attachment or other writ, not exceeding two hundred dollars, in gold coin of the United States; *provided*, if any or all of the claims so presented and claiming preference under this section, shall be disputed by either the debtor or the creditor, the person presenting the same shall commence an action within ten days for the recovery thereof, and shall prosecute his action with due diligence, or be forever barred of any claim of priority payment thereof. But in case action is rendered necessary by the act as aforesaid, by either debtor or creditor, and judgment shall be had for said claim, or any part thereof, carrying costs, the costs

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Opinion of the Court—Beatty, G. J.,

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attending the prosecution of said action, and legally taxable therein, shall likewise be a preferred claim with the same rank as the original claims," etc. (Stats. 1873; 76; Comp. L., sec. 143.)

The correctness of the ruling of the district court in granting a new trial depends altogether upon the proper construction of this section of the law, for there was no conflict in the evidence as to the material facts.

It was proved that the plaintiff and his assignors presented their claims duly verified to the sheriff before the sale of the property levied on. There was no proof of any presentation or notice of the claims to the Humboldt Mining Company or to Huntington, Hopkins & Co., except that, as to the latter, it is to be inferred that the sheriff informed them. He testified that he notified the claimants and their attorneys, verbally, that Huntington, Hopkins & Co. denied the claims.

Appellant contends that the district court erred in finding upon this evidence that the claims were disputed. According to his construction of the law, it becomes the duty of the sheriff in cases like this, upon the presentation of claims like that of the plaintiff, to pay them out of the proceeds of the sale, unless either the debtor or creditor in the execution gives formal written notice to the holders of the claims that they are disputed. But this is not the meaning of the statute. Read by itself alone it might be so construed; but it must be considered with reference to the constitution, and, if possible, construed in a sense that will make it conform to the paramount law. The construction contended for by the appellant would make this statute clearly unconstitutional.

No person can be deprived of his property without due process of law. (Const., art. 1, sec. 8.) The proceeds of sale under execution are the property of the judgment creditor to the extent of his judgment, and the judgment debtor is not only the owner of the surplus, but he has a right to insist that no part of the proceeds shall be applied to the payment of any claim against him that has not been ascertained and determined by due process of law. The officer

levying the execution is accountable to the debtor and creditor for the entire proceeds of the sale, and the legislature could not, if it would, absolve him from such accountability by directing him to apply the proceeds to the satisfaction of claims, that validity of which has neither been admitted by them, nor established by legal process.

We do not think that in this instance the legislature has attempted anything of the kind. As we construe the statute, it clearly implies, although it does not expressly say so, that notice of the claims must not only be given to the sheriff, but also to the debtor and creditor, for how otherwise can they dispute the claims?

If this is so, we think it equally clear that it is the duty of the claim-holders to give the notice. The law does not impose the duty upon any one else, and they, as the persons seeking the benefit of the law, must be held to compliance with its conditions. They should, in our opinion, give timely notice of their claims to the parties interested in the fund out of which they demand payment, and should ascertain for themselves whether their claims are disputed.

No power is conferred upon the sheriff to decide this question, and he is not bound to decide it at his peril. If the debtor and creditor, to whom he is accountable for the fund in his hands, give him express authority to pay it out in satisfaction of the claims of third parties, that will justify him in so doing, but without such express authority he is bound to treat all such claims as disputed. He is not a judicial officer; he has no means of acquiring jurisdiction over the parties, and no power to determine the validity of the demands. To him they are claims, and nothing more; and all he is required to do is to retain the proceeds of the sale in his hands until he is authorized either by the express direction of the debtor and creditor, or by the judgment of a competent court, to pay the claims, or until the time for suing on the claims has elapsed, without the institution of any proceedings to establish their validity.

Our construction of the law also differs from that of the appellant as to the time within which action must be commenced on the claims presented to the sheriff in case they



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are disputed. He thinks an action may be commenced at any time within ten days after formal notice from the debtor or creditor that the claims are disputed. We think the action must be commenced within ten days after the presentation of the claim to the officer who has levied the writ. The words of the statute are extremely vague and ambiguous, but the construction we have adopted is at least as natural as that of the appellant, and has the recommendation of making the law definite and certain, instead of leaving it so that it would be impossible for a sheriff ever to tell when he could safely decide that the time for suing was past.

If these views are sound, it follows that the ruling of the district court in granting a new trial was correct. The claims of the plaintiff were disputed. Not only was there an entire failure on the part of the debtor and creditor in the execution to authorize the sheriff to pay them, but the latter expressly forbade him to pay them. Under these circumstances he was bound to hold on to the proceeds of the execution until the rights of the parties were determined in due legal form, or until the time for commencing an action was past. No action having been commenced within ten days after the presentation of the claims, his liability to the plaintiff was at an end, and it was his duty to apply the funds in his hands according to the respective rights of the parties to the action, in which the execution issued.

This conclusion and this construction of the laws do not involve any such hardships to claim-holders as appellant has suggested in his argument.

If, as we suppose, the officer levying the writ, is bound to treat all claims as disputed claims until he is expressly authorized by the debtor and creditor to pay them, it follows that a refusal of debtor or creditor to give such authority, when properly demanded, is, in legal effect, a dispute of the claim, such as will justify the commencement of an action thereon, and the addition thereto of the costs of suit. The proof of demand and refusal in such case could be made in the same manner that it is made in any other case where demand and refusal are essential to the right of

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Opinion of Hawley, J., dissenting.

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action or the recovery of costs, and nothing is more simple, as a general thing, than the making of such proof,

The order of the district court is affirmed.

HAWLEY, J., dissenting:

I agree that the "act to protect the wages of labor," is in some respects vague and indefinite; but, in my opinion, it is not susceptible of the construction which has been given it. As I construe the law, the claimant is only required to give notice of his claim—in the manner specified in section 3—to the officer executing the writ. It seems to have been taken for granted by the legislature that such a notice would be sufficient to enable the debtor, or the creditor, to dispute the claim if they so desired.

The act implies that the officer, upon receiving the notice from the claimant, will, in order to protect himself, notify the debtor and the creditor.

The mere fact that, in the opinion of the court, it would be better to impose that duty upon the claimant instead of the officer, is no reason why the law should be so construed, unless, from the language of the act, it reasonably appears that such was the intention of the legislature.

By the provisions of section 3, the claimant is not required to bring any action, unless his claim is "disputed by either the debtor or the creditor," and, in my opinion, he may bring his action at any time within ten days after receiving notice from the debtor or creditor that his claim is disputed.

Courts are not authorized in order to sustain a law, to give it a construction not supported by the words of the statute. It is their province to conform to the evident intention of the legislature "without indulging in speculation, either upon the impropriety or hardship of the law."

REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,

OCTOBER TERM, 1880.

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[No. 985.]

N. A. MERRILL, APPELLANT, v. JOHN DIXON, ET. AL.,  
RESPONDENTS.

CLAIM AND DELIVERY OF PERSONAL PROPERTY—OWNER OF LAND ENTITLED TO WOOD CUT THEREON.—The owner of land is entitled to wood cut thereon, and can maintain an action therefor, if its identity can be established.

EVIDENCE TO ESTABLISH CHARACTER OF MINERAL LAND—MAP OF UNITED STATES SURVEYOR INCOMPETENT.—Plaintiff offered to show that the land, on which the wood was cut, had been returned, and denominated mineral lands on the map, of the township, regularly made and filed by the United States surveyor: *Held*, that the testimony was properly excluded by the court.

IDEM—MINERAL MUST BE VALUABLE.—The mere fact that the land contained "copper, gold, and silver-bearing quartz," does not impress it with the character of mineral land, within the meaning of the act of congress, excluding mineral lands from the grant. Only lands valuable for mining purposes are reserved from sale.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

*William Cain*, for Appellant.

I. The court erred in ruling out the testimony, that the  
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## Argument for Respondents.

land, upon which the wood was cut, had been returned, and denominated as mineral land. (*Patterson v. Winn*, 11 Wheat. 380; *Railroad Co. v. Smith*, 9 Wall. 98, 100; *Doll v. Meador*, 16 Cal. 325; *People v. Stratton*, 25 Id. 251; *Read v. Caruthers*, 47 Id. 181; *McLaughlin v. Powell*, 50 Id. 64.)

II. James Henry was in the actual possession of this land, and cutting this wood, subject only to the regulations of the United States, in good faith and claim, and color of right, and not as a bare trespasser, by bow and spear, and the railroad could not claim the wood. (13 U. S. Stats. 358, 4; *Halleck v. Mixer*, 16 Cal. 578; *Kimball v. Lohmas*, 31 Id. 156; 2 Pars. Cont. 136; 3 Id. 200; *Hyde v. Cookson*, 21 Barb. 104; *Brown v. Sax*, 7 Cow. 94; dissenting opinion; *Page v. Fowler*, 39 Cal. 417; *Stockwell v. Phelps*, 34 N. Y. 363; *Peck v. Brown*, 5 Nev. 81.)

## W. Webster, for Respondents:

I. The patent to the Central Pacific Railroad is not before the court in any form, and the court will not assume that the patent contains matter that would entitle the appellant to show that the lands granted or conveyed were not within the scope of the grant and patent by the government to the Central Pacific Railroad. Error should appear affirmatively in the record. (4 Nev. 414; 8 Id. 164.)

II. The true owner of land may maintain replevin to recover wood cut on the land by one in possession of the same without color of title. (*Kimball v. Lohmas*, 31 Cal. 156.)

III. The Consolidated Poe Mining Company is equally guilty with Henry of a trespass. (*Whitman Gold and Silver Mining Company v. Tritle*, 4 Nev. 499.)

## William Cain, for Appellant, in reply:

I. The court will not assume that the patent conveyed any land to the Central Pacific Railroad Company not granted to it by the acts of congress. (1 Greenl. on Ev., sec. 38.)

II. The Consolidated Poe Mining Company had the right to cut wood for mining purposes, the land being more

than ten miles from the railroad. (13 U. S. Stat. 358, sec. 4; 1 Greenl. Ev. sec. 10.)

By the Court, LEONARD, J.:

This is an action to recover the possession of three hundred and ninety-eight cords of cedar wood, or its value, in case a delivery cannot be had.

At the time the action was commenced, plaintiff claimed and had a delivery of the wood to him. The jury found a verdict for the defendants for a return of the wood or its value. This appeal is from the judgment and from an order denying plaintiff's motion for a new trial.

The facts of the case, necessary to be stated, are as follows: In the fall of 1876, one James Henry, under a contract with the Consolidated Poe Mining Company, cut the wood in question for said company, upon the west half of section 9, township 21 north, range 19 east, Mount Diablo base and meridian; the same being about fourteen miles north of Reno, in this state, on the line of the Central Pacific Railroad, and about ten miles east of the Consolidated Poe Mining Company's works.

Neither Henry nor the Poe Company, in a legal sense, claimed, or had any right, title, or interest in, or claim to any part of said section 9, whereon the wood in question was cut. Nor, in the same sense, had either the possession of the land. There were growing trees upon the tract, in September, 1876, and Henry entered and cut and piled the wood in controversy, for the Poe Company's use at its mill, at an agreed price per cord.

In August, 1877, before it was removed, the wood was attached by the creditors of the Poe Company, and at sales under executions issued upon judgments recovered in the attachment suits mentioned, it was purchased by plaintiff, August 23, 1877.

Defendants claim the wood in question by purchase from the Central Pacific Railroad Company in September, 1877, and the purchase is not denied.

It is not and can not be disputed, that the land upon which the wood was cut belonged, at that time, to the rail-

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Opinion of the Court—Leonard, J.

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road company, unless it was mineral land, and, as such, excepted from the operation of the grant, stated in the acts of congress, approved July 1, 1862, and July 2, 1864. (See Statutes at Large, vol. 12, 492, and vol. 13, 358.)

If the railroad company owned the land when the wood was cut by Henry, it was entitled to the wood cut thereon, and it could have maintained this action therefor, or its value, so long as its identity could be established (*Harlan v. Harlan*, 15 Pa. St. 513; *Wincher v. Shrewsbury*, 2 Scam. 284; *Kimball v. Lohmas*, 31 Cal. 158); and defendants succeed to the rights of the railroad company. Plaintiff's motion for a new trial, and the ground relied upon for a reversal of the judgment, was, and is, based upon an alleged error of the court below, in excluding the evidence of Don Barker, in rebuttal, as to the character of the land upon which the wood in controversy was cut, whether mineral, or otherwise, as returned and denominated by the United States surveyor. The witness testified that he was a deputy United States surveyor, and was familiar with the manner of surveying the public lands of the United States; that he had before the court a duly certified copy of the map of the township embracing the land upon which the wood in question was cut. He presented the map, with its certificates by the United States surveyor, showing that it was strictly conformable to the field-notes of the survey of that township, on file in the United States surveyor's office. He then continued to testify as follows:

"I have never been over this land myself, and do not know the nature of this section 9, whether mineral land or agricultural; but on this plat it is returned and denominated as copper, gold, and silver-bearing quartz, and from this I judge that such is its nature."

Defendants objected to that testimony as immaterial, incompetent, and irrelevant. The objection was sustained by the court, and an exception taken by plaintiff.

The statement does not contain a copy of the patent from the United States conveying the land upon which the wood was cut; but it is said, by counsel for plaintiff, that it con-

tains a special reservation of mineral lands, according to the terms of the acts of congress before mentioned.

We find from the report of the land commissioner (2 Lester's Land Laws, 337, that, "in every case reported from the district land officers, of selections made under the acts of 1862 and 1864, for the Pacific railroad, the agent of the company, in the first instance, is required to state in his affidavit that the selections are not interdicted, mineral, or reserved lands, and are of the character contemplated by the grant. Upon the filing of lists, with such affidavits attached, it is made the duty of registers and receivers to certify to the correctness of the selections in the particulars mentioned, and in other respects. They subsequently undergo scrutiny at this office, are tested by our plats, and by all the data on our files, sufficient time elapsing, after the selections are made, for the presentation of any objections to the department, before final action is taken; and to more effectually guard the matter, there is inserted in all patents issued to said railroad company a clause to the following effect: 'Yet, excluding and excepting from the transfer by these presents all mineral lands, should any such be found to exist in the tracts described in this patent, this exception, as required by statute, not extending to coal and iron land.'"

For the purposes of this case, we shall consider that all mineral lands which were intended by congress to be excluded and excepted from the operation of the grant to the railroad company, were excluded and excepted by the patent conveying the lands to the said company upon which this wood was cut. And, although we are strongly impressed with the idea that the plaintiff's relation to the title is not such as to allow him to question the validity and efficacy of the patent (*Doll v. Meader*, 16 Cal. 324), still, it being unnecessary, that subject will not be considered.

Counsel for plaintiff says in his brief that, the reason why the testimony of Barker was offered was, "to show that the land on which the wood was cut had been returned and de-

nominated mineral lands.” But suppose it was so returned and denominated?

That fact would not tend to show that the land was such mineral land as was excepted and excluded by the grant. The text of the act of 1864, as it appears in 13 Statutes at Large, at page 358, is as follows: “And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government, reservation, or mineral lands, or the improvements of any *bona fide* settler, or (on) any lands returned and denominated as mineral lands. \* \* \* The word “or,” last used in the sentence quoted, should read “on.” (See 2 Lester’s Land Laws, 123.) So the statute should read as follows:

“And any lands granted by this act \* \* \* shall not \* \* \* include \* \* \* any mineral lands, or the improvements of any *bona fide* settler on any lands returned and denominated as mineral lands.”

The witness, Barker, did not pretend to know anything about the lands embraced in section 9. He did not know whether they were at all valuable for mining purposes. He simply knew they were returned and denominated upon the map as “copper, gold, and silver-bearing quartz.”

After the company’s patent from the government was admitted in evidence, the burden of proof was upon plaintiff to show, admitting he was in situation to demand the right to do so, that the tract described therein was, in fact, such mineral land, that it was excepted from the operation of the grant and by the terms of the patent. Neither the map nor the testimony of Barker tend to show that fact. It can only be claimed that the map showed, *prima facie*, that there was, upon the section, “copper, gold, and silver-bearing quartz;” but it did not tend to show whether it was there in quantity or quality sufficient to make the land valuable for mining purposes, and if that was not shown, proof of the *prima facie* fact just mentioned did not tend to show such mineral lands as are excluded from the grant.



## Points decided.

In excluding mineral lands, congress only intended to exclude lands valuable for mining purposes. It is only valuable mineral lands and deposits that are reserved from sale, except as provided by law, in respect to mineral lands. (See U. S. Rev. Stats., secs. 2318, 2319.)

In *Alford v. Barnum*, 45 Cal. 484, the court said: "But it is contended by the defendant, that the land in controversy was 'mineral land,' and so, within the reservation of the act of congress of July 1, 1862, and July 2, 1864, by which public lands were granted to the railroad company, and within the exceptions and reservations of the patent which in this respect, follows the terms of the grant. \* \* \* The mere fact that portions of the land contained particles of gold or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land within the meaning of the acts referred to. It must, at least, be shown that the land contains metal in quantities sufficient to render it available and valuable for mining purposes. Any narrower construction would operate to reserve, from the uses of agriculture, large tracts of land which are practically useless for any other purpose, and we can not think this was the intention of congress." It is well known that it is the constant practice of the land department to allow lands returned, denominated, and claimed as mineral lands, to be purchased as agricultural lands, upon satisfactory proof that they are not valuable for mining purposes.

The judgment and order appealed from are affirmed.

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[No. 1027.]

THE STATE OF NEVADA, RESPONDENT, v. JOSE  
LOPEZ, APPELLANT.

CRIMINAL LAW—CONSTRUCTION OF STATUTE—JURY TO VIEW PREMISES—

DUTY OF JURY.—In construing the provisions of sections 377 and 378 of the criminal practice act, authorizing the court to allow the jury to view the premises where the offense is charged to have been committed: *Held*, that the order of the court should specify the place to be inspected, and should designate some person who knows the place, to point it out to the

## Argument for Appellant.

jury. The person so designated, and none other, except the officer in charge, should conduct the jury to the spot, and should leave them to make their own observations, without any comment or explanation whatever.

**IDEM—RECEIVING EVIDENCE OUT OF COURT.**—When the jury arrived at the premises, they found a person who had never been sworn, as a witness, in the case. This person, in response to questions addressed him by members of the jury, pointed out to the jury all the special features of the premises. *Held*, a violation of the statute, and a denial of the right of the defendant to be confronted with the witnesses against him.

**ERROR BEING SHOWN, BURDEN IS ON THE STATE TO SHOW THAT NO INJURY OCCURRED.**—When it is shown that a clear legal right of the defendant in a criminal case has been transgressed, it devolves upon the state to prove that he was not harmed thereby.

**CRIMINAL LAW—INSTRUCTIONS—MURDER IN THE FIRST DEGREE, WITHOUT INTENT TO KILL.**—Under our statute (Comp. L. 2327), there may be murder without any intent to kill. An involuntary killing, which is committed in the prosecution of a felonious intent, is murder; and if the felony attempted is arson, rape, robbery, or burglary, it is murder in the first degree. (Comp. L. 2323.)

**IDEM—TAKING MONEY FROM A PERSON NOT NECESSARILY ROBBERY.**—Taking money from the person of another is not necessarily robbery, and it is inaccurate to say, in an instruction, that killing, "in the attempt to take money," is murder in the first degree.

**IDEM—MEANING OF WORDS "DELIBERATE" AND "PREMEDITATED."**—The words "deliberate" and "premeditated," as used in our statutory definition of murder, are of similar import, each implies the other, and it makes no difference whether they are used conjunctively or disjunctively.

**IDEM—EXPRESS MALICE—MURDER IN THE FIRST DEGREE.**—Under the statute of this state, express malice necessarily renders any murder, murder of the first degree.

**IDEM—VOLUNTARY KILLING WITH DEADLY WEAPON, NOT NECESSARILY MURDER IN THE FIRST DEGREE.**—The court instructed the jury as follows: "If the defendant purposely and voluntarily struck Vicente Ruiz with an ax, it must have been willful, and if it was willful, and he intended to kill, it must have been deliberate, and if the deliberation was for a single moment, it amounted to premeditation, so that the act became willful, deliberate, and premeditated." *Held*, erroneous.

APPEAL from the District Court of the Seventh Judicial District, Elko County.

The facts appear in the opinion.

*R. R. Bigelow*, for Appellant:

I. The conversations held by the jurors with Chris. Walsh were concerning a subject connected with the trial, and

## Argument for Respondent.

constitute a fatal error. It was not the intention of the law that the jury should be allowed to roam around and pick up any information out of court. It was only intended that the jury should view the place where the offense is charged to have been committed, for the sole purpose of enabling the jurors to understand the testimony given in the court. (*Wright v. Carpenter*, 49 Cal. 607.) No explanations whatever are to be made, and no person even allowed to speak to them on any subject connected with the trial. (1 Comp. L. 2002; *People v. Green*, 53 Cal. 60.)

II. The second instruction given by the court is erroneous. (1 Comp. L. 2321, 2323; Whart. on Hom., sec. 184 *et seq.*; *Tooney v. State*, 5 Tex. Ct. of App. 187; *Pharr v. State*, 7 Id. 477.)

III. The court erred in instructing the jury that if the killing was done with either deliberation or premeditation, it is murder in the first degree. The law requires that both deliberation and premeditation shall exist, to make the crime murder in the first degree.

IV. The court erred in instructing the jury that willful, unlawful, and premeditated killing constitutes murder in the first degree, leaving out entirely the questions as to whether the killing was done with malice aforethought or contained the element of deliberation. Malice aforethought was always necessary to constitute murder, under the common law, and our statute requires both that and deliberation to exist, together with the ingredients mentioned in the instructions, to make up the crime of murder in the first degree. (Whart. Homicide, secs. 176, 177, 179, 180; *People v. Sanchez*, 24 Cal. 28; *People v. Long*, 39 Id. 694; *People v. Nichol*, 34 Id. 212; 2 Bish. Cr. Law, 726-28.)

The latter part of the instruction is clearly erroneous. (Bouvier's Law Dic., "Deliberation;" 2 Bish. Cr. L. 716; *Golden v. State*, 25 Ga. 527.)

*M. A. Murphy*, Attorney-General, for Respondent:

I. The statute authorized the court to order a view of the premises. (1 Comp. L. 2001.) The defendant was not prejudiced. The record is silent, and it will be presumed

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Opinion of the Court—Beatty, C. J.

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that the court pursued the course pointed out by the statute, and appointed Chris. Walsh to show the jurors the place where the homicide was committed.

The defendant's attorneys did not except to the order of the court, in instructing the jury to view the premises, nor did they take an exception to the course pursued by the jury in making such examination until after the verdict had been recorded, and it was then too late to take an exception.

II. The objections to the instructions given by the court are not well taken. There are certain kinds of murder which carry with them conclusive evidence of premeditation. The statute has taken upon itself the responsibility of saying that these cases shall be deemed and held to be murder of the first degree. The test question, "Is the killing willful, deliberate, and premeditated?" is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. (1 Comp. L. 2323; *State v. Harris*, 12 Nev. 415; *People v. Sanchez*, 34 Cal. 25; *People v. Nichol*, 34 Id. 214; *People v. Long*, 39 Id. 694.)

By the Court, BEATTY, C. J.:

The defendant appeals from a judgment convicting him of murder in the first degree, and also from the order of the district court denying his motion for a new trial.

One of the grounds for granting a new trial on application of the defendant in a criminal action, is the following:

"2. When the jury has received any evidence out of court other than that resulting from a view as provided in section 377." (Cr. Pr. Act., sec. 428.)

Section 377 reads as follows: "Section 377. Whenever in the opinion of the court it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact accrued, it may order the jury to be conducted in a body, in custody of the sheriff, to the place which shall be shown to them by a person appointed by the court for that purpose."

The meaning of this section is sufficiently evident, but

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Opinion of the Court—Beatty, C. J.

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it is rendered still more plain by reference to the section immediately following:

"Section 378. No person shall be suffered to speak to the jury on any subject connected with the trial, and the officer shall return them into court without unreasonable delay, or at a specified time.

But one construction can be put upon this language, and that is, that when the jury are sent out under these provisions of the statute, they go for the single purpose of viewing the place, and not for the purpose of hearing any oral explanations or comments even from the person appointed by the court to show it to them.

As at other recesses and adjournments of the court, the following oath should be administered to the officer in whose custody they are sent:

"You do solemnly swear that you will, during this recess, keep this jury together, and that you will return them into court at the opening thereof, and that in the meantime you will not allow any person to speak to them or either of them, nor speak to them or either of them yourself on the subject of the case now on trial, so help you God." (Cr. Pr. Act, sec. 380.)

It would be well also to repeat to the jury the usual admonition "not to converse among themselves or with any one else on any subject connected with the trial." (Sec. 381.)

These various provisions of the statute all point to the same conclusion as to the correct practice in sending out a jury for the purpose of a view. The order of the court should specify the place to be inspected, and should designate some person who knows the place, to point it out to the jury. The person so designated, and none other, except the officer in charge, should conduct the jury to the spot, and should leave them to make their own observations without any comment or explanation whatever. (*People v. Green*, 53 Cal. 60.)

In this case the following order was made by the court pending the trial: "It being deemed by the court proper that the jury should view the place of the commission of the alleged offense, the officer in charge of the jurors was

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Opinion of the Court—Beatty, C. J.

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directed by the court to conduct them to said place, and show them the same."

By this order, the officer in charge of the jury was the person appointed by the court to show them the place. He, and no one else, was charged with the duty. But it appears from the affidavits filed in support of the motion for a new trial, that the officer in charge of the jury had no personal knowledge of the place where the homicide occurred, and took the jury to a place which he *supposed* to be the one designated in the order of the court.

This was in itself a serious irregularity, for the person sent with the jury for that purpose, ought to be able to testify that he has shown them the identical place specified in the order of the court. But this is not the ground relied on by the defendant in support of his appeal. It appears by the affidavits, that when the jury arrived at the premises they were sent to inspect, they found there a person named Chris. Walsh, who was never even sworn as a witness in the case, and who, in response to questions addressed to him by members of the jury, pointed out to them all the special features of the premises.

We do not see how it is possible to say that this was not a violation of the law, and a denial of the right of the defendant to be confronted with the witnesses against him. Indeed, it is not seriously denied that the jury "received evidence out of court other than that resulting from a view," etc., but it is contended that Walsh told them nothing more than others—witnesses—had told them, and that the defendant could not have been injured.

Of course, if it can be made clear that no injury resulted to the defendant from the act complained of, the error is cured. But when it is shown that a clear legal right of the defendant in a criminal case has been transgressed, it devolves upon the state to prove that he was not harmed thereby, and in this case we think such proof is wanting.

The theory of the prosecution was, that the deceased was killed by a blow received while he was sleeping, or at least lying, in his bed. The defendant testified that he and deceased occupied the same room; that deceased, coming in

late at night, drunk and abusive, after some altercation, attacked and wounded him with a knife; and that he struck the fatal blow in self-defense. A number of men were sleeping on the premises at the time, and as they heard no noise of a struggle or altercation, it was of obvious importance to show on the one hand that they would have been likely, and on the other, that they would not have been likely to hear such noise if any had been made. In this view, probably the jurors inquired as to the room where the homicide occurred, and the place where the other persons slept, and their inquiries as to these particulars were answered by Walsh.

Whether his answers were correct or incorrect can not be known. They may have been false and extremely prejudicial to the defendant, but whether they were or not makes no difference. It can not be denied that the jury received material and vitally important evidence out of court from a witness who was not sworn, who was not confronted with the defendant, and as to whom there was no opportunity of cross-examination.

Such being the case, we think the district court erred in denying defendant's motion for a new trial, and that the judgment and order appealed from must be reversed.

It view of the necessity of a retrial of the case it will be proper to notice some inaccuracies in the instructions in order to prevent any future question respecting them.

The following was given at the request of the state:

"If the jury believe beyond a reasonable doubt that the defendant killed Vicente Ruiz while feloniously taking or attempting to take any money from the person of Ruiz, then the jury should find the defendant guilty of murder in the first degree."

This instruction is not erroneous, for the reason principally relied on by counsel. Under our statute (Comp. L. 2327) there may be murder without any intent to kill. An involuntary killing which is committed in the prosecution of a felonious intent is murder; and if the felony attempted is arson, rape, robbery, or burglary, it is murder in the first degree. (Comp. L. 2328.) The statute on this point is too

plain to admit of construction. But in one or two minor particulars this instruction is not sufficiently guarded. It assumes to state an hypothesis that will authorize a verdict of murder in the first degree; but it does not state the hypothesis accurately or completely, and is therefore technically erroneous. Taking money from the person of another is not necessarily robbery, and it is inaccurate to say, that killing in the attempt to take money is murder in the first degree. It was necessary also, in order to make the case complete, that the killing should have been done in Elko county. This error could perhaps be shown to have been immaterial in this case; but in criminal, and especially in murder cases, even merely technical errors should be avoided as far as possible.

The next instruction complained of is the following: "Murder in the second degree is the unlawful killing of a human being, with malice aforethought, either express or implied, but without the admixture of premeditation or deliberation. If you believe from the evidence, beyond a reasonable doubt, that about the — day of October, 1879, the defendant, with malice aforethought, but without the admixture of premeditation or deliberation, willfully and unlawfully struck Vicente Ruiz with an ax, with intent to kill him, you should convict the defendant of murder in the second degree."

The fault found with this instruction is, that it permits a verdict of murder in the first degree, and impliedly requires it, in the absence of either of two necessary ingredients, viz., premeditation and deliberation. It is doubtful if this criticism would be held sound, even if the words "deliberate" and "premeditated," as they are used in our statutory definition of murder, were not synonymous, but it is a sufficient answer to the objection of counsel that these words are of similar import, each being held to imply the other, and so it makes no difference whether they are used conjunctively or disjunctively. (*People v. Pool*, 27 Cal. 584.)

We find no error in this instruction, except an error on the side of the defendant, which consists in saying that



*express malice* may be an ingredient of murder in the second degree. Under our statute, *express malice* necessarily renders any murder, murder of the first degree. There may be murder of the first degree without it, but it can not co-exist with murder of the second degree. (Comp. L., sec. 2322, 2323, 2327.)

The next instruction to which exception is taken is the following:

"Murder in the first degree consists of a willful, unlawful, premeditated killing. The intention to kill must exist," etc.

This is inaccurate and inconsistent with the first instruction above quoted, in which the jury were correctly informed that there might be murder in the first degree without any intent to kill (as where the killing takes place in the attempt to perpetrate a robbery, etc.) Of this, however, the defendant can not complain, as it was in his favor; but the latter part of the instruction, and especially the concluding sentence, contains a more serious error. It says:

"In short, if the defendant purposely and voluntarily struck Vicente Ruiz with an ax, it must have been willful and if it was willful, and he intended to kill, it must have been deliberate; and if the deliberation was for a single moment, it amounted to premeditation; so that the act became willful, deliberate, and premeditated."

If we understand this language correctly, it deduces the conclusion, that any voluntary killing with a deadly weapon, provided it is unlawful, is necessarily murder in the first degree. But this is not so. There may be an intent to kill springing from ungovernable passion, where no deliberation or premeditation can be implied. In such case the killing will be either murder in the second degree or manslaughter, according to the legal sufficiency or insufficiency of the provocation, or the presence or absence of sufficient cooling time.

In this case it was practically important not to misstate the law of voluntary manslaughter, for although the effort of the defendant was to show a complete justification of the

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Opinion of the Court—Beatty, C. J.

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killing, his testimony none the less tended to show provocation.

The other portions of the charge, not having been excepted to, we presume were correct.

The judgment is reversed, and the cause remanded for a new trial.

HAWLEY, J., concurring: I concur in the judgment.

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[No. 972.]

ANDREW TAFT, RESPONDENT, v. MATTHEW KYLE  
AND R. SADLER, APPELLANTS.

DATE OF NOTE—DISCREPANCY—WHEN NOT SUFFICIENT TO DECLARE TESTIMONY FALSE.—Witness testified that a certain note was executed and delivered August 5, 1875. The note, being produced, appeared to bear date August 5, 1878: Held, in the absence of any opportunity being given to the witnesses to explain, that this circumstance was not sufficient to authorize the district court to pronounce their testimony false.

RULE AS TO CONFLICT OF EVIDENCE, ENFORCED.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts appear in the opinion.

G. W. Baker, for Appellants.

D. E. Baily, for Respondent.

By the Court, BEATTY, C. J.:

The defendant, Kyle, is sheriff of Eureka county. At the instance of his co-defendant, Sadler, he attached certain personal property as the property of Taft & Johnson. The plaintiff, a brother of one of the defendants in the attachment suit, claims the property attached, and sues for its value. The defense is, that the sale to the plaintiff was without consideration, and fraudulent.

The case was tried in the district court, without a jury, and the sale found to have been *bona fide*, and for a valuable consideration.

The defendants appeal from the order of the district court denying their motion for a new trial, and the only ground of their appeal is, that the above-mentioned finding was against the evidence.

It is not denied that the testimony of the plaintiff and his vendors supports the finding of the court, and it must be conceded that any other finding would have convicted them of perjury. But this is precisely what appellants claim they have done for themselves by the glaring contradictions in their testimony.

The plaintiff testified that on August 5, 1875, Taft & Johnson were indebted to him for labor and for borrowed money to the amount of five hundred dollars, for which sum they gave him their note bearing that date, agreeing, verbally, that if it was not paid in one month, it should thenceforth bear interest at the rate of two per cent. per month; that on account of said note, their indebtedness to him amounted to about nine hundred dollars in January, 1879, in satisfaction of which he took a bill of sale for the property in controversy.

Taft and his partner, Johnson, testified to the same effect, all parties agreeing in the statement that the note was written by Johnson, and dated on the day it was delivered—August 5, 1875.

The note being called for and produced, appeared to bear date August 5, 1878; and this circumstance, appellants contend, is sufficient to convict them all of falsehood.

It does not appear, however, that the attention of any of the witnesses was called to the discrepancy between the apparent date of the note and their testimony, and we do not know but what they could have explained it if they had been given an opportunity. It may have been due to the resemblance of the figures 5 and 8, as they are sometimes formed, or to some other mistake. In the absence of any opportunity given to the witnesses to explain, we do not think this circumstance was sufficient to require the district court, or to authorize us, to pronounce their testimony false.

As to another particular the plaintiff contradicted himself. He testified that in a trade with Taft & Johnson,  
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Statement of Facts.

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prior to the sale in question, he paid them twenty-five dollars in cash. They testified that they received no cash in that transaction, but got credit on account for two hundred dollars. Plaintiff, being recalled, admitted that his first statement as to this matter was incorrect, and he failed to give any plausible explanation of it.

But if it were conceded to appellants that this circumstance deprived him of all credit before the court, it would not follow that his brother and his partner, Johnson, were not worthy of belief, and they both testify to the facts found by the court.

For aught that appears, the district judge may not have relied at all upon the testimony of the plaintiff. There was other substantial and unimpeached testimony to support the findings, and the fact that it was contradicted by witnesses for the defendants, can not, under the well-known rule of decision, avail them in this court.

The judgment and order appealed from are affirmed.

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[No. 945.]

WALTER S. HOBART, APPELLANT, v. L. D. WICKS  
ET AL., RESPONDENTS.

WATER RIGHTS—APPROPRIATION OF—CONVERSION AT DIFFERENT POINTS.—

Respondents appropriated the waters of Alder creek, in 1868, for the purpose of operating a V flume, and diverted the water from a point below the lands of appellant. Prior to July, 1872, respondents diverted the water, by means of a branch flume, at a point above the lands of appellant, and since 1872 have diverted the water, sometimes at one point, and sometimes at the other. Appellant became the purchaser of the lands lying on the creek, between the two points of diversion, in October, 1873. The court found that respondents were the owners of the water of the creek, and entitled to use it at either point of diversion: *Held*, correct.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The land owned by plaintiff is not agricultural, or grazing land; but is valuable only for the timber growing upon it. On the ninth day of October, 1873, the land was

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Argument for Appellants.

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patented by the state of Nevada, and granted, by its patent, to the grantor of plaintiff. Alder creek flows in its bed and channel through, over, and upon the lands of plaintiff. Plaintiff never appropriated or used the water of Alder creek for any purpose whatever, and has not any use therefor. The water, when flowing through plaintiff's land in the channel of the creek, does not irrigate the land, or make it productive. The plaintiff does not use, or require, the said water for irrigating, or for stock, or domestic purposes.

*Ellis & King, Attorneys for Appellants:*

I. The extent of the presumed right is determined by the user on which is founded the presumed grant, the right granted being commensurate with the right enjoyed. (Angel on Watercourses, sec. 224 *et seq.*)

The diversion of defendant, in 1868, inflicted no appreciable injury upon defendant.

No circumstance attending this diversion, indicated or gave sign of any other intended diversion, to be made higher upon the stream in the future.

Plaintiff was entitled to rely upon the principle, that defendant's user would be the measure of defendant's right, should plaintiff allow it to ripen.

By the diversion of 1872, the entire stream was diverted and led away from plaintiff's lands, and his entire estate, so far as the same depends upon this water, is destroyed by defendant.

Plaintiff was entitled, both in law and morals, and may have been led by a spirit of accommodation, to acquiesce in the diversion of 1868, and yet in the same light be entitled to resist the greater invasion of 1872.

If the right asserted is that of a continuous use, it can only be supported by proof of a continuous user.

If the right asserted is to use the thing for a portion of the time only, there must be proof of a regularly recurring use for that proportion of the time in certain orderly periods.

II. Our non-user confers no right on defendant. (*Town-*

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send v. *McDonald*, 2 Kern. 381; *Pillsbury v. Moore*, 44 Me. 154; *Haines v. Vansickle*, 7 Nev. 249.)

*R. M. Clarke*, for Respondents:

Plaintiff makes no use of the water, and it does not benefit him or his land in any degree. He can not, therefore, complain of defendant's diversion and use.

Plaintiff had no interest or property in the water by reason of his ownership of the land, and defendant acquired a perfect right of use by appropriation.

By the Court, BEATTY, C. J.:

This is a suit to enjoin the diversion of a stream of water from its natural channel upon and across the lands of the plaintiff.

The cause was tried in the district court, without a jury, and a judgment rendered in favor of the defendants.

The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The only point made in support of the appeal, is that the conclusions and judgment of the district court are against the findings of fact, and not supported thereby. The material findings of fact are, that the defendants and their predecessors in interest appropriated the waters of Adler creek, in 1868, for the purpose of operating a V flume for the transportation of wood, lumber, and timber, from the mountains to a point on the Pacific railroad near Bronco, in Washoe county. In that year they diverted the water from the creek into their flume at a point below the lands now owned by the plaintiff. Subsequently, and prior to July, 1872, they constructed a branch flume extending further up the stream, and in that month diverted the water of the creek into said branch flume, at a point above the lands now owned by plaintiff. Since the year 1872, defendants have continued to use both the original flume and the branch flume as their business required, sometimes diverting all the water at the original point of diversion, and at other times diverting it at the point where it was taken out in 1872.

The plaintiff became the owner of the lands lying on the creek between the two points of diversion in 1873, after the appropriation of the water by the defendants, and after they had begun to divert it at the upper point, and to use it, as it was convenient to them, to operate either the old flume or the branch flume. Prior to that time said lands were vacant and unoccupied timber lands belonging to the United States.

Upon these facts it is adjudged that the defendants are owners of the water of the creek and entitled to use it, and the whole of it, during the ordinary stages of its flow for the purpose of operating their flumes and the ditches connected therewith.

We can not see that the decree awards to the defendants any greater right than the facts above stated entitle them to. They had acquired by appropriation the right to all the water in the stream before the plaintiff purchased his lands, and while they were still the property of the United States. Defendants had not only appropriated the water for their original flume, but they had constructed their branch flume, and commenced the practice of diverting the water from the channel of the stream at the upper as well as the lower point, as their convenience dictated. If they had a right to do this before plaintiff's purchase—and we see no reason for denying such right—then he has no reason to complain that they continue the practice. What they were doing in 1873, at the date of plaintiff's purchase, they were doing with the express permission of the United States (Stat. July 26, 1866, sec. 9), the then owner of the lands, and plaintiff took subject to their right.

We do not agree with counsel for appellant that there is anything inconsistent in the claim of defendants to divert the water now at one point and now at the other. It may be necessary, and presumably is necessary, to do so in the proper conduct of their business.

The judgment and order appealed from are affirmed.

[No. 981.]

D. LACHMAN ET AL. APPELLANTS, v. W. A. WALKER,  
SHERIFF OF WASHOE COUNTY, RESPONDENT.

HOMESTEAD—DECLARATION MUST BE RECORDED.—No person is entitled to the benefit of the homestead law without filing a written declaration claiming the premises as a homestead.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

*William Cain*, for Appellants:

I. The lien of a judgment never attaches on a homestead claim. Upon a conveyance thereof, the purchaser takes the land, clear of any judgment lien, docketed whilst the homestead claimant was occupying it. (*Green v. Marks*, 25 Ill. 225; *Bliss v. Clark*, 39 Id. 590; *Wiggins v. Chance*, 54 Id. 175; Civil Practice Act, 206; *Ackley v. Chamberlain*, 16 Cal. 182; *Bowman v. Norton*, Id. 220; *Houghton v. Lee*, 50 Id. 101.)

II. Compliance with the act of 1865 is not a condition precedent to exempt a homestead from execution. A party forfeits no rights secured by the law and constitution of this state if he fails to avail himself of the additional benefits of that act. He may not have the exemptions, nor the rights of survivorship, acquired by compliance, but he has all the protection of a homestead claimant under the constitution and the act of the legislature of this state, November 13, 1861.

Non-compliance is no forfeiture. (*Estate of David Walley*, 11 Nev. 265; *Cohen v. Davis*, 20 Cal. 187; *Clark v. Shannon*, 1 Nev. 568; *Goldman v. Clark*, Id. 607; *Hawthorne v. Smith*, 3 Id. 182.)

*Haydon & Queen*, for Respondent:

The court below was right in sustaining defendant's demurrer to plaintiff's complaint, because the complaint was defective in not stating that plaintiff's grantors had selected



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the property in controversy as a homestead, and caused the declaration of their intention to be recorded as required by law. (*Hawthorne et al. v. Smith*, 3 Nev. 189.)

By the Court, LEONARD, J.:

Plaintiffs instituted this action to enjoin defendant, sheriff of Washoe county, from selling certain real property under an execution issued out of the district court, in Washoe county, upon a judgment recovered in said court, September 27, 1878, in favor of G. Rinaldo, and against Patrick McCarran, for the sum of five hundred and forty-four dollars, besides interest and costs.

Prior to January 7, 1879, for more than four years, McCarran and wife occupied and claimed the property as a homestead, but neither one nor both selected the premises as a homestead, according to the homestead act of this state, approved March 6, 1865.

On the seventh of January, 1879, McCarran and wife conveyed the property to plaintiffs, and on the thirtieth of January, 1879, the defendant levied upon the property, and advertised it for sale. Rinaldo's judgment was docketed in said court, September, 1878, and the premises levied on do not exceed seven hundred dollars in value.

The court below sustained defendant's demurrer to the complaint, because it did not appear therefrom that the grantors of plaintiffs had at any time availed themselves of the benefits of the homestead act, or had selected the premises according to the provisions of said act; that, therefore, the premises were at no time the homestead of Patrick McCarran and wife, so as to exempt the same from the lien of the judgment recovered and docketed September 27, 1878, in favor of G. Rinaldo, and against Patrick McCarran; that they were subject to said judgment lien when they were conveyed to plaintiffs, and so continued until defendant made his levy. Plaintiffs refused to amend their complaint, and a judgment of dismissal was ordered and entered. This appeal is from that judgment, and but one question is presented for our consideration, viz.: Is compliance with the first section of the homestead statute (Comp. L. 186), in relation to the manner of selection, a condition precedent

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to the exemption therein provided, when, as in this case, the premises are actually occupied as the home of the judgment debtor, and might have been selected and held as a homestead according to the provisions of the statute? The statute provides as follows:

Section 1, "The homestead \* \* \* to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale, on execution or any final process, from any court, for any debt or liability contracted or incurred after November, 13, 1861. Said selection shall be made by either the husband or wife, or both of them, or other head of a family, declaring their intention, in writing, to claim the same as a homestead. Said declaration shall state that they, or either of them, are married; that he or she is the head of a family; that they, or either of them, as the case may be, are, at the time of making such declaration, residing with their family, or with the persons under their care and maintenance, on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead, which declaration shall be signed by the party making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded, and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants."

We intimate no opinion of what would have been the effect of a homestead declaration, filed by plaintiff's grantors, subsequent to the docketing of Rinaldo's judgment, but before sale of the property under execution issued upon that judgment, and prior to the conveyance by McCarran and wife to plaintiffs. In this case no declaration has ever been filed, and we have not the slightest doubt that the property is not exempt. The statute only exempts a homestead which has been selected according to its provisions. "The homestead \* \* \* to be selected \* \* \* shall not be subject to forced sale. \* \* \* Said selection shall be made by either husband or wife, or both of them, \* \* \* declaring their intention in writing to claim the same as a homestead."

The law does not compel any person to have his property become a statutory homestead, against his will, but it requires him to do certain things in order to enjoy its benefits.

Our first homestead statute (Laws of 1861, 24) provided that, the homestead should be "selected by the owner thereof." But neither the manner nor the time of doing so was definitely stated.

The third section provided, however, in case of a levy upon lands before the homestead had been selected and set apart, that the householder might notify the officer of what he regarded as his homestead, with a description thereof, and that the remainder, alone, should be subject to sale.

Under the California statute of 1851, similar to ours of 1861, the courts of that state held that the occupancy of the premises by the husband with his family, was presumptive evidence of selection and appropriation as a homestead; but under the statute of 1860, similar to ours now in force, which declared what acts should constitute a selection, the supreme court was of opinion that a person was not entitled to the benefits of the law without filing a written declaration claiming the premises as a homestead. (*Cohn v. Davis*, 20 Cal. 194. See also *McQuade v. Whaley*, 31 Id. 533.)

This court, on several occasions, has intimated the same conclusion. (*Hawthorne v. Smith*, 3 Nev. 189; *Estate of Walley*, 11 Id. 264; *Smith v. Stewart*, 13 Id. 70.)

In *Hawthorne v. Smith*, this court said: "As the law is totally silent as to the time when the selection shall be made of the homestead, \* \* \* but simply says, that when selected it shall be exempt from forced sale, we are forced to the conclusion that, after the selection is made and filed for record, no levy upon, or sale of the homestead property, can be legally made, except for those classes of debts mentioned in the constitution." There was not the slightest intimation that the premises would have been exempt, if the declaration required by the statute had not been made and filed before the sale under execution. We are of the opinion that the court below did not err in sustaining the demurrer, and the judgment is affirmed.

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Opinion of the Court—Beatty, C. J.

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[No. 962.]

WM. A. TULL, APPELLANT, v. J. P. ANDERSON,  
RESPONDENT.

**AUTHENTICATED STATEMENT—WHERE NO AMENDMENTS ARE FILED.**—The certificate of the clerk, that no amendments were ever proposed, is a sufficient authentication of a statement, to which no amendments are proposed, and is sufficient proof of that fact.

**STATEMENT—MUST BE FILED IN STATUTORY TIME.**—The record shows that the statement was not filed or served until nineteen days after the verdict of the jury: *Held*, too late.

**TRANSFER OF CASE FROM JUSTICE'S COURT TO THE DISTRICT COURT—QUESTION OF RIGHT OF POSSESSION.**—Where the trial of a case, in a justice's court, involves a question of possession, and right of possession of real estate, the case should be transferred to the district court.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts sufficiently appear in the opinion.

*Geo. P. Harding*, for Appellant.

*Fisk & Windle*, for Respondent.

By the Court, BEATTY, C. J.:

This action was originally commenced in a justice's court, to recover one hundred and fifty dollars, the alleged value of hay growing on land claimed by plaintiff, which the defendant was charged to have converted by entering upon the land with force and arms.

On the filing of a verified answer denying plaintiff's right to the *locus in quo*, and setting up a claim thereto on the part of the defendant, the justice decided that the determination of the action would necessarily involve a question of possession, and right of possession, of real property, and thereupon transferred the case to the district court (Comp. L., sec. 1600), where it was tried by a jury, and verdict and judgment rendered for the defendant.

Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The district court, upon what particular ground does not clearly appear from the opinion of the judge, refused to

entertain the motion for a new trial on its merits. The ground upon which counsel for respondent defends this action, or that at least upon which he asks us to disregard the statement on motion for new trial, is, that it is not authenticated. But we see no fault to find with it in that respect. It is the original statement proposed by the plaintiff, accompanied by a certificate of the clerk, that no amendments were ever proposed by the defendant. This is a sufficient authentication of a statement to which no amendments are proposed, and sufficient proof of that fact. (Pr. Act, sec. 197.)

It does appear, however, that the statement was not filed or served until nineteen days or more after the verdict of the jury, which was too late, unless the time for filing was extended by order of the court or by stipulation of the parties (Pr. Act, sec. 197), and there is nothing in this record to show that the time was extended. We must presume, therefore, that the district court refused to hear the motion on its merits, because the moving party had not taken the necessary steps in time. If so, the decision was correct, and must be affirmed.

The only other question in the case arises upon the appeal from the judgment. The appellant contends that the district court had no jurisdiction of the case, that the complaint and answer raised no issue as to the ownership of land, and that the district court erred in assuming jurisdiction. We think, on the contrary, that it appears very plainly from the complaint and answer, that the only issue between the parties was the right of possession to the land upon which the hay was growing when defendant entered and cut it, and that the case was properly transferred to the district court.

Appellant seems to suggest, rather than argue, that the judgment is erroneous, because it is for a greater amount than the defendant claimed in his answer.

The defendant asked, by his answer, for a judgment for costs merely. This judgment is for three hundred dollars, the costs and disbursements of the defendant in the action. This is certainly a pretty heavy cost bill in a case like this,

## Argument for Appellant.

but it is not impossible that the defendant may have been put to that expense in defending the action, and there is nothing in the record before us upon which we can assume to decide that the allowance was excessive.

The judgment and order appealed from are affirmed.

[No. 936.]

HENRY FISHBACK, RESPONDENT, v. JEREMIAH  
MILLER, APPELLANT.

**SALE OF MINE—FRAUDULENT REPRESENTATIONS—CAVEAT EMPTOR.**—The rule of *caveat emptor* applies only when buyer and seller have equal opportunities of knowledge, and when the defect complained of is patent and obvious to the senses. It does not apply to a case where the seller of a mine makes representations in respect to matters of which the buyer has no knowledge, and no means at hand of obtaining knowledge.

**IDEM—SOLE INDUCEMENT TO PURCHASE.**—It is not necessary that the fraudulent representation should have been the sole and exclusive inducement to the purchase. It is enough that it may have constituted a material inducement.

**IDEM—BURDEN OF PROOF THAT REPRESENTATIONS WERE NOT RELIED UPON.**—When representations made by the seller are shown to be material and false, the burden is upon him to show that they were not relied upon by the buyer, and that the purchase would have been made without the representations.

APPEAL from the District Court of the Sixth Judicial District, White Pine County.

The facts are stated in the opinion.

A. M. Hillhouse, and Greathouse & Blanding, for Appellant:

I. The fifth instruction given to the jury is not only too broad, and therefore misleading, but is entirely erroneous in point of law. Where the representations were express, and in writing, the purchaser has a right to rely upon them, and is not bound to "test their truth or falsehood," by any "vigilance or attention." (*Mead v. Bunn*, 32 N. Y. 275; *Risch v. Von Lillienthal*, 34 Wis. 250.)

*Caveat emptor* does not apply to the solemn assurances of

## Argument for Appellant.

the vendor, and a man has a right to rely on the truthfulness of the representations of those with whom he deals. (Kerr on Fraud and Mistake, 79; Bigelow on Fraud, 67; *Mead v. Bunn*, 32 N. Y. 275, 280; *McClellan v. Scott*, 24 Wis. 81, 87; *Upshaw v. Debois*, 7 Bush, 442; *Walsh v. Hall*, 66 N. C. 233; *Hale v. Philbrick*, 42 Iowa, 81; *Oswald v. McGehee*, 28 Miss. 340; *Spalding v. Hedges*, 2 Pa. St. 240; *Starkweather v. Benjamin*, 32 Mich. 305; *Motlack v. Todd*, 19 Ind. 130; *Parkham v. Randolph*, 4 How. (Miss.) 435; *Kiefer v. Rogers*, 19 Minn. 32; *Young v. Hopkins*, 6 Mon. 23; *Campbell v. Whittingham*, 5 J. J. Marsh. 96; *Bailey v. Smook*, 61 Mo. 213; *Holland v. Anderson*, 38 Id. 55; *Oleggett v. Crall*, 12 Kans. 393; *David v. Park*, 103 Mass. 501; *Brown v. Castles*, 11 Cush. 348; *Manning v. Albee*, 11 Allen, 520; S. C., 14 Id. 7; *Watson v. Atwood*, 25 Conn. 818.)

II. The maxim *caveat emptor* does not apply, when the vendor of property resorts to any artifice to put the purchaser off his guard. (*Swinn v. Bush*, 22 Mich. 99; *Webster v. Bailey*, 31 Id. 86; *Baker v. Seahorn*, 1 Swan, 54; *Gant v. Shelton*, 8 B. Mon. 423; *P Phelps v. Quinn*, 1 Bush, 375; *Robertson v. Clarkson*, 9 B. Mon. 507; *Biggs v. Perkins*, 75 N. C. 397.)

III. The fifth instruction is further erroneous, in this, that it nowhere contains any definition of "ordinary vigilance and attention."

IV. In the sixth and seventh instructions, the jury are told that the misrepresentations, in order to be of any avail as a defense, must have constituted "the sole inducement," and must have been "relied upon exclusively as the inducement to the purchaser;" and, in the sixth instruction, they are further told, that "the burden of proof is on the defendant to establish, by a preponderance of evidence, that he relied upon the false representations as the sole inducement." Both of these propositions are clearly erroneous. (Kerr on the Law of Fraud and Mistake, 74; *Shaw v. Staine*, 8 Bosw. 157; *Addington v. Allen*, 11 Wend. 381; Bigelow on Fraud, 88; *Cabot v. Christie*, 42 Vt. 121; *James v. Hodsdon*, 47 Id. 137; *Young v. Hall*, 4 Ga. 95.)

V. The sixth instruction, given at request of plaintiff, is

## Argument for Appellant.

erroneous as a rule of evidence. It tells the jury, that the burden of proof is on defendant to establish, by a preponderance of evidence, that the false representations made by Powell were relied upon by defendant as the sole inducement to the purchase. This is error. (Kerr on the Law of Fraud and Mistake, 75.)

VI. The first instruction, given at the request of plaintiff, is erroneous; first, because it is not true, as an abstract proposition of law; and, secondly, because, even if true, as an abstract proposition, it was inapplicable to the case at bar in this, that there was no evidence tending to show equality of opportunity for "observation and judgment." (*Winter v. Bandel*, 30 Ark. 362; *State v. Squaires*, 2 Nev. 233.)

This instruction is also intrinsically erroneous and misleading, under the authorities cited, and for the reasons given, in points I and II.

VII. Plaintiff can not contend that, while his instructions are contradictory, the law is correctly stated in those of the defendant, and that, therefore, the contradictions in plaintiff's instructions are cured. (3 Gra. & Wat. on N. T. 800; *Winchell v. Latham*, 6 Cow. 682; *Wilder v. Cowles*, 100 Mass. 487; *Van Slyck v. Mills*, 34 Iowa, 375; *Davis v. Strohm*, 17 Id. 421.)

VIII. The fact that defendant visited the ground personally would not of itself, in any way, have tended to prove that he did not rely entirely upon the representations of Powell, even had Powell then remained silent and had not forestalled further examination by a rewarranty. (*Risch v. Von Lillienthal*, 34 Wis. 255.)

IX. Even where the representations have simply been as to title, and the vendee has his adequate remedy at law on the covenants of his deed, yet a court of equity will rescind the contract. (*Upshaw v. Debow*, 7 Bush (Ky.), 446.)

X. The total absence of all consideration was of itself alone conclusive of the fraud, and entitled the defendant to a rescission. (*Risch v. Von Lillienthal*, 34 Wis. 258; Kerr on Fraud and Mistake, 186, 187; *Kuelkamp v. Hidding*, 31 Wis. 508.)



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Argument for Respondent.

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*Thomas Wren, Crittenden Thornton, and Thomas Laspoyre, for Respondent:*

I. The rule for which appellant's counsel contend, in their first point, is too broadly stated. It would convert every representation into a warranty.

The averments of the false representations of Powell, his knowledge of their falsehood, the reliance of defendant thereon, the defendant's lack of means or opportunity of knowledge, and the offer to reconvey the property, are entirely foreign to any action or defense based upon a breach of warranty. The defendant is bound by the scope and theory of his own pleading. In an action on the case, or in assumpsit for breach of warranty, the allegation of a *scienter* is immaterial. If made, it need not be proved. (*Schuchardt v. Allen*, 1 Wall. 368; *Williamson v. Allison*, 2 East, 446; *Gresham v. Postan*, 2 Carr. & P. 540; *Brown v. Edgington*, 2 Man. & Gran. 279; *Holman v. Dord*, 12 Barb. 336; *House v. Fort*, 4 Blackf. 293; *Trice v. Cockran*, 8 Gratt. 449; *Lassiter v. Ward*, 11 Ired. L. 443.)

So, in an action for a breach of warranty, the vendee can not disaffirm the sale and return the property. His remedy is an action for damages for breach of contract. (*Voorhees v. Earl*, 2 Hill, 288; *Cary v. Gruman*, 4 Id. 625; *Thornton v. Wynn*, 12 Wheat. 193; *Mondell v. Steel*, 8 Mees. & Wels. 858; *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 Cr. & M. 207; *Pateshall v. Tranter*, 3 Adol. & El. 103.)

The distinction between "representations" and "warranties" is too firmly fixed to be obliterated at this day. It is important to be understood and maintained in this case. The fact that a representation is in writing does not convert it into a warranty. Neither is a warranty any the less a warranty because not in writing. Writing or no writing is a false quantity in the definition.

The true distinction seems to be between a mere assertion or representation, however positive, extrinsic to the contract, although relating to its subject-matter and influencing the judgment of the purchaser, and a promise or undertaking entering into the contract and forming one of

## Argument for Respondent.

its terms. (*Borrekins v. Bevan*, 3 Rawle, 45; *McFarlan v. Newman*, 9 Watts, 56; *Hopkins v. Tanqueray*, 15 Com. B. 130; *Duffie v. Mason*, 8 Cow. 25; *Cooke v. Mesely*, 13 Wend. 277; *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; *House v. Fort*, 4 Black. 293.)

The quotation from the text of Bigelow on Fraud, 67, 68, is not sustained by the cases cited in appellant's brief, many of which were cases of representations as to the title of real property. They are in opposition to the entire line of modern decisions, and destructive of the spirit and intent of recording acts in general. The question of title is not involved in this case. If it were, we should have no fear in opposing to the cases cited by the text-writer the authority of *Peabody v. Phelps*, 9 Cal. 213, and *Hastings v. O'Donnell*, 40 Id. 148.

The cases cited by appellant (which are reviewed), lack the force of authority in support of the general proposition which they announce.

Many of the cases turned upon special circumstances of each, and not upon the general rule as laid down by the text-writer and quoted by counsel. They are founded upon circumstances, which show a peculiar relation of confidence, or the lack of equal means of information, such a residence at a distance from the locality of the property, or means and artifices successfully used to dissuade from investigation, where inquiry would have afforded knowledge and protection.

II. The first instruction was not calculated to mislead the jury. The vice of the argument of the counsel, and the error of the text-writer, consist in the statement of the exception instead of the rule. The rule, as stated by Chancellor Kent (2 Com. 485, 486), and sustained by the authorities, is the same as the language of the plaintiff's first instruction. Reasonably construed, the rule does not import that all human knowledge, or all expedients, or devices, to guard against fraud, must be invoked. Exceptions are reasonably implied. The distance of the subject-matter of the bargain, any existing relation of special trust, or confidence, beyond the simple attitude of buyer and seller, or any fraudulent

## Argument for Respondent.

device to prevent inquiry, or to render it unavailing, would constitute such exceptions. No such facts appear in this case.

III. The criticism of counsel for appellant, upon the sixth and seventh instructions to the jury, given at the request of respondent, is labored and ingenious. The argument is based upon the assumption, that the words sole and exclusively refer to the collective weight or influence of all the inducements operating upon the mind of Miller.

There were but two actors in this comedy, Miller and Powell. One asserted, and the other believed. One knew, or pretended to know, and the other was ignorant. No inducements would have existed if Powell had not spoken. Miller knew of none. What error or injury could arise from telling the jury that the defendant must have relied upon Powell alone, and upon his representations solely and exclusively?

By a comparison of the instructions, it will be seen that the words sole and exclusively relate to the personal origin of the representations and inducements under the influence of which the appellant acted. The instructions are equivalent to a direction that the false representations which will constitute a defense must be those of Powell. If any inducements existed, they were the offspring of Powell's assertions. The representations bear to the inducements the relation of cause to effect. For any results not the consequence of those causes the plaintiff is not responsible.

The instructions in this case are not liable to the objection that they, or either of them, have selected a single circumstance, or fact or assertion, and placed that before the jury as the sole cause of the plaintiff's confidence. There were not several sources of fraudulent statements, or several representations, some immaterial, some trivial in importance, some persuasive, some almost convincing. There were not several persons, some innocent, some guilty, some strangers without influence, some friends with influence, whose united assertions may have turned the scale.

IV. In reply to the first branch, appellant's sixth point, we are content to cite 2 Kent's Com. 485, 486. The instruction is substantially in the language of the text.

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The cases cited by counsel for appellant on this point, turned upon the fact, as it appeared before the court, that there did not appear to be an equal opportunity of observation and judgment. The evidence in the case at bar showed that Miller's opportunity and ability to inspect was ample. More than this; it was exercised. The following authorities show the consequence of equal opportunities, when afforded, acted upon, and improved. (*Dyer v. Hargrave*, 10 Vesey, Jr. 506; *Jennings v. Broughton*, 17 Beav. 234; S. C., 5 De Gex. M. & G. 125; *Attwood v. Small*, 6 Cl. & Fin.; *Lysney v. Selby*, 2 Ld. Raym. 1118; *Slaughter's Adm'r v. Gerson*, 13 Wall. 383.)

V. There is no conflict between the first and fifth instructions of plaintiff, on the one hand, and the sixth and seventh, on the other. They relate to distinct and different propositions. In any action or defense founded on fraudulent representations, the issues are four: First, were the representations material? second, were they false? third, did the party defrauded rely upon them? fourth, did he use any diligence or prudence in his own behalf? No necessary contradiction is involved in the giving of one instruction, which relates to a single issue, conclusive in itself, and a second instruction, which has reference to another issue, equally conclusive. Every limitation of the general proposition on which a case rests, need not be expressed in a single instruction.

*Greathouse & Blanding*, for Appellant, in reply:

Counsel filed a brief, reviewing at great length the positions taken by respondent.

I. There is no necessity for the discussion indulged in as to the difference between warranty and representation. There is no question of warranty in this case. It is a simple matter of the effect of false representations. *Peabody v. Phelps*, 9 Cal. 213, and *Hastings v. O'Donnell*, 40 Id. 148, with respect to title, are not law.

It is well settled that false representations as to title will support any appropriate form of action or defense. (*Alvarez v. Brannan*, 7 Cal. 503; *Wright v. Carillo*, 22 Id. 604, 606;

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*Parham v. Randolph*, 4 How. Miss. 435; *Watson v. Atwood*, 25 Conn. 313; *Walsh v. Hall*, 66 N. C. 238; *McClellan v. Scott*, 24 Wis. 81; *Claggett v. Crall*, 12 Kans. 393; *David v. Park*, 103 Mass. 501; *Culver v. Avery*, 7 Wend. 380.)

II. Recording acts only affect a limited class with constructive notice, and this only in certain cases. They have no effect upon and impart no notice as between immediate parties dealing with each other. They are intended merely for the protection of subsequent purchasers and incumbrancers. (*Sharon v. Minnock*, 6 Nev. 378; *McCabe v. Gray*, 20 Cal. 509; *Chamberlain v. Bell*, 7 Id. 294.)

III. The case of express and specific misrepresentations is not an exception to the rule of *caveat emptor*. It is really another and a different rule altogether. It is the rule of good faith and common honesty which, when a seller has once expressly asserted a fact, does not permit him to turn round and say, "you had no right to rely upon my assertion, but should have suspected its falsehood."

By the Court, BEATTY, C. J.:

This is an action on a promissory note. The defense is fraud and failure of consideration. The following is the substance of the answer: It is alleged that prior to March 3, 1869, plaintiff and others were owners of a pretended quartz lode, situated in White Pine county, in this state; that, being desirous of selling the same, they conveyed their respective interests to J. O. Powell, who afterwards, at the city of San Francisco, opened negotiations with defendant for the sale to him of said mine; that said Powell, on the third of March, 1869, and at divers times prior thereto, represented to the defendant that said mine was intrinsically very valuable; that a shaft was sunk on the lode to the depth of ten feet, and that the ore of said vein, at the bottom of the shaft, would assay one thousand dollars per ton; that defendant had no opportunity at that time to inspect or examine the mine, or to make test of the value of the ores therein; that he relied wholly on Powell's representations as to the depth of the shaft, and the value of the ores therein, and, so relying, concluded a bargain by which

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he agreed to pay two thousand dollars down, and give his note for four thousand dollars more; that on the third of March, 1869, Powell executed a conveyance of the mine, and defendant paid him two thousand dollars in cash, and executed the note referred to in the complaint, by which he promised to pay the plaintiff, thirty days after date, the sum of four thousand dollars in gold coin; that he afterwards paid two thousand dollars on said note; that before the payment of the remaining two thousand dollars he discovered that the representations of Powell, concerning the mine, were utterly false and fraudulent; that no shaft had been sunk on said mine, but only a little hole two and a half feet deep, in which no ore could be found that would assay more than fifty dollars per ton; that Powell's representations were false and fraudulent, and made with the express purpose of cheating and defrauding the defendant; that defendant, immediately upon the discovery of the fraud, repudiated the purchase, tendered a reconveyance of the mine, and demanded back the money he had paid; wherefore, he denies any indebtedness to plaintiff, and asks a judgment for his costs.

The cause was tried in the district court before a jury, who found a verdict for plaintiff for two thousand dollars and interest from April 3, 1869. Defendant moved for a new trial, which was refused, and he now appeals from that order and from the judgment.

The errors relied on in support of the appeal relate exclusively to the instructions of the court given to the jury at the request of the plaintiff. Before entering upon a discussion of these instructions, however, it will be necessary to state the substance of the testimony adduced at the trial.

It appears that for more than six months prior to March, 1869, Miller and Powell were both residents of the White Pine mining district, in which the Hopkins mine (the mine referred to in the pleadings) was located. A large number of mineral discoveries had been made in the district, which were then supposed to be extremely valuable. Among others, the California mine had a great reputation. The

Hopkins lode was located a short distance from the California mine, and this fact Miller knew. He had, however, never been upon the location, and only knew in a general way that it was near the California. The winter of 1868-69 and the following spring were a period of great excitement regarding the White Pine mines; numerous locations were made, and anything that showed a prospect of value was salable, especially if it was in the vicinity of a mine like the California.

Miller was a speculator in mines, engaged in buying up such locations as he thought he could sell at a profit; he had been engaged in that business for several years, and was as good a judge of the value of a mine as Powell.

Prior to January, 1869, Powell had agreed to sell the Hopkins mine to one Tolles, for six thousand dollars, provided the money was paid within a certain time. The time for payment was about to expire, and, Tolles not being able to make the payment, Miller offered, without ever having seen the mine, and without any knowledge of it, except what he had derived from Tolles, to become responsible for the payment of the six thousand dollars, if Powell would execute a conveyance of the mine, and put the deed in his hands. His object in making this offer, was to obtain a share of the profit that Tolles expected to realize upon a resale of the property to parties with whom he was then (January, 1869) in negotiation.

Miller's offer, in behalf of Tolles, seems to have been declined; at all events, nothing came of it; and after the time for Tolles to make payment had expired, Miller offered, in his own behalf, to give Powell five thousand dollars for the claim—one thousand dollars down, and four thousand dollars in sixty days. Powell concluded to accept this offer, but, in the mean time, Miller had received an unfavorable report of the mine from one Ingoldsby, with whom he had been connected in some mining transactions, and when Powell offered to make a conveyance, he retracted his offer of five thousand dollars. Miller then went to San Francisco, and Powell, also, a few days later. In San Francisco Miller sought Powell, and renewed negotiations for the

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purchase of the Hopkins mine. In the course of these negotiations, Powell made statements which were substantially embodied in a writing, which he drew up and signed and delivered to Miller before the completion of the purchase. The following is the material portion of that writing:

"The Hopkins ledge and company contains one thousand feet, located December 4, 1868, situate on the southern slope of Treasure Hill, about one thousand two hundred feet south-east from the California mine, on the same ridge. It crops out about three hundred feet, showing ore the entire distance. I have had four assays, ranging from one hundred dollars to one thousand seven hundred and sixty-one dollars and twenty-five cents. \* \* \* There is work done on it nearly every place. Shaft down on the center of the claim about ten feet deep, showing on improvement in the character of the quartz as depth is attained. The one thousand seven hundred and sixty-one dollars and twenty-five cents assay was from work at the bottom of the shaft."

Upon the receipt of this statement, and a deed conveying the mine, Miller paid Powell two thousand dollars, and executed and delivered the note upon which this action is founded. A few days later Miller and Powell returned to White Pine, and Miller requested Powell to point out the Hopkins mine to him. They went together to the ground and found only a little hole two or three feet deep on the croppings of the lode. Powell, however, said that that was not the shaft referred to in his statement; that the shaft must be filled up with snow, and, as he was not very familiar with the premises, he would send up another man to point out the shaft. The ground was at that time covered in most places with snow, and Miller, accepting Powell's explanation, and upon his urgent request, paid two thousand dollars on the note. A few days later Powell sent a man with Miller to point out the shaft; but this man took him to the same little hole that had been shown him by Powell, and which was in truth the only pretense of a shaft that had ever been sunk on the claim. Miller thereupon repudiated the purchase, tendered a sufficient deed of reconveyance, and demanded back the money he had paid.



Miller testified that he made the purchase wholly relying on the statements of Powell, and it was conclusively proved that the mine was of no intrinsic value; that no shaft had been sunk on it other than the little hole above mentioned, and that no ore could be found in or about that hole yielding an assay greater than two dollars and sixty cents per ton. Powell, who was the only witness examined on the part of the plaintiff, admitted that he had never had or made any assays from the mine, but had based his statements to Miller upon statements made to him by Tolles as to the assays, and by Fishback (the plaintiff) as to the work on the vein. There was other testimony, but nothing of consequence.

Such being the case, the court gave to the jury, at the request of the plaintiff, the following instructions:

"1. While the law affords to every one reasonable protection against fraud in dealing, it does not protect against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. The law requires the purchaser to apply his attention to those particulars which may be supposed to be within the reach of his own observation and judgment.

"If the purchaser be wanting in attention to those points where attention would have been sufficient to protect him from surprise and imposition, the maxim that the buyer must be on his guard applies.

"4. Even if Miller was actually deceived and defrauded, then if he reaffirmed the contract afterwards, with knowledge or fair means of knowledge or notice of the fraud, you should find for the plaintiff, and the payment of two thousand dollars is a reaffirmance if made with knowledge of all the facts.

"5. If the truth or falsehood of the representations might have been tested by ordinary vigilance and attention, it was Miller's own folly if he neglected to do so, and in such case you must find for plaintiff.

"6. The burden of proof in regard to every material allegation of the defense is upon the defendant. Therefore, the defendant must establish by a preponderance of evi-

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dence that the representations made by Powell were false, and the defendant relied upon such representations as the sole inducement to the purchase of the Hopkins location.

"7. The execution and delivery of the note in suit is admitted by the defendant, and the only questions for the jury to find are, whether the representations of Powell were false, and whether the defendant, Miller, relied upon the same exclusively as the inducement to the purchase of the property."

These instructions were erroneous and prejudicial to the defendant in more than one particular. By the first and fifth the maxim of *caveat emptor* is applied to a case in which it is wholly inapplicable. That rule applies when buyer and seller have equal opportunities of knowledge, and when the defect complained of is patent and obvious to the senses; but it does not apply to a case like this, where the seller makes express representations in respect to matters of which the buyer has no knowledge and no means at hand of obtaining knowledge.

In Bigelow on Fraud (67 *et seq.*) this question is largely discussed, and the authorities cited in the notes fully sustained the passage of the text in which the author says; "Every contracting party, not in actual fault, has a right, however, to rely upon the express statement upon existing fact, the truth of which is known to the contracting party who made it, and unknown to the party to whom it is made, when such statement is the basis of a mutual engagement. He is under no obligation to investigate and verify the statement, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." (p. 67.)

If, then, Miller was without actual fault, he was under no obligation to investigate and verify Powell's statements, and it would have required something more than ordinary vigilance and attention to do so. The sale was negotiated in San Francisco; the mine was more than five hundred miles distant. It is true that Miller had, for some months previous, resided in the mining district where the Hopkins claim was located; but his residence

in the district imposed no obligation upon him to examine all the mining locations within its boundaries, and it was no fault of his that he departed to San Francisco in complete ignorance of the state of development of the Hopkins lode, and of the assay value of its ores.

The proof is clear and uncontradicted, that when Miller went to San Francisco he had never seen the mine, and knew nothing about it, except what he had heard from Tolles and Ingoldsby. He had been willing, in January, for the sake of sharing in the profits of a speculation which Tolles had in view, to assist him in purchasing the mine; but this only proves that he was willing to rely on the judgment of Tolles in a matter where they were to be jointly interested; it does not prove that he had any personal knowledge with respect to the property. Subsequently, he offered five thousand dollars for the mine on his own account, but his offer was immediately retracted on hearing Ingoldsby's report. What Ingoldsby's report was does not appear, but, presumably, it was a report of the actual condition of the claim—a report of a little hole on the croppings exposing no ore of any value. Upon this report he decided that the claim was not worth five thousand dollars, and here negotiations concerning the purchase stopped. When, a month or two later, he met Powell in San Francisco, time enough had elapsed since the date of Ingoldsby's inspection for the sinking of a shaft ten feet deep; and Powell's statement that such a shaft had been sunk, as well as his statement regarding the assays, was one which Miller had as much right to rely on as any other man in San Francisco. To him, as to every one else, the distance of the mine from the place where the negotiation was pending, was a sufficient excuse for not attempting to investigate or verify the facts stated by the vendor. It was an error, therefore, to lay down for the guidance of the jury a rule which, under the facts, conclusively established by all the testimony in the case, could have no possible operation.

For the same reason, the fourth instruction was erroneous. There was no evidence tending to show that at the

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time Miller paid two thousand dollars on this note he had any knowledge, or means of knowledge, that Powell's statements as to the shaft and the assays were untrue. He had been to the locality of the mine with Powell, for the purpose of inspecting it; but there was a great deal of snow on the ground, and though the shaft could not be discovered, Powell assured him it was there, and accounted for his inability to point it out by alleging his want of familiarity with the premises, and suggesting that it was filled up with snow. There is no contradiction in the evidence as to these facts, and they show conclusively that the two thousand dollars was paid on this note, while Miller was still in ignorance of the condition of the property, and without means of knowledge, while, in other words, he was still relying on Powell's statements, and still excusable in doing so.

The sixth and seventh instructions contain a proposition that was erroneous. As we understand them, they tell the jury to find for the plaintiff, unless they are satisfied that Powell's representations were the sole and exclusive inducement to the purchase by Miller. But this is not the law. In *Kerr on Fraud and Mistake* (Bump's American ed. 74) it is said: "It is not, however, necessary that the representation should have been the sole cause of the transaction. It is enough that it may have constituted a material inducement. If any one of several statements, all more or less capable of leading the party to whom they are addressed to adopt a particular line of conduct, be untrue, the whole transaction is considered as having been fraudulently obtained; for it is impossible to say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed." (See also *Bigelow on Fraud*, 88, 89, and cases cited.)

Counsel for respondent does not deny that these instructions, taking them in the sense in which we understand them, are technically erroneous; but he contends that the error could not have prejudiced the defendant in this case, because both by his answer and testimony he shows that he was influenced in making the purchase by nothing except Powell's statements. This, however, is by no means clear. He did indeed say in his direct testimony that he

relied wholly on Powell's statement in making the purchase, but he admitted upon cross-examination some previous knowledge concerning the mine, derived from Tolles and Ingoldsby, and the jury may well have concluded that he knew, before seeing Powell in San Francisco, that the Hopkins mine was located near the California, which fact he expressly stated was one inducement to make the purchase. And this statement was perfectly consistent with his answer, in which it is alleged that defendant "relied wholly on the representations of the said Powell *with regard to the depth of the shaft and the value of the ores.*" With respect to these matters only he relied wholly upon the statements of Powell, but he does not allege, and he did not testify, that there was nothing else to induce him to make the purchase. Under the circumstances, we can not say that the error in these instructions was harmless.

The sixth instruction was also erroneous in stating that the burden was on the defendant to establish, by a preponderance of evidence, that the false representations of Powell were relied on by defendant in making the purchase. The rule of evidence is that when representations made by the seller in a case like this are shown to be material and false, the burden is upon him to show that they were not relied on by the buyer, and that the purchase would have been made without the representations. (Kerr on Fraud and Mistake, 75.)

For these errors the judgment and order appealed from must be reversed. Before taking leave of the case, however, we wish to say, in justice to J. C. Powell, that he appears from the testimony to have been himself deceived in regard to the condition of the mine, at the time of his statements to Miller. He was relying on representations made to him by his principal, the plaintiff in this action, and by Tolles. This fact acquits him of any intentional wrong. But having made positive statements which were in fact unfounded, the legal effect is the same as if they had been willfully false, and it is in that sense only that we have spoken of them as false statements.

The judgment and order of the district court refusing a new trial are reversed, and the cause remanded.

## Argument for Appellant.

[No. 977.]

## HENRY C. TOOMBS, APPELLANT, v. THE CONSOLIDATED POE MINING COMPANY AND G. G. BRIGGS, RESPONDENTS.

**CONDITIONAL AGREEMENT—VENDOR'S LIEN.**—In consideration of a settlement for extra work done by plaintiff, and of a conveyance from him to the Consolidated Poe Mining Company, of his interest in a quartz mill, the company agreed to pay him a certain sum of money out of the first net proceeds of ores, from its mines; crushed and reduced at its mill: that the amount should not be a debt otherwise collectible of the company, until there were net profits, and then only to the extent thereof. There were no net proceeds derived from the working of the mine: Held, that plaintiff had no right of action for the money mentioned in the agreement, or for the enforcement of a vendor's lien.

**APPEAL** from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

*W. Webster and W. L. Knox*, for Appellant:

I. The laws of this state give a vendor of real estate a lien on the property sold, for the purchase money, or any part thereof, remaining unpaid after a conveyance has been made to the vendee, and the lien is good against all persons succeeding to the rights of the vendee, who had notice. (*Sparks v. Hess*, 15 Cal. 186; *Chance v. McWhorter*, 26 Ga. 315; 14 Abb. 57, sec. 1197; 7 Ohio, 222; 14 Abb. 57, sec. 1203; *Truebody v. Jacobson*, 2 Cal. 286.)

II. A taking vendee's note, or an extension of time of payment, is no waiver of the vendor's lien. (*Truebody v. Jacobson* 2 Cal. 286; 14 Abb. U. S. Dig., secs. 1100; 1106; 21 Cal. 173; 14 Ala. 169; 5 Id. 397; 1 Black Ind. 46, 216; 3 Bibb. 183; 4 B. Mon. 131; 6 Id. 67, 74; 4 N. J. Eq. 251; 2 Bland, 626; 2 Johns. N. Y. Ch. 308; 21 Vt. 271; 14 Abb. Dig. 57, sec. 1194; *Ott v. King*, 8 Gratt. 224; *Walker v. Sedgwick*, 8 Cal. 368; 2 Story Eq. Jur. 1220.)

III. In this case, there has been no express or other waiver of plaintiff's lien on the property sold. So long as the vendee was endeavoring in good faith to work its ores and realize the means for payment of this balance due,

## Argument for Respondent.

plaintiff could not enforce the payment of the debt; but when it abandoned its efforts to that end, and suffered the property to go out of its control, then the plaintiff, under the contract of sale, might resort to the remedy of enforcing his vendor's lien. (2 Parsons Cent. 686, 675, 677; *Wilhelm v. Fimple*, 31 Iowa, 131; *Short v. Stone* 8 Q. B. 358; *Elderton v. Emmens*, 6 C. B. 160.)

IV. A sub-vendee, with notice, takes the estate *cum onere*. (*Parker v. Foy*, 43 Miss. 260.)

The contract of waiver must be inconsistent with the existence of the lien. (2 Story Eq. Jur. secs. 1225, 1226, note.)

V. The doctrine of equity is, that a vendor of real estate, either selling, or both selling and conveying the property without receiving payment of the purchase money, retains a lien upon it as security for such purchase money, or so much of it as remains unpaid. (*Farrar v. Winterton*, 5 Beav. 1; *Burns v. Taylor*, 23 Ala. 255; 2 Story Eq., secs. 1216, 1218, 1220; *Briscoe v. Bronaugh*, 1 Tex. 326; 1 Hilliard on Mort. 622, sec. 16.)

VI. The law presumes an intention to retain a lien, and imposes upon the vendee the burden of proving the contrary. (*Teed v. Carruthers*, 2 Y. & Coll. Ch. 31.)

If the purchaser might learn the existence of the lien by examining the first vendee's deed, he is chargeable with notice of such lien. (*Manley v. Slason*, 21 Vt. 271; *Honore v. Blakewell*, 6 B. Mon. 67; 1 Hilliard on Mort. secs. 31, 32.)

C. S. Varian, for Respondent Briggs:

I. The "settlement" is the mutual agreement of the parties that two thousand five hundred and seventy-five dollars is due for extra work on their joint property; that the defendant's company will pay it to plaintiff in a certain way and out of certain funds, contemplated and designated by both of the parties, without fraud, and with full and equal knowledge of all the facts and circumstances.

In no sense can this settlement be said to fix the designated sum as a part of the purchase price. (*Patterson v. Edwards*, 29 Miss. 67.)

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II. The plaintiff expressly waived any claim upon the property by designating a fund. This stipulation was an act manifesting his intention to discharge the land. (2 Washburn R. P. 90 *et seq.*; Walker's Am. L. 315; *Clark v. Hunt*, 3 J. J. Marsh, 554; *Blackburn v. Gregson*, 1 Bro. C. C. 424; *Phillips v. Saunderson*, 1 S. & M. (Ch.) 462; 2 Crabbe Real Prop. 853; *Coote Mort.* 219; 2 Hilliard on Mort. 696; *Selby v. Stanley*, 4 Minn. 65; *Daughaday v. Paine*, 6 Id. 450.)

III. The creditor, or subsequent purchaser, must have notice that a secret trust can not be enforced against him. (*Bagley v. Greenleaf*, 7 Wheat. 46.)

To operate as a notice, the conveyance must have been recorded. (1 Comp. L. 252, 253.) Where notice is claimed through the deed, by its recital of unpaid purchase money, the burden of proof is on the party asserting lien; consequently it must be alleged. (*Hilliard on Mort.* 684; *McAlpine v. Burnett*, 23 Tex. 649; *Peru Bridge Co. v. Hendricks*, 18 Ind. 11.)

By the Court, LEONARD, J.:

This is a suit to enforce a vendor's lien upon a certain quartz mill and mill-site. The Poe Company, a corporation, and defendant, Briggs, demurred separately to the complaint. Both demurrers were sustained, and as to defendant, Briggs, the suit was dismissed. Plaintiff was granted leave to amend his complaint as to the Poe Company, but refusing to do so, the suit was dismissed as to that company also. If we mistake not, a consideration of one of the many points made will prove decisive of the appeal. From the complaint we gather the following facts:

On the sixth day of August, 1873, the owners of the Consolidated Poe Mining Company, then unincorporated, entered into a written contract with plaintiff, whereby it was agreed that the latter should build a quartz mill, at an estimated cost of ten thousand dollars, for the purpose of working the ores of the company's mines, the mill, when completed, to be the property of plaintiff and the members of the Poe Company. Subsequently, the Consolidated



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Poe Mining Company was incorporated under the same name, with plaintiff's consent. Plaintiff built the mill, and, after the incorporation, it was accepted by the proper officers of the company. Plaintiff was paid the estimated cost, and by an instrument, under seal, called therein a "deed and act of settlement between the parties," it was agreed, on the third day of December, 1873, that the mill had cost five thousand dollars more than the original estimate, and, in satisfaction of that amount, the following stipulation was inserted in, and made a part of, the conveyance from plaintiff to the Poe Company, to wit:

"Said first party (Poe Company) hereby agrees and covenants that out of the first proceeds of crushing and reducing ores of gold and silver in said mill, from its said mine, after the payment of the expenses of working its said mill and mine, it will pay to the second party (plaintiff); his heirs or assigns, the sum of two thousand five hundred and seventy-five dollars, in United States gold coin, with interest thereon until the payment of such interest and principal of the note of — per centum per month from date of these presents; but such sum of two thousand five hundred and seventy-five dollars shall not be a debt otherwise collectible of the first party, until the proceeds of its mill and mine, over expenses, will pay such sum and interest, or part thereof, and then only to the extent of such part over such expenses. In consideration of the foregoing covenants of the first party, and the covenants of the second party, in said written instrument; and the settlement herein made and contemplated, the second party hereby bargains, sells, grants, and conveys unto the first party all the right, title, interest, and estate to said stamp quartz mill and all the machinery thereof," etc. Then follows a conveyance of plaintiff's right of possession and occupation in and to the lands occupied by the parties for milling and mining purposes.

Thus it appears that so far as the extras are concerned (and this suit is to enforce a vendor's lien for them only), the consideration of the conveyance was the settlement stated; that is to say, it was the agreement on the part of

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the Poe Company to pay plaintiff the sum of two thousand five hundred and seventy-five dollars out of the first net proceeds of ores from its mine, crushed and reduced at its mill; and, on the part of the plaintiff, that said sum should not be a debt otherwise collectible of the Poe Company, until there were net profits, and then only to the extent thereof. The company agreed to pay, and the plaintiff to receive, the amount agreed upon, out of the net proceeds, and not otherwise. If there should be no such proceeds, nothing was to be due or payable; and, outside of the original estimate, the ten thousand dollars which were paid, that agreement and the rights given thereby, formed the consideration of the conveyance. Plaintiff took his chances upon the net proceeds, and the company made itself liable in a certain event only.

It is admitted that there have been no proceeds after payment of the expenses; and, more than that, it appears that the proceeds have fallen far short of paying the actual expenses.

Such being the case, it is plain that there is nothing due or payable from the company to plaintiff, unless there are facts alleged which relieve plaintiff from the consequences of his agreement, and enable him to pursue the remedy now sought, as he might have done, if the transaction had been an ordinary sale and purchase without payment of the purchase money.

We express no opinion as to what plaintiff's rights or remedies would have been, if the inability to pay from the net proceeds had been caused by the fault of the company, because that is not alleged or claimed. It was the duty of the company, under the covenants stated in the deed, to work the mine, and by proper means extract the gold and silver from the ores. It is alleged that both parties fully believed the sum of two thousand five hundred and seventy-five dollars and interest, besides working expenses, would be realized from the ores, but that they proved very base and refractory, and that both plaintiff and the company were deceived; that, contrary to the expectations of both parties, the ores were more refractory and base than any

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Opinion of the Court—Leonard, J.

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others on the Pacific coast; that the company, after expending large sums of money in tests and experiments, and in building furnaces and other appliances for the reduction of said ores, from December, 1873, to and including the summer of 1876, abandoned further efforts to work its ores and mines; that the company not only expended large sums of money in working the mine and reducing the ores, but that, in time, it became largely indebted for supplies, labor, and money, expended in its business of mining and working ores; to secure which it mortgaged its mines, and the mill and mill-site in question, for about five thousand dollars; that being unable to pay said mortgage indebtedness or any part thereof, it suffered a sale of its entire property under an order and decree of a competent court, on the seventh day of March, 1878, at the suit of defendant, Briggs, for the sum of eight thousand and nine dollars; that the company is hopelessly insolvent, being largely indebted to other persons; that for the purpose of complying with its covenants, plaintiff has waited until all reasonable assurance of receiving payment in the manner agreed, and from the sources stipulated, has ceased, and until the company, by its own acts and inability to pay, has been deprived of its means of complying with its covenants to pay plaintiff from the profits and proceeds of its mine and mill.

The above are all the facts stated, from which it is, or can be, claimed that plaintiff has a right of action either for money due, or for the enforcement of a vendor's lien. If, under the contract, plaintiff has no right of action to recover a money judgment, it follows, of course, that he can not maintain this suit to enforce the lien claimed. The existence of a debt due as purchase money, is a condition precedent to a right of action to enforce the lien.

It is not alleged, nor does it anywhere appear, that the Poe Company failed to do anything which it should have done, or did anything which it ought not to have done under its contract. There is no allegation of fraudulent acts, or even of errors in judgment. It worked its mine, and reduced its ores, as it agreed to do. In so acting, debts were contracted which it was unable to pay, and the result

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Point decided.

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was a forced sale of its property. Nothing appears which indicates aught but an honest desire and a long-continued effort on its part to carry out its contract. The property was sold as stated, but no fault is ascribed to the company is being unable to avert that disaster.

It is alleged that, after working the mine and running the mill some three years, further efforts were abandoned; but it is not charged that the company, under the circumstances, ought to have continued its work, or that it could have done so with profit.

Under the contract, the only condition that could make the claim upon which this suit is based an enforceable debt does not exist, and no facts are stated which relieve the plaintiff of the necessity of showing the existence of that condition, in order to maintain his suit against either defendant.

The complaint does not state a cause of action, and the judgment appealed from is affirmed.

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[No. 956.]

**THE GOLDEN FLEECE GOLD AND SILVER MINING COMPANY, RESPONDENT, v. THE CABLE CONSOLIDATED GOLD AND SILVER MINING COMPANY, APPELLANT.**

**STATEMENT MUST BE SERVED IN TIME.**—A statement, on motion for new trial, must be served within the statutory time, or it will not be considered on appeal.

**IDEM—EVIDENCE AS TO SERVING MUST BE PRODUCED IN DISTRICT COURT.**—The supreme court, on appeal, has no right to consider any evidence as to the time when the statement on motion for new trial was served, except such as was produced in the district court and made a part of the record of the case.

**APPEAL from the District Court of the Second Judicial District, Washoe County.**

The facts appear in the opinion.

C. H. Belknap, for Appellant.

*R. M. Clarke, and N. Soderberg, for Respondent.*

By the Court, BEATTY, C. J.:

This case was formerly here on appeal, and was remanded for a new trial. (12 Nev. 312.)

A re-trial in the district court has again resulted in a verdict and judgment for the plaintiff, and the defendant again appeals from the judgment and from the order overruling its motion for a new trial.

The respondent, at the beginning of the first term after the filing of the transcript on this appeal, moved to strike out the statement on motion for a new trial, and (in case that motion was granted) to dismiss the appeal.

The first ground of the motion to strike out was, that the statement was not served in time.

The law requires the statement to be filed and served on the same day. (Pr. Act, sec. 197.) In this case it was filed on July 1, which was the last day for filing, and served, as appears by plaintiff's acknowledgement of service indorsed thereon, the following day. No amendments were proposed by the respondent, and the district judge, in passing upon the motion for new trial, found as a fact that the statement was not filed in time.

This being the state of the record, counsel for appellant asked leave to supply proof in this court that the statement was in fact served on the first day of July. We permitted him to submit such proofs, and in the mean time overruled the motion to strike out.

Upon further consideration we are satisfied that we have no right to consider any evidence as to the time when the statement was served, except such as was produced in the district court, and made a part of the record of the case. (See 31 Cal. 108; 36 Id. 521.)

If, therefore, the proofs submitted by the parties in this court had been sufficient to satisfy us that this statement was, in fact, served on July 1, we should have been obliged to disregard them. But they do not. On the contrary, they tend to confirm the truth of the record, and the finding

Points decided.

of the district court; and, for both reasons, the motion to strike out ~~must~~ prevail.

The statement being out of the case, and no error appearing in the judgment roll, the judgment and order appealed from must be affirmed.

It is so ordered.

[No. 963.]

**ADA ALLEN, RESPONDENT, v. JAMES REILLY,  
APPELLANT.**

**ACTION ON PROMISSORY NOTE—PLEADING—AVERMENT.** "LAWFUL HOLDER," IMMATERIAL.—In an action on a promissory note, the averment in the complaint, that plaintiff "is now the holder and owner of said promissory note," is immaterial.

**WHEN CASE MAY BE SET FOR TRIAL.**—In the absence of any rule of court to the contrary, a case may be set for trial at any time during the term, if it is at issue upon questions of law or fact, although the suit was not commenced until after the beginning of the term.

**CHANGE OF VENUE—BIAS OF JUDGE.**—Bias or prejudice on the part of the judge constitutes no legal incapacity to sit on the trial of a cause, and is not sufficient ground to authorize a change of the place of trial.

**CONTINUANCE—PRESENCE OF WITNESS AT TRIAL—ERROR CURED.**—Where a continuance is asked for, upon the ground of the absence of a material witness, and the witness afterwards appears and testifies upon the trial: *Held*, that the presence of the witness cured the error, if any was committed by the court, in refusing to grant a continuance.

**IDEM—NO INJURY.**—Defendant moved for a continuance, on the ground that H. Mau, an absent witness, would testify to a payment of five hundred dollars upon the note sued on. The defendant, testifying in his own behalf, declared that he did not consider the payment of this five hundred dollars to be made upon the note. The affidavit of the absent witness was presented by the plaintiff, denying all knowledge about the payment of the five hundred dollars: *Held*, that defendant was not injured by the absence of the witness.

**EVIDENCE OF OTHER INDEBTEDNESS.**—A payment of five hundred dollars to plaintiff being shown: *Held*, that the court did not err in allowing plaintiff, in rebuttal, to testify to the existence of other indebtedness due from the defendant to the plaintiff at the time of said payment.

**MISTAKE IN FAVOR OF APPELLANT.**—An appellant cannot complain of a mistake in his own favor, as to the amount of interest due on a note.

**FORM OF VERDICT—AMOUNT OF INTEREST.**—Where the verdict of the jury, although irregular in form, is sufficient to enable the court to understand their intention, and the judgment is entered in accordance therewith, except as to the rate of interest on the note: *Held*, that the court had

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the right to allow interest on the amount found due by the jury at the rate expressed in the note.

CONFLICT OF EVIDENCE.—Rule as to weight and conflict of evidence enforced.

INDEMNITY UPON LOST NOTE.—Indemnity is not required in an action upon a lost non-negotiable note.

APPEAL from the District Court of the Sixth Judicial District, White Pine County.

*C. J. Lansing*, for Appellant.

*A. M. Hullhouse*, for Respondent.

By the Court, LEONARD, J.:

It appears from uncontradicted allegations of the complaint in this action, that on the third day of May, 1875, the defendant for a valuable consideration, at Hamilton, in this state, executed and delivered to plaintiff his certain promissory note in writing, by which he then and there promised, one day after date, to pay plaintiff the sum of one thousand five hundred dollars, gold coin of the United States, with interest thereon at the rate of two and one half per cent. per month, from date until payment.

This action was brought to recover principal and interest. Defendant pleads full payment and satisfaction, and this is the only issue raised by the answer.

Plaintiff alleges in her complaint, that she "is now the holder and owner of said promissory note," and defendant denies that "plaintiff is the lawful owner or holder of said note." But the allegation in the complaint just stated was only an averment of a conclusion of law. It was immaterial, and might have been omitted. It was merely a legal conclusion which necessarily followed from the other facts stated in the complaint, and a denial of that averment did not raise a material issue. (*Wedderspoon v. Rogers*, 32 Cal. 572; *Poorman v. Mills & Co.*, 35 Id. 121; *Fleury v. Roget*, 5 Sandf. 246.)

Besides, the defendant only denied that plaintiff was the lawful owner or holder, thus admitting that she held and owned it unlawfully, evidently upon the theory that it had been paid. We repeat, then, that the only issue was the

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one above mentioned. Upon the pleadings, plaintiff would have been entitled to judgment, had not defendant alleged payment, the proof of which he was bound to establish in order to defeat the action. It follows that the court did not err in denying the motion for a nonsuit.

The jury found the following verdict:

"We, the jury in the above-entitled cause, find for the plaintiff in the sum of nine hundred and fifteen dollars, gold coin, with interest on said sum at the rate of (1 1-3) one and one third per cent. per month, from the third day of May, 1875, to this date and until paid.

PATRICK KEOGH, FOREMAN.

Dated October 9, 1878.

"We agree to one thousand four hundred and seven dollars and fifty cents. PATRICK KEOGH, Foreman."

The court ordered judgment for one thousand four hundred and seven dollars and fifty cents, with interest from date upon nine hundred and fifteen dollars, at the rate of two per cent. per month.

The September term of the district court of White Pine county commenced, according to law, September 2, 1878, and this action was brought September 4. On the ninth of the same month, before the defendant had appeared in the action, the court "Ordered that all cases that come at issue between this date and the seventh of October next be set for trial on said last named day." This case was placed on the court's calendar by the clerk on the fifth day of October, and on the seventh of the same month, the following day was fixed for the time of trial.

When defendant filed his answer, on the thirteenth of September, J. B. Barker, Esq., was his attorney in the case. A few days thereafter Barker went to California on account of sickness, and was absent at the time of trial. On the day fixed for trial, C. J. Lansing, Esq., appeared as defendant's attorney, and was so entered of record. He then moved to set aside the orders setting the case for trial on the seventh and eighth of October, and to reset it for some other day, but upon what grounds the motion was made does



not appear. The entire motion was overruled, and thereby, it is claimed the court erred. We are not aware of any statute which prohibits the setting of cases for trial at any time during the term at which they are commenced, if they are at issue upon questions of law or fact, although not commenced until after the beginning of the term; and if the action of the court in setting the case for trial was inconsistent with its established rules of practice, we are not advised of the fact, and in the absence of any showing to the contrary, we must presume in favor of the regularity of the proceedings, and the correctness of the rulings of the court below.

Defendant then moved for a change of venue, on the ground that he could not have a fair and impartial trial before the judge presiding, because he and defendant had been, and then were, bitter personal enemies. The motion was supported by the defendant's affidavit setting out the facts just stated, but it was denied by the court. The judge was not disqualified under the statute. (Comp. L. 950.) It is held in California that bias or prejudice on the part of the judge, even in a criminal case, constitutes no legal incapacity to sit on the trial of a cause, and is not sufficient ground to authorize a change of the place of trial. (*The People v. Williams*, 24 Cal. 33.) And so it was held in a civil case. (*McCauley v. Weller*, 12 Id. 523.) This is especially true when the jury finds the facts; for, if a court errs in matters of law, its errors may be corrected as effectually on appeal taken by an enemy as by a friend. Besides, the presumption is, that the court will not be influenced by the animosities of the judge, if such he has.

But this was a case where it was proper for the court to act upon its own personal knowledge. The judge knew his feelings towards the defendant better than any one else, and he had a right to act upon what he knew. And if it was necessary, in support of the judgment, we would presume that he acted on his own knowledge, that at the time of the trial he had no animosity against the defendant.

(*Table Mountain M. Co. v. Waller's Defeat M. Co.*, 4 Nev. 222.)

The defendant next filed his affidavit, and moved thereon for a continuance until October 18, 1878. The motion was overruled, and the cause was tried October 8.

It is unnecessary to state the entire contents of the affidavit for continuance. The ground stated was the absence of two witnesses, residents of Eureka county, forty miles from the place of trial, in White Pine county, named William Pardy and Henry Mau.

Defendant stated in his affidavit that he expected to prove, and could prove by Pardy, that "he, defendant, on the twenty-eighth day of March, 1876, had a settlement with plaintiff in full of all demands then existing between them; that the defendant then paid the plaintiff in full the balance that was then due on the said promissory note, and that the plaintiff accepted and received the same in full satisfaction of said note, and that defendant then and there, to wit, at Hamilton, in White Pine county, Nevada, requested and demanded of the plaintiff the said promissory note, and that plaintiff, in the presence of said Pardy, told him, and declared, that she had destroyed the said promissory note, and had burned the same, and that the same was no longer in existence." The statement shows, however, that the desired witness, Pardy, was present in court and testified for the defendant. It appears that on the twenty-eighth of March, 1876, he was agent of the White Pine County Bank, but it is not shown that he had any connection therewith at the time of the trial, or that he had the charge or custody of the books and papers of the bank, or could produce them in court, if they were desired or required. But defendant did not state in his affidavit that the books or papers of the bank were necessary for any purpose, in connection with the testimony of Pardy or otherwise. He did state that, "after the said case was set for trial, he sent a telegram to the said town of Eureka, requesting the said Pardy to come to Hamilton \* \* \* with his books and papers that related to the matters in controversy in this action, and that

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said Pardy refused to come to Hamilton, the place at which this action was set for trial."

That was stated, however, only for the purpose of showing diligence. It may be presumed, that at the time the telegram was sent, he thought he wanted the books and papers referred to; but when he made his affidavit he did not say he wanted them, or that they were necessary for his defense, or that he could not safely proceed to trial without them, or that they contained anything of importance to him, or that they were necessary in connection with Pardy's testimony, in order that he might prove by the latter the facts stated in the affidavit. In a word, the court had no reason to think that the defendant wished or required the books and papers of the bank, or that Pardy had access to them or control over them. Nor does it anywhere appear that they were necessary. No objection was made by plaintiff to any question propounded to Pardy as to the affairs of plaintiff and defendant with the bank. He was permitted to testify to what he knew, and it does not appear that he required any books or papers, in order to make his statement full and complete.

Such being the facts, if the court erred, it did so in denying the motion because of the absence of Pardy alone; and his presence as a witness for defendant cured that error, if such it was.

Defendant also stated in his affidavit, that he expected to prove, and could prove by Henry Mau, that "on the fifteenth day of March, 1876, he (defendant) paid plaintiff five hundred dollars, and in part payment of the promissory note described in the complaint."

Should it be admitted that the defendant used reasonable diligence in relation to the desired witness, Mau, and that, from the affidavit, as it was written, the court erred in refusing a continuance, still it is undeniable that the defendant suffered no injury thereby. There are two reasons for this conclusion. When a witness upon the trial, he testified as follows:

"At the time I paid her (plaintiff) the five hundred dollars, March 15, 1878, nothing was said about the note, or

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paying it on the note. I said nothing about the note; for I supposed it was burned. I merely gave her the money. \* \* \* I took no receipt from her against the note. \* \* \* None of this money was given to plaintiff as payment upon the note. I did not consider it payment of the note. I merely made her a present \* \* \* of the five hundred dollars."

And in the second place, in the counter affidavit of Henry Mau, used and referred to on motion for a new trial, affiant stated that, he "never informed defendant that he knew, or would testify, that defendant paid to plaintiff five hundred dollars or any sum of money, on said promissory note, at any time or place; that he had no knowledge whatever that any sum of money was ever, at any time, paid by defendant to plaintiff upon said note." Besides, plaintiff admitted receiving the five hundred dollars, but claimed that it was paid on account of other indebtedness.

From the foregoing, it is too plain for discussion that the absence of Mau was no injury to the defendant. Other facts are disclosed by the record which justify the action of the court, but we deem it unnecessary to advert to them.

Nor did the court err in permitting plaintiff to testify, in rebuttal, that at the time of the conveyance of defendant's interest in the Boston mine; at the time of the payment of five hundred dollars, and at the date of settlement, March 28, 1876, defendant was indebted to her outside of the note, to which indebtedness those payments, as claimed, were intended to apply. The only issue raised by the answer, as before stated, was whether or not the note had been paid. Defendant claimed that certain moneys, a part of which plaintiff admitted receiving, were paid in satisfaction of the note, or the indebtedness evidenced thereby; while plaintiff insisted that all sums received by her subsequent to execution of the note were intended as payments of other indebtedness then existing.

It is true that defendant testified upon cross-examination that he did not pay the five hundred dollars upon the note, or make the conveyance in part satisfaction thereof; on the contrary, he admitted that nothing was said about the note;

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still, his effort at the trial was to apply those sums as part payment of the note, and counsel, in his brief, now claims that the five hundred dollars were paid in part satisfaction of the indebtedness expressed in the note.

Under such circumstances, it was perfectly proper for plaintiff to testify that the sums paid subsequent to the execution of the note were not paid or received upon the note, if such was the fact, and to strengthen the probability of the truth of the assertion by showing the existence of other indebtedness to which the payments might have been and were applied.

The jury found a verdict for plaintiff for nine hundred and fifteen dollars, and interest thereon at the rate of one and one-third per cent. per month from the date of the note. How they arrived at the conclusion that plaintiff was entitled to that rate of interest only, will probably never be known. If any portion of the note was unpaid, she should have received interest at two and one-half per cent. per month upon that amount, because the answer admitted that that was the rate expressed in the note, and testimony to the contrary was inadmissible. Besides, defendant testified that, he thought "the note drew only two per cent. from date until paid."

But at any rate, the jury's mistake was in favor of the defendant, and he can not complain. The whole amount of recovery was not at first expressed in the verdict, as required by section 178 of the Civil Practice Act, and upon motion of plaintiff's attorneys the court resubmitted the case to the jury. Thereupon the same verdict was returned, with the following words added: "We agree to one thousand four hundred and seven dollars and fifty cents," and judgment was entered thereon as before stated.

The court's duty was to resubmit the case, and although the second verdict is, as claimed by counsel for defendant, somewhat irregular as to form, still, there is no difficulty in ascertaining the jury's intention, and the judgment entered is in accordance therewith, except as to the rate of interest, after judgment, upon the principal sum found due; and as to that, the court very properly disregarded the verdict;

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because, by statute, plaintiff was entitled to interest upon nine hundred and fifteen dollars, at the rate expressed in the note, and the jury could not take away that right.

The testimony was very conflicting upon the question of payment of the note, and we can not, therefore, disturb the judgment upon the ground that the verdict is not sustained by the evidence upon that point. One other question remains to be considered. It is said that, "the evidence is insufficient to sustain the verdict, and that the verdict is against law, because the note sued on was lost, and no bond of indemnity was offered or given."

The complaint does not contain a copy of the note, and it nowhere appears that it was negotiable, or if negotiable, that it was indorsed by plaintiff. Mr. Hillhouse, attorney for plaintiff, testified that "plaintiff gave him the note sued on, in July or August, 1876; that he lost it; that it was long past due when he received it from plaintiff." It is not shown whether the loss was before or after the action was commenced, although it seems from the complaint that it was after, for it is there alleged that plaintiff was then "the holder and owner" thereof, as before stated, and the complaint is verified.

There is authority for holding that, in an action against the maker of a lost negotiable note, which was past due at the time of the loss, the defendant is not entitled to claim indemnity. (*Thayer v. King*, 15 Ohio, 246.) But upon that question we express no opinion.

Indemnity is not required in an action upon a lost *non-negotiable* note. (Story on Prom. Notes, sec. 106; *Wilder v. Seelye*, 8 Barb. 409; *Lazell v. Lazell*, 12 Vt. 449; *Deper v. Wheelan*, 6 Blackf. 485; *Hough v. Barton*, 20 Vt. 455; *Rowley v. Ball*, 3 Cow. 313; *Blade v. Noland*, 12 Wend. 173; *McNair v. Gilbert*, 3 Id. 344; *Pintard v. Tackington*, 10 Johns. 104.)

Inasmuch as it is not shown affirmatively that the note was negotiable, we will not presume it was of that character. See authorities last cited.

It appearing by stipulation of counsel that the plaintiff, Ada Allen, has died since the commencement of this action,

## Argument for Appellants.

in pursuance of said stipulation, it is ordered that Katie Riley, administratrix of the estate of Ada Allen, deceased, be and she is hereby substituted as a party plaintiff and respondent herein, and the judgment is affirmed.

[No. 992.]

JOHN S. CHILD, RESPONDENT, v. SAMUEL SINGLETON AND REBECCA SINGLETON, APPELLANTS.

**HOMESTEAD—DECLARATION OF, MUST BE RECORDED—RIGHT OF HUSBAND TO MORTGAGE.**—A homestead, in fact, in the absence of a recorded declaration that it has been selected as such, can be mortgaged by the husband alone without the consent of his wife.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The facts are stated in the opinion.

*A. C. Ellis and M. Tebbs*, for Appellants:

A mortgage, under our statute, is not a conveyance of lands, nor does the mortgagee take any estate in the land mortgaged. He acquires a lien upon it simply for the security of his demand, which can only be enforced by a judgment for the sale of the property mortgaged, and a sale in pursuance of the judgment. (*Bludworth v. Lake*, 33 Cal. 255; *Grattan v. Wiggins*, 23 Id. 16; *Nagle v. Macy*, 9 Id. 426; *McMillan v. Richards*, Id. 365.)

A mortgage is a mere incident to the debt which it secures, and follows the transfer of the note with the full effect of a regular assignment. (*Ord v. McKee*, 5 Cal. 515; *Bennett v. Solomon*, 6 Id. 134; *Peters v. Jamestown B. Co.*, 5 Id. 335; *McMillan v. Richards*, 9 Id. 365; *Koch v. Briggs*, 14 Id. 256; *Haffley v. Maier*, 18 Id. 13; *Kidd v. Teeple*, 22 Id. 255; *Dutton v. Warschauer*, 21 Id. 609.)

It can not, therefore, be claimed that the wife has been deprived of her homestead by the execution of a mortgage by the husband alone, when, before condition broken

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and before a sale or decree, she pursues the statute, and files her declaration of homestead.

*R. M. Clarke and N. Soderberg*, for Respondent:

The right to the homestead exemption dates from the filing, for record, of the declaration. The enforcement of this salutary provision is indispensable to the protection of creditors, and the terms of the provision are mandatory. (Smyth Homestead and Exemptions, secs. 55, 56, 269; 13 Iowa, 122; *Bartholomew v. Hook*, 23 Cal. 278; *Manning v. Dove*, 10 Rich. (S. C.) L. 403; *Davenport v. Alston*, 14 Ga. 271; *Commercial Savings Bank of San Jose v. Daniel Corbett et al.*, 5 Sawyer, 543; *In re Reed*, Id. 410; 18 Id. 482; 26 Id. 140, 370; 36 Cal. 11.)

By the Court, BEATTY, C. J.:

Prior to the year 1874, the defendants were husband and wife, and were residing on a farm in Douglas county, which was, in fact, their homestead. On the twenty-fourth of January, 1874, and before either of the defendants had recorded a declaration of homestead, the husband mortgaged the premises to the plaintiff. This action having been commenced to foreclose the mortgage, the wife thereafter recorded a declaration of homestead, and the homestead claim is set up as a defense to the suit.

The district court decreed a sale of the mortgaged premises in satisfaction of plaintiff's demand. The single question raised by defendants' appeal is, whether a homestead, in fact, in the absence of a recorded declaration that it has been selected as such, can be mortgaged by the husband alone without the consent of his wife.

We can not agree with counsel for appellants, that the case of *Hawthorne and wife v. Smith*, 3 Nev. 182, is precisely in point. The question there was as to the manner of protecting the homestead against forced sale at the suit of an attaching creditor. Here the question is as to the disability of the owner to make a voluntary alienation of the homestead. For the power to sell undoubtedly includes the power of mortgage, and if the husband in this case had



the power to sell his homestead, without the consent of his wife, at any time prior to the filing of a declaration of homestead, then there can be no doubt that he had the power to subject it to the lien of a mortgage, and the mere fact that a sale of the property under judicial process has become necessary for the satisfaction of such lien, does not bring the case within the doctrine of *Hawthorne v. Smith*. If a mortgage is valid when executed, the vested rights of the mortgagee can not be defeated by any subsequent acts of third parties. In the case referred to it was held that an attaching creditor had no greater rights, as against the occupants of the homestead, than creditors at large, and that a sale at his suit could be defeated by the filing of a declaration of homestead at any time before sale. But it was not decided, nor was it intimated, that the making of such declaration would defeat a prior voluntary alienation by the owner of the property.

This, then, is the question to be decided: Did Singleton, before the filing of his wife's declaration, have the power to sell their homestead without her consent?

As the law stood, at the date of the adoption of the constitution, it is clear that he would have had no such power. (Stats. 1861, 24; *Goldman v. Clarke*, 1 Nev. 607.) Residence alone was then sufficient to constitute a legal homestead, and the husband had no power to sell or encumber it without the consent of his wife.

But by section thirty of article four of the constitution, the legislature of the state was enjoined to pass laws providing for the recording of homesteads, and in pursuance of this injunction, the law of 1865, entitled "An Act to exempt the homestead and other property from forced sale in certain cases," was passed. (Comp. L. 186, *et seq.*)

This law, while it does not expressly repeal the territorial law of 1861, has, in the opinion of the court, the effect of repealing it by implication. This being so, it follows that we have no other law on our statute book defining what a homestead is; and since it is only the homestead "provided by law" that can not be alienated without the consent of the owner's wife (Const., art. IV., sec. 3), it follows that

## Argument for Appellants.

the homestead of these appellants, not having been selected by a recorded declaration of the claim (Comp. L. 186), was, at the date of the mortgage to plaintiff, subject to alienation by the husband alone. (See *Smith v. Shrieves*, 13 Nev. 303; *O. and S. Bank of San Jose v. Corbett*, 5 Saw. 547; Smyth on Homestead Exemptions, sec. 269, and authorities there cited.)

For these reasons the judgment of the district court is affirmed.

[No. 1003.]

**JOSEPH TOGNINI, ET AL., APPELLANTS, v. MATTHEW KYLE, RESPONDENT.**

**CLAIM AND DELIVERY OF PERSONAL PROPERTY—FRAUD MAY BE INFERRED.**—Where fraud is charged, express proof is not required, but it may be inferred from strong presumptive circumstances.

**ISSUE—SUFFICIENCY OF EVIDENCE TO ESTABLISH FRAUD.**—The evidence reviewed and held sufficient to show that the sale of the personal property was made with intent to defraud creditors, and that the vendees participated in the fraud of the vendor.

**CONFLICT OF EVIDENCE.**—Rule as to weight and conflict of evidence enforced.

**INSTRUCTION—FALSE ENTRY IN BOOKS—TRANSACTION FRAUDULENT.**—The court instructed the jury as follows: "If the jury believe from the evidence that the transaction between plaintiffs and Nicholas Luchessi, in relation to the order for the payment of Biagio Luchessi was fraudulent, and there was a false entry upon plaintiffs books to show payment of this order, and this transaction was intended to hinder, delay, or defraud Hansen, then you must find for the defendant." Held, that, when taken and considered with other instructions, it could not have misled the jury.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

*Bishop & Sabin*, for Appellants:

I. There was no evidence to sustain the verdict. It was evidently rendered under a misapprehension of the law, and of the evidence, or as the result of prejudice. In either event a new trial should be ordered. (*Quint v. Ophir*, 4

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Nev. 304; Hilliard on New Trials, 461, sec. 27; *Tompkins v. Corry*, 14 Ga. 118; *Williams v. Brasfield*, 9 Yerg. 270; *Levingsworth v. Fox*, 2 Bay, 520; *Potter v. Carney*, 8 Cal. 574; Hilliard on New Trials, 276, sec. 34.)

II. It was error in the court in giving defendants instructions two and three. It was error to direct the attention of the jury to a point on which there was no evidence, and especially so, to assume that point as proven. (Hilliard on New Trials, 293, 294, note (a) 294, and cases cited; *Snyder v. Wilt*, 15 Penn. 59.)

The instructions are based on the assumption that there were false entries in appellants' books of account. There is no word of testimony to sustain this assumption. The court, by instruction No. 3, asked by defendant, submits to the jury the question whether or not said accounts and books are not fraudulent, and fraudulently kept. For these reasons alone the judgment should be reversed and a new trial granted. (*Eckert v. Flowery*, 43 Penn. 46; *Harris v. Wilson*, 1 Wend. 511; Hilliard on New Trials, 312, sec. 69.)

III. The court erred in using the term fraud, in the instructions, without instructing the jury in what legal fraud consisted. There being no fraud in law, as distinguished from fraud in fact, the giving of instructions objected to was erroneous. (Hilliard on New Trials, 349, secs. 126, 127; *Jackson v. Timmerman*, 7 Wend. 436; *Fowler v. Swift*, 3 Ind 188; *Williams v. Bently*, 29 Pa. 272; *Flack v. Neill*, 22 Tex. 253.)

IV. There is no evidence from which fraud could be fairly inferred, it was error for the court to submit the question of fraud to the jury. (Hilliard on New Trials, 353, note a; *Herdic v. Bilger*, 47 Pa. 60.)

*Laspeyre & Beatty*, for Respondent:

I. Sometimes a fact in issue is not directly proved, but is inferred or presumed from other facts; often a single fact will determine the verdict by inference, and where the inference is reasonable, the verdict will not be disturbed. (3 Gra. & Wat. N. T. 1275, 1278; *Price v. Evans*, 4 B. Mon. 386; *Ward v. Crutcher*, 2 Bush, 87; *Swaggerty v. Stokely*, 1 Nev. Vol. XV.—30.

Swan, 38; *McDaniel v. Bacca*, 2 Cal. 326; 2 Cow. 404; 1 Story Eq. Jur., sec. 190; 1 Greenl. on Ev., sec. 53, note 1, 75.)

II. There was abundant evidence showing fraud in the entire transaction of the pretended assignment, and fraud was clearly established before the jury. (Testimony reviewed at length.)

III. The third instruction did not assume a fact. The language of this instruction in regard to the statute of frauds follows the statute substantially.

IV. This court will not disturb the instructions of the district court to the jury, on the ground that there was no evidence upon which to base them, when there was some evidence, although it may have been slight. (*Allison v. Hagan*, 12 Nev. 41; *Perlberg v. Gorham*, 10 Cal. 122; *People v. Cleveland*, 49 Id. 578; *Robinson v. W. P. R. R. Co.*, 48 Id. 420.)

V. All instructions must be construed together. (10 Sm. & M., Miss. 25; 3 Gra. & Wat. N. T. 862-863; *Depeyster v. Columbian Ins. Co.*, 2 Caines, 85; *Edmondson v. Machell*, 2 Term R. 5.)

VI. The court will not disturb the verdict if the evidence is conflicting. (*Henry Rice v. James Cunningham*, 29 Cal. 492; 3 Gra. & Wat. N. T. 1213, 1214, 1218, 1240, 1286, note D; *Preston v. Keys*, 23 Cal. 193; *Kimball v. Gearhart*, 12 Id. 27; *Kyle v. Tubbs*, 32 Id. 332; 1 Gra. Wat. N. T. 385; *Douglas v. Tousey*, 2 Wend. 352; *Hammond v. Wadhams*, 5 Mass. 353; *Baker v. Briggs*, 8 Pick. 122; *McAfee v. Ryan*, 11 Mo. 364; *Lee v. Banks*, 4 Litt. (Ky.) 12; *Moore v. Foster*, 10 B. Mon. 255; *Dodge v. Britain*, 1 Meigs, 84; *Kincaid v. Turner*, 2 Gilm. 618; *Bacon v. Parker*, 12 Conn. 212; *Alsop v. Com. Ins. Co.*, 1 Sumner 451; *Bishop v. Perkins*, 19 Conn. 300; *Duell v. Bear River & A. M. Co.*, 5 Cal. 85; *Speck v. Hoyt*, 3 Id. 419; *Smith v. Billet*, 15 Id. 26.)

VII. The statute does not contemplate conclusive evidence of fraud. (*White v. Leszynsky*, 14 Cal. 165.)

By the Court, LEONARD, J.:

On the first of March, 1879, and up to and including the

date of the commencement of this action, plaintiffs were partners and doing business as merchants in Eureka county, under the firm name and style of Tognini & Co. and Vanina.

On the day above stated they purchased of Nicholas Luchessi, all the property of the latter, consisting of ten thousand bushels of charcoal, more or less, in the pit, and certain teams, tools, etc., the consideration agreed upon being two thousand dollars for the charcoal, and three hundred and fifty dollars for the balance of the property. Immediately after the purchase, plaintiffs took possession of the property, and employed a man to haul the coal to market. After some four thousand bushels had been hauled away, as sheriff of Eureka county, and under and by virtue of a writ of attachment regularly issued, in a suit brought by P. N. Hansen against Nicholas Luchessi, defendant attached the balance of the coal in the pit, six thousand and twenty-nine bushels, as the property of Luchessi.

Plaintiffs brought this action to recover possession of the coal so attached, or its value, alleged to be sixteen cents a bushel.

Defendant answered, denied all the material allegations contained in the complaint, and alleged that, at the time of his attachment, Luchessi was the sole owner of the coal attached, and the only person legally entitled to its possession; that plaintiffs' possession was null and void for the reasons following, to wit: "That the transfer and assignment thereof to them from Nicholas Luchessi, if any there was, was made, if at all, for the purpose of hindering, delaying, and defrauding the creditors of said Luchessi, and more particularly the said P. N. Hansen, and that for that purpose, and none other, the plaintiffs took possession thereof, if at all." Defendant recovered judgment, upon the jury's verdict, for the possession of the coal, or its value, nine hundred and sixty-four dollars and sixty-five cents.

Plaintiffs appeal from the judgment and from the court's order denying a new trial.

Counsel for appellants contend: First, that there is no evidence to sustain the verdict and judgment; and second,

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that the court erred in giving instructions two and three at the request of respondent. These assignments will be considered in their order. There was only one material fact in issue between the parties; which was, whether or not the sale was made with lawful intent, and was, therefore, valid; or with intent to hinder, delay, or defraud the creditors of Nicholas Luchessi of their lawful suits, damages, forfeitures, debts, or demands, and was, therefore, void. All other questions were dependent upon that.

It was the jury's peculiar province, under proper instructions, to decide that issue by a fair consideration of all the facts and circumstances developed at the trial. (*Thomas v. Sullivan*, 13 Nev. 249; *Starkie on Evidence* (9th ed.), 698; *Blackman v. Wheaton*, 13 Minn. 326; *Weisiger v. Chisholm*, 28 Tex. 780; 1 *Graham & Waterman on New Trials*, 525; *Ward v. Crutcher*, 2 Bush. (Ky.), 87.)

And although the law never presumes fraud, still, where it is charged, "express proof is not required, but it may be inferred from strong presumptive circumstances." (*McDaniel v. Bacca*, 2 Cal. 339; *Ward v. Crutcher*, *supra*; 3 *Graham & Waterman on New Trials*, 1275; *Hilliard on New Trials*, 473; *Bump on Fraud. Conveyances*, 541; *Id.* 560, *et seq.*; 1 *Story's Eq. Jur.*, sec. 190.)

There is no kind of action wherein it can be held with greater reason, that the fact in issue may be inferred from other facts proved, than in cases charging fraud. As a rule, the motives of men can be best ascertained by a proper consideration of their acts and declarations, and oftentimes they can be revealed by no other means.

An intent to defraud is not published to the world; but, on the contrary, the usual course is to give the contract an appearance of an honest transaction, and, as far as possible, to have the conduct of the interested parties correspond therewith. In *Thomas v. Sullivan*, *supra*, we said: "No witness can look into the minds of the parties and thus be able to swear, positively, that they intended to defraud the creditors of the vendor; and hence fraud can generally be shown only by facts and circumstances which tend directly or indirectly to establish it."

Any other rule would make the statute of frauds practically a dead letter; and there is little danger that honest men will suffer by a stubborn adherence thereto.

Under this rule, if it is true, as claimed by counsel for appellants, that there was no evidence tending to prove a fraudulent intent in this case, or no facts shown from which the jury had a right to infer such intent, then a new trial should be granted; on the contrary, if there was such evidence, or such facts were shown, then the judgment must stand, unless the instructions complained of misstate the law.

After a careful examination and consideration of the testimony, we think many facts were proven, from which, taken together, the jury were justified in concluding that the sale of the coal in question was made by Nicholas Luchessi with an intent to defraud his creditors, and that appellants participated in the fraud of the vendor. A few of those facts will be stated.

1. Appellants agreed to pay twenty cents a bushel for the coal at the pits, when, at that place, it was worth but sixteen cents. Luchessi was anxious to sell, and was the first person who suggested the sale; and yet, without reason, if the transaction was an honest one, appellants agreed to pay some four hundred dollars more than the property was worth.

2. One of the appellants, Vanina, testified that appellants "had the control of all of Nicholas Luchessi's coal, prior to the time of purchase; that they had already delivered considerable coal for Luchessi, and had the right to keep sufficient out of this coal to pay themselves when it was delivered, and the men working on the ranch looked to appellants for their pay." Zanolja, also one of appellants, the one who made the contract, testified that "all the men working for Luchessi had agreed to wait for their pay until his coal was delivered; that the coal would have been delivered in appellants' name without any sale to them, and that they would have paid the workmen just the same if the coal had not been attached by some one." He testified also that when Luchessi sold him the coal, "he did not mention that

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he owed Hansen; he did not say anything about owing any one but the men that he gave us the orders to pay;" that "Luchessi came down and said, 'the boys want security for their money,' and he wanted to sell the coal to us to pay his workmen, and to settle the bill he owed us for Biagio Luchessi; and I agreed to take the coal and did take it." Pinney, appellants' book-keeper, testified that he "heard all the trade;" that Luchessi said, "'All my men want money,' and wanted Vanina and Zanolia to buy his charcoal that was on the ranch."

It will be seen from the foregoing, that the reason given for the sale was that Luchessi wished to pay appellants and his men, who were demanding their pay. If appellants had control of the coal; if without sale to them it would have been delivered in their name; if they had the right to keep out sufficient to pay them when the coal was delivered, it is difficult to perceive why Luchessi should wish to sell it in order to pay them, or why they should wish to purchase it, especially in view of the fact that they did not, according to their testimony, know that Luchessi was indebted to any one but his men, and they had agreed to wait for their pay until the coal was delivered. If the men so agreed, it is not easy to see why they should have demanded their pay when they did, or why Luchessi should have been so anxious to sell all his property in order to pay them before their wages were due; and if it was an honest transaction, it is especially difficult to understand why appellants were willing to pay four hundred dollars more than the value of the property, when after the purchase their situation was no more favorable than before.

3. Zanolia and Pinney both testified that, after the former had accepted the several orders for the payment of Luchessi's workmen, Luchessi took the orders to the ranch for the men—a very proper and natural proceeding. But Luchessi swore that, "after the orders were accepted by Zanolia they were kept by Tognini & Co. and Vanina (appellants), so they could pay them when the men wanted their money;" that he "did not show the orders to the men or take the orders to the ranch, or tell the men what he had



done;" that he "told Zanolio to pay the men, and the men were satisfied."

If the object of the sale was as claimed by appellants, Luchessi would have given the accepted orders to his workmen, or would have received instructions from them as to what disposition should be made of them. At least, such would have been the natural course among men so situated. It was a strange proceeding to leave the orders of men clamoring for their pay with the acceptors; and it is remarkable that they were satisfied, although Luchessi, who sold his entire property to pay them and appellants, did not show them the accepted orders, or tell them what he had done; and there was no proof that any one else informed them that appellants had become responsible to them.

4. One of the orders accepted was in favor of Biagio Luchessi, brother of Nicholas, for six hundred and thirty-two dollars.

Pinney swore that the whole amount was due to appellants from Biagio, and that Nicholas "went responsible for the bill" before the sale, but not in writing. He was subpoenaed to bring into court all of appellants' books relating to these transactions, but he did not bring book three, which contained items aggregating four hundred and seventy-three dollars and sixteen cents, out of Biagio's total account of six hundred and thirty-two dollars, because he "did not think it would be wanted."

Book three was the only book that showed the items of Biagio's indebtedness to appellants, to the extent of four hundred and seventy-three dollars and sixteen cents. Pinney swore positively, however, that the balance due to appellants from Biagio was six hundred and thirty-two dollars, while Nicholas Luchessi testified that he owed Biagio six hundred and thirty-two dollars, "for labor on the ranch and for sledding wood, and for some goods that he had bought at the store." Pinney swore that Biagio's account for 1878 was but one hundred and fifty-eight dollars and eighty-four cents, and that the balance of indebtedness (four hundred and seventy-three dollars and sixteen cents) was contracted between December 31. 1878. and some time in February,

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1879, although he had no one working for him in 1879. Witness afterwards stated that the item of indebtedness for 1879 (four hundred and seventy-three dollars and sixteen cents) included a charge for board, "while Biagio was laid up with a sore hand in the summer of 1878;" but the journal for 1878, then in court, failed to show any charge for board in 1878, although it purported to contain all charges against him for that year. Moreover, Hansen testified that Zanolia told him in January, 1879, that appellants did not trust Biagio, and there was no proof of the amount of the charge claimed for board in 1878. It might have been one dollar or more. So the facts upon which the jury could act were, that between the first of January and some days before the first of March, appellants trusted Biagio for four hundred and seventy-three dollars and sixteen cents, at a time when (from Hansen's testimony) they were not trusting him; and that he purchased that amount of goods at a time when he was employing no men. Zanolia testified that the journal and ledger in court contained all the business transactions between appellants and Nicholas Luchessi and Biagio Luchessi; and Vanina said: "We bought no other property from Luchessi but the charcoal." He stated, also, that he was present when the sale was made.

We might pursue this examination further with the same result, but deem it unnecessary to do so. From all the testimony, we can not say that the conclusion of the jury was arrived at without sufficient reason, or that, in refusing a new trial upon the ground of insufficiency of evidence to justify the verdict, the court abused its legitimate discretion.

On behalf of appellants the jury were instructed as follows: "A man who owes various parties, and has not sufficient property to pay all of his creditors, may elect what one of his creditors he will pay, and he may sell his property to pay any of his creditors in full, to the exclusion of any or all of his other creditors. For a man may pay one, and not pay another, or may equally divide his property among all his creditors. And the only question for cred-

itors is, did the party make a sale of his property in good faith and for a valuable consideration, and did plaintiffs take actual possession of the same immediately after sale?"

"If the jury find, from the evidence, that Tognini & Co. and Vanina, the plaintiffs, purchased the coal in question from N. Luchessi, on or about the first day of March, 1879, for a valuable consideration, and that said purchase was made in the usual course of business, then the jury are instructed that said plaintiffs had the right to make the purchase, and Luchessi had the right to make the sale, no difference to whom the said Luchessi may have been indebted; that if plaintiffs had purchased the coal, and agreed to pay for the same before the said coal was taken under the attachment issued in the case of *Hansen v. Luchessi*, the jury should find a verdict for the plaintiffs."

Instruction number two, given for respondent, is without fault, and will not be considered.

Number three is as follows: "If the jury believe, from the evidence, that the transaction between plaintiffs and Nicholas Luchessi, in relation to the order for the payment of Biagio Luchessi, was fraudulent, and there was a false entry upon plaintiffs' books to show payment of this order, and this transaction was intended to hinder, delay, or defraud Hansen, then you must find for the defendant."

Against this instruction it is urged that, "it is a commentary on the evidence introduced; that it assumes as true a state of facts not proven, and which did not exist; that it called the attention of the jury to matters not alleged or proved, assuming that evidence had been offered and admitted in reference thereto."

It may be conceded that it is error for a court to direct the jury's attention to a fact in issue upon which there is no direct evidence, or no evidence from which they ought to infer the existence of such fact.

It is plain, however, that under the rule stated, it was proper for the court to instruct the jury upon the main issue in the case; that is to say, upon the intent of the parties, for, as we have seen, facts were shown from which the jury

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might infer that the transaction was fraudulent as to the creditors of Luchessi.

And we think, for the same reason, the court did not err in instructing the jury as it did in relation to the entries in appellants' books. There were suspicious circumstances in connection with the account of Biagio Luchessi; and although it does not appear that the books were admitted in evidence, still there was much testimony given, without objection, touching Biagio's account—among other things, its amount for the year 1878, and from January 1, 1879, until he settled with appellants in February following. The book-keeper, subpoenaed for that purpose, brought the journal and ledger into court, and referred to Biagio's account therein, in giving his testimony. Luchessi's account, including the sale of coal and other property, as found on page 624 of the journal, is in the transcript.

The book-keeper said: "The account of Biagio Luchessi is all carried out on the ledger, and the true balance due from him to the plaintiffs, on March 1, 1879 (the date of the sale), was six hundred and thirty-two dollars. The journal does not show all of Biagio's account, because the balance due when this journal was started was taken to the ledger from book No. 3, a small book on which his account was kept with other accounts." He then gave his reason for not bringing book No. 3 into court, as before stated. If it was agreed between the parties, for the purpose of defrauding Hansen, a *bona fide* creditor of Luchessi, that Biagio's account should be fraudulently increased for the sake of having it cover, in whole or part, the amount agreed to be paid for the property, and if in carrying out the intent of the parties, false entries were made upon plaintiffs' books, then the sale was void, and that, in our opinion, is a fair and reasonable construction of the instruction in question.

We think the instructions, taken together, fairly express the law of the case, and that the jury could not have been misled.

It is said, finally, that the court erred in using the word "fraud" in the instructions without also imparting to the jury its proper definition. In reply, we refer to *Allison v. Hagan*, 12 Nev. 62.

Judgment and order appealed from affirmed.

Points decided.

[No. 1035.]

ELLEN E. HIXON, RESPONDENT, v. ROBERT F. PIXLEY, APPELLANT.

**PARTNERSHIP—CONVERSION OF MINING STOCKS—SUFFICIENCY OF EVIDENCE.**—Plaintiff relied upon two grounds: first, that Pixley was a partner of McConnell at the time of the conversion of the mining stocks; second, that if not a partner in fact, he suffered himself to be held out to the world as such: *Held*, that the evidence was sufficient to sustain a verdict in favor of plaintiff upon both grounds.

**CONFLICT OF EVIDENCE.**—Rule as to conflict and weight of evidence enforced.

**PARTNERSHIP—PUBLICATION OF NOTICE OF DISSOLUTION—LIABILITY OF PART WHO HOLDS HIMSELF OUT TO THE WORLD AS A PARTNER.**—If a retiring partner, after notice of dissolution is published in a newspaper, holds himself out to the world as a partner, he must, in order to relieve himself from liability on account of such publication, prove that knowledge of such notice of dissolution came to the actual knowledge of plaintiff.

**IDEM—CREDIT OF RETIRING PARTNER.**—If one partner, after the dissolution of the copartnership, consents that his name shall be held out to the world as a partner, all persons, whether new customers or not, will be presumed to deal with the firm upon this partner's credit as well as upon the credit of the other partner.

**IDEM—BELIEF OF PLAINTIFF THAT RETIRING MEMBER WAS STILL A PARTNER.**—If plaintiff was aware of the previous copartnership, and had no knowledge of the dissolution, and was misled by the acts of the retiring partner, and induced to deal with the firm upon the faith and belief that the retiring partner was still a member of the firm, it would not be incumbent upon her to show, "that she would not have so dealt but for that belief."

**IDEM—KNOWLEDGE OF DISSOLUTION—LAPSE OF TIME TO BE CONSIDERED.**—The defendant asked the court to instruct the jury, that in determining the question, whether plaintiff was ignorant of the fact of dissolution, they should take into consideration, among other things, "the lapse of time occurring after the alleged dissolution, and prior to plaintiffs dealing with McConnell & Co." The court struck out these words: *Held*, upon a review of the entire instruction, that the jury were not misled to the prejudice of the defendant. (Beatty, C. J., dissenting.)

**TROVER—ALLEGATION OF VALUE MATERIAL.**—The allegation of value in an action of trover is a material averment. If not denied, it need not be proven.

**IDEM—TIME OF CONVERSION IMMATERIAL.**—The allegation as to the time of conversion, in an action of trover, is immaterial.

**INSTRUCTION—NOTICE AND DEMAND.**—The instruction as to notice and demand, as modified, reads as follows: "If you find from the evidence that the stocks mentioned in the complaint were sold by McConnell & Co., pursuant to a lawful notice to the plaintiff that they would be so,

## Argument for Appellant.

If she failed to make her margins good within a time specified by the notice, and that the plaintiff did so fail, then your verdict will be for the defendant, provided you find that defendant was entitled to sell said stocks upon the giving of such notice, and the failure of the plaintiff to comply with the demand of such notice." Held, no error.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts sufficiently appear in the opinion.

*Lindsay & Dickson*, for Appellant:

I. The evidence was insufficient to justify the verdict. There is no substantial conflict in the testimony. The fact that there is some evidence to sustain the verdict does not preclude this court from ordering a new trial on the ground that the evidence is insufficient. There must be a substantial conflict. (*State v. Yellow Jacket S. M. Co.*, 5 Nev. 415; 49 Cal. 375.)

II. The evidence is also insufficient to justify the verdict, and the same is against law, because it appears from the testimony of McConnell, which is undisputed on this point, that the plaintiff was owing McConnell & Co. upon the stocks alleged to have been converted, over five thousand three hundred and ninety dollars at the time, and long before the commencement of this action. And there is no testimony in the case that any demand was ever made by or on behalf of plaintiff, for the possession of said stocks; or that any tender of the amount so due upon said stock was ever made to defendant, by or on behalf of the plaintiff. (Story on Bail., sec. 314; *Boylan v. Huguet*, 8 Nev. 345; *Atkins v. Gamble*, 42 Cal. 87.)

III. The court erred in giving to the jury the first instruction relative to the allegation of value not being denied by the answer. It is only the material allegations of a complaint which are admitted, when not controverted by the answer. (1 Comp. L. 1128.)

Is the allegation of value, in an action of trover, a material allegation? (Chit. on Pl. 377, and note 1; *Waits' Ann. Code*, 311.)

The New York courts have repeatedly held that the

## Argument for Respondent.

allegation of value in a complaint in trover is not admitted by a failure to deny it in the answer. (2 Wait Pr. 417, 425; *McKenzie v. Farrell et al.*, 4 Bosw. 192, 201, 202; *Raymond v. Traffarn*, 12 Abb. Pr. 52; *Connoss v. Meir*, 2 E. D. Smith, 314; *Hackett v. Richards*, 3 Id. 13, 31; *Newman v. Otto*, 4 Sandf. 668.)

But if the allegation of value be material, a failure to deny it by answer, in this case, admitted that the stocks in question were worth the sum alleged in the complaint, at any and all times between the second of September, 1878, and the third of March, 1879, and nothing further. An admission can not be any broader than the allegation claimed to be admitted.

The allegation of time was rendered material in this case by the manner in which it was connected with the allegation of value.

That which is immaterial is frequently rendered material by the manner in which it is pleaded. (1 Greenl. on Ev., secs. 50, 60; *Todd v. Myres*, 40 Cal. 355.)

IV. The court erred in modifying the instructions asked by appellant. (See *Sharon v. Minnock*, 6 Nev. 377; *Parsons on Part. 412*; *Wade on Law of Notice*, sec. 513; *Parsons on Part. 413, 418*; *Biglow on Estop*, 425, 426.)

*R. M. Clarke*, for Respondent:

I. The evidence was sufficient to justify the verdict. The judgment is supported by an overwhelming preponderance of the evidence.

II. By consenting to the use of his name in the contracts of purchase with respondent, Pixley became a party to such contracts, and is conclusively bound thereby. (*Wade on Notice*, sec. 486; *Emmett v. Butler*, 7 Taunt. 232; *Ketcham v. Clarke*, 6 Johns. 144; *Parsons on Part. 413, 414*; *Collyer on Part. sec. 535*.)

III. It was not necessary to prove the value of the stock converted. The complaint alleged the value, and the answer failed to deny it.

This averment was material, and a failure to deny it made it unnecessary to prove it. (*Carlyon v. Lannan*, 4 Nev. 156; *Blackie v. Cooney*, 8 Nev. 41.)

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IV. The modified instructions which the court gave do not contain any error which is prejudicial to the appellant.

By the Court, HAWLEY, J.:

This is an action of trover, brought by plaintiff to recover from defendants, Robert F. Pixley and Isaac McConnell, as copartners, the sum of twenty-three thousand three hundred and ninety dollars, for the alleged wrongful conversion of certain shares of mining stocks.

Defendant McConnell suffered default.

Defendant Pixley appeared, and filed an answer denying that at the time of the alleged transactions with plaintiff he was a partner with the defendant McConnell.

The plaintiff, in order to sustain this action against Pixley, relied upon two grounds: First. That he was a partner at the time of the alleged conversion. Second. That if not a partner in fact, he suffered himself to be held out to the world as such, and thereby became liable to plaintiff. The jury found a verdict in favor of plaintiff.

The defendant, Pixley, appeals.

1. Appellant claims that the evidence is insufficient upon either branch of the case, to justify the verdict.

It appears that the defendants in March, 1875, entered into a copartnership, in Carson City, Nevada, to carry on and conduct the business of stock brokers under the firm name of Pixley & McConnell. This partnership continued until the thirteenth of June, 1877, at which time, according to the testimony of Pixley, it was dissolved. But, according to the testimony of McConnell, this dissolution was a sham; that notice thereof was published in the newspapers to induce Pixley's creditors to believe that there had been a dissolution in fact, so that they might be prevented from attaching the firm assets.

Each defendant was equally interested in having his own testimony sustained. Evidence was introduced tending to corroborate the statement of each defendant, and there were facts and circumstances testified to on each side by other witnesses; which were, to some extent, inconsistent with the testimony of the respective defendants.



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Upon the testimony, it was exclusively within the province of the jury and the court below to decide the question whether the dissolution was *bona fide* or not. There being, in our opinion, a substantial conflict in the evidence, the verdict of the jury will not, upon this ground, be disturbed.

2. It is admitted that appellant suffered himself to be held out as a partner after the date of the dissolution, and we are of opinion that plaintiff's evidence shows that she was induced to deal with McConnell & Co. by reason of her belief that Pixley was a member of the firm. The record shows that, after the date of the publication of the dissolution, the business was conducted by McConnell at the same place, in the name of McConnell & Co.; that plaintiff was aware of the partnership relations existing between Pixley & McConnell, prior to the thirteenth of June, 1877; that she had no actual knowledge of the dissolution; that she never transacted any business with the firm, or either member thereof, until about five months after the publication in the newspapers of the dissolution of copartnership; that in all her transactions the same blanks were used in the business, with the heading printed thereon, "Pixley & McConnell, Stock Brokers," as were used by the firm before the date of the dissolution; that all the accounts of the purchases and sales of stock which were rendered plaintiff, show upon their face that the business was conducted by "Pixley & McConnell, Stock Brokers," and that Pixley had knowledge of the use of said blanks and consented thereto.

The evidence is clearly sufficient to sustain the verdict upon this branch of the case.

Unless the legal objections urged by appellant's counsel are well taken, the judgment of the district court must be affirmed.

3. It is claimed that the court erred in modifying the following instructions asked by appellant:

"1. If you find from the evidence that the defendant, Robert F. Pixley, was not in fact a member of the firm of McConnell & Co. subsequent to the month of June, A. D. 1877, then your verdict must be for the defendant, unless

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you find the said defendant, Robert F. Pixley, failed to give proper notice of his dissolution of copartnership with the defendant Isaac McConnell, and that the plaintiff was misled to her prejudice by such failure. It is admitted that the plaintiff never had any business dealings with the defendants until after the thirtieth day of June, 1877, the time when the defendant, Pixley, claims that the partnership was dissolved, therefore, general publication in the newspapers published in the town where the defendants carried on their business prior to the alleged dissolution, and where the plaintiff resided, would be sufficient notice to the plaintiff of the dissolution."

The court modified this instruction by striking out the words "to her prejudice," and by adding at the end thereof: "Provided, that knowledge of such notice of dissolution of copartnership came to the actual knowledge of plaintiff."

"2. It is claimed by the plaintiff that the defendant, Pixley, is jointly liable with the defendant, McConnell, to the plaintiff in this action, notwithstanding Pixley may not have been in fact a partner of McConnell in the stock brokerage business after the thirteenth day of June, A. D. 1877, for the reason that the old signs of Pixley & McConnell remained, and were used, after that time, at the place of business of McConnell & Co., and that the old form used by Pixley & McConnell continued, after the time of the alleged dissolution, to be used by McConnell & Co.

"In order to warrant you in holding the defendant liable on this ground you must be satisfied:

"1. That the old signs and the old forms continued to be so used with the consent of the defendant, Pixley.

"2. That the plaintiff was ignorant of the fact of the dissolution, and in determining the question whether she was ignorant or not, you are to take into consideration the fact of the published notices of dissolution, the time and manner of their publication, the place which they occupied in the paper, the greater or less notoriety of the fact of the dissolution, the plaintiff's intimacy with the family of the defendant, Pixley, at the time of the alleged dissolution; the lapse of time occurring after the alleged dissolution and prior to

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*the plaintiff's dealing with McConnell & Co., and all other circumstances showing the manner in which the dissolution was communicated; and if, from all these circumstances, you believe that the fact of the dissolution was likely to come to the knowledge of plaintiff, you may infer that it did so come to her knowledge, if you believe that it did.*

"3. If you find that the plaintiff, before her dealings with McConnell & Co., had knowledge of the existence of the former partnership between Pixley and McConnell; and that she was actually ignorant of the fact of the dissolution; still you can not hold defendant, Pixley, liable, if you find that he was not a partner in fact after June, 1877, unless you are also satisfied from the evidence that the plaintiff was misled to her prejudice by the use of the old signs and forms in use by McConnell & Co. with the consent of Pixley; that is, unless you find that the plaintiff dealt with McConnell & Co., believing that Pixley was a member of the firm of McConnell & Co., and that she would not have so dealt but for that belief."

The court modified this instruction, by striking out the sentences we have italicized, and by inserting after the word "prejudices" the words "by her former knowledge of the partnership."

We are of opinion, that the modifications made by the court were not prejudicial to the defendant. The first instruction ought to have been refused. If intended to apply to the first branch of the case, it was erroneous, because it authorized a verdict in defendant's favor, although the jury might believe that Pixley held himself out to the world as a partner. Had it contained the necessary qualification upon this point, the modification made by the court would have been erroneous.

If intended to apply to the second branch of the case, the modification was correct. The second instruction refers exclusively to the second branch of the case, and, as given to the jury, is correct.

If Pixley, after the dissolution, consented that his name should be held out to the world as a partner, all persons, whether new customers or not, having knowledge of the

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previous copartnership, would be presumed to deal with the firm upon Pixley's credit as well as upon the credit of McConnell.

If the evidence satisfied the jury that plaintiff was aware of the previous copartnership; that she had no knowledge of the dissolution; that she was misled by the acts of Pixley, and induced to deal with the firm of McConnell & Co., upon the faith and belief that Pixley was a partner, then it was not incumbent upon her to show "that she would not have so dealt but for that belief."

The most important question, upon which we entertain some diversity of opinion, is as to the effect of the action of the court in striking out the words: "The lapse of time occurring after the alleged dissolution, and prior to the plaintiff's dealing with McConnell & Co." The jury had the right to take into consideration all the circumstances specified in the second subdivision of this instruction, as asked by the defendant's counsel, in determining whether or not the fact of the dissolution was likely to have come to the knowledge of the plaintiff.

In some cases "the lapse of time" might, in connection with other circumstances, be very material and important. (*Merritt v. Pollys*, 16 B. Mon. 357.)

I am of opinion, that, although it would have been proper to have left this clause in, the error of striking it out is not of sufficient gravity to authorize a new trial in this case. I am satisfied that the defendant was not prejudiced by the action of the court in striking it out. The controlling questions were as to the fact of the published notices of the dissolution; the greater or less notoriety of the fact of the dissolution, and the plaintiff's intimacy with the family of the defendant, Pixley. In considering these questions the jury would necessarily have to take into consideration the length of time the notices were published, and all the notoriety of the dissolution after it occurred, and prior to the time that plaintiff commenced "dealing with McConnell & Co."

The instruction, as given to the jury, fairly presented the law, applicable to this branch of the case, in such a manner that the jury could not have been misled as to their duty.

4. The court did not err in giving or refusing certain instructions upon the assumption that the value of the stocks, as alleged in the complaint, was admitted by a failure to deny it in the answer.

This court has decided that the allegation of value in an action of trover is a material allegation, and if not denied, need not be proven. (*Carlyon v. Lannan*, 4 Nev. 156; *Blackie v. Cooney*, 8 Id. 41.)

The complaint alleges that since the "second day of September, A. D. 1878, and before the commencement of this action, said defendants appropriated and converted to their use said shares of stock. That the value of said shares of stock *at the time of said conversion* was twenty-three thousand three hundred and ninety dollars."

The evidence shows that the stocks were converted in the month of August, 1878, prior to the time alleged in the complaint, and there was no proof offered as to the value of the stock at that or any other time.

The statement of counsel, that appellant, by failing to deny an allegation, that between the second of September, 1878, and the third of March, 1879, the stocks were worth twenty-three thousand three hundred and ninety dollars, does not admit that they were worth that or any other sum in August, 1878, is technically correct.

But the law is that the allegations as to the time of the conversion is immaterial, and by the failure to deny the allegations of the complaint, the defendant, Pixley, admitted "that the value of said shares of stock, *at the time of said conversion*, was twenty-three thousand three hundred and ninety dollars."

5. There is no error in the modifications made by the court to the second instruction, asked by the defendant, Pixley, relating to the question of notice and demand.

The judgment of the district court is affirmed.

BEATTY, C. J., dissenting.

I do not feel able to say that the error of the court in striking out the "lapse of time," etc., could not have prejudiced the appellant, and am therefore obliged to dissent.



EXTRA ANNOTATION  
TO  
PRECEDING VOLUME





# NOTES

ON THE

## NEVADA REPORTS.

### CASES IN 15 NEVADA.

15 Nev. 27-33, 37 Am. Rep. 454. **STATE v. AH SAM.**

**Statutory construction.** — Cited in *State v. On Gee How*, 15 Nev. 187, in construing Stat. 1879, p. 121; *State v. Board of County Com'rs*, 17 Nev. 102, 28 Pac. 124, in construing Stat. 1879, p. 345; *Esser v. Spaulding*, 17 Nev. 408, 30 Pac. 900, holding constitutional Stat. 1879, p. 123, § 23; *State v. County Com'rs*, 19 Nev. 345, 10 Pac. 909, holding constitutional Stat. 1885, p. 60; *State v. Board of Com'rs*, 21 Nev. 289, 29 Pac. 976, holding constitutional Act 1891, p. 30; cited in dis. op. of Bonnifield, J., in *State v. Board of Com'rs*, 22 Nev. 414, 41 Pac. 150, in discussing constitutionality of Stat. 1895, p. 107; *State v. Board of Com'rs*, 22 Nev. 407, 41 Pac. 147, holding Act 1895, p. 107, unconstitutional; *Gustavel v. State*, 153 Ind. 616, 54 N. E. 124, in construing Act 1899, p. 195, to protect fish and game, holding same constitutional.

— **Where clause not within title.** — Cited in reference note in 61 Am. Dec. 342, to point that the true interpretation of this clause has become too well settled by the usage and practice of every department of the state government; it is, that so much only of a statute is void as contains matters different from what is expressed in the title. Such has been the uniform construction put upon this provision by the state courts separately and of the judges in convention.

— **Title of statute.** — Cited in reference notes in 61 Am. Dec. 339, to point as to purpose of constitutional requirement regarding title to acts of legislature; 64 Am. St. Rep. 106, as to sufficiency of title to act concerning opium smoking.

— **"Subject" and "object" of act.** — Cited in dis. op. of Bonnifield, J., in *State v. Board of Com'rs*, 22 Nev. 412, 41 Pac. 149, to point that subject and object of act are treated as synonymous terms; *State v. State Bank & Trust Co.* 105 Pac. (Nev.) 567, in discussing validity of statutes embracing but one subject where parts of them are invalid.

**Construction of constitution.**—Cited in *State v. State Bank & Trust Co.*, 105 Pac. (Nev.) 568, to point that constitution is to be liberally construed.

**15 Nev. 33-39. STATE v. MARKS.**

**Jury—Right to impartial.**—Cited in *State v. Hartley*, 22 Nev. 356, 40 Pac. 374, 28 L.R.A. 39, to point that defendant in criminal case is entitled to trial by impartial jury and legislature cannot deprive him of this right; *Irvin v. State*, 19 Fla. 890, to point that in application for new trial for reason that juror had previous to trial formed and expressed an opinion, affidavit should unequivocally allege defendant was ignorant of fact as stated at time of impaneling of jury.

**—Challenge for cause.**—Cited in *State v. Mott*, 29 Mont. 300, 74 Pac. 731, to point that principal case followed *People v. Fair* in construing statute as to challenge for cause.

**Verdict.**—Cited in *State v. Thompson*, 101 Pac. (Nev.) 560, to point that verdict will not be disturbed where evidence conflicting, if there is substantial evidence to support it.

**15 Nev. 39-44. SADLER v. BOARD OF COUNTY COM'RS EUREKA COUNTY.**

**Constitutional Law.**—Cited arguendo in *State v. Board of Com'rs*, 22 Nev. 406, 41 Pac. 147, holding unconstitutional Act 1895, p. 107.

**Certiorari.**—Cited in *State v. Board of Com'rs*, 23 Nev. 252, 45 Pac. 530, holding that the writ of certiorari will only run to a board of county commissioners as to matters in which they exercise judicial functions; cited in dis. op. of Bonnifield, J., in *State v. Board of Com'rs*, 23 Nev. 259, 45 Pac. 533, as to when certiorari lies; *State v. White Pine County*, 101 Pac. (Nev.) 105, in discussing point that writ of certiorari will not lie against county board for act which is not the exercise of judicial functions.

**Title of act.**—Cited in dis. op. of Bonnifield, J., in *State v. Board of Com'rs*, 23 Nev. 256, 45 Pac. 532, in discussing subject of Act 1879, p. 45.

**Board of county commissioners—Power of.**—Cited in *Lyon County v. Ross*, 24 Nev. 112, 50 Pac. 3, as to power of board of county commissioners; *State v. Boerlin*, 30 Nev. 476, 98 Pac. 403, as to power of board of county commissioners to mode in which they may exercise those powers; *Lund v. Washoe County*, 101 Pac. (Nev.) 552, to point that claims for furnishings or alterations to county bridges amounting to or aggregating more than maximum authorized, without advertising for bids, cannot be recovered on, although ordered or approved by board of commissioners.

**Trust created by statute.**—Followed in *Lyon County v. Ross*, 24

Nev. 113, 50 Pac. 4, as to trust created by statute and duty and power of liability thereunder.

Franchise, granting — Mode measure of power. — Cited in *Pacific Electric Co. v. City of Los Angeles*, 118 Fed. 753, to point that in determining whether council, in disposition of franchise, lawfully complied with law, rule that mode is measure of power should be carefully observed.

Cited in reference note in 81 Am. Dec. 107, to point that where a power is conferred by law, and the manner of its exercise is also prescribed, the power can be exercised only in the prescribed mode.

15 Nev. 45-49. **YOUNG WORTH v. JEWELL.**

"Control" and "manager," synonymous. — Cited in *Ure v. Ure*, 185 Ill. 218, 56 N. E. 1087, to point that the words "control" and "manager" are synonymous.

Coverture — Business. — Cited in reference notes in 126 Am. St. Rep. 114, to point that profits arising from a business carried on during coverture ordinarily belongs to the community; 21 L.R.A. 625, where a woman carried on business under the Nevada Sole Trader's Act, and employed her husband at a reasonable compensation, in good faith, his creditors are not entitled to the profits of the business.

15 Nev. 46-56. **STATE v. HYMER.**

Homicide — Degrees. — Cited in *State v. Lindsay*, 19 Nev. 50, 3 Am. St. Rep. 776, 5 Pac. 823, as to homicides which are murder in first degree under 1 Comp. L. 2323.

Cited in reference notes in 63 L.R.A. 356, to point that any death consequent upon the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary shall be deemed murder in the first degree; 63 L.R.A. 359, where homicide is committed in the perpetration of, or attempt to perpetrate any of the felonies enumerated in the statute, the murder carries with it conclusive evidence of the premeditation; the question whether the killing was wilful, deliberate, and premeditated is answered by the statute in the affirmative, and, if the prisoner is guilty of the offense, it is murder in the first degree.

— Evidence. — Cited in *Moore v. People*, 26 Colo. 217, 57 Pac. 858, in sustaining objections to improper admission of evidence as to threats in homicide case; *State v. Larkins*, 5 Ida. 206, 47 Pac. 946, in sustaining admission of evidence connected with declarations and acts of accused, in house of deceased tending to show animus of accused toward deceased; *Hawley v. Dawson*, 16 Ore. 347, 18 Pac. 594, to point that motion to strike out testimony of witness cannot be sustained, if any part of it is admissible; *State v. Vance*, 29 Wash. 489, 70 Pac. 51, to point that evidence complained of was admitted without objection and was proper to show general malice and purpose to injure or kill someone.

Cited in reference note in 89 Am. St. Rep. 694, to point that threats

made by the defendant accused of murder to kill or injure "someone" not definitely designated, especially when made shortly before the commission of the crime to which they may be construed to have reference, are admissible in connection with other explanatory circumstances on proof of the corpus delicti. It is, however, a matter of mere inference whether the deceased came within the scope of these threats, and their weight or probative force is a question for the jury alone.

**Instructions.**—Cited in *State v. Streeter*, 20 Nev. 409, 22 Pac. 760; *State v. Hartley*, 22 Nev. 360, 40 Pac. 372, 28 L.R.A. 41, and *State v. Johnny*, 29 Nev. 224, 87 Pac. 10, sustaining instruction as to weight and effect to be given to defendant's evidence in criminal case; *State v. Johnson*, 16 Nev. 38, to point that judge should not state to jury his estimate of witness in giving his opinion as to weight to be attached to his testimony.

Cited in reference note in 19 L.R.A.(N.S.) 816, to point that the rule is sometimes stated to be that an instruction that the interest accused has in the case may be considered by the jury in weighing his testimony is not erroneous.

#### 15 Nev. 56-57. **MATTER OF GRANGER.**

Cited in reference note in 95 Am. Dec. 338, to point that a statute authorizing the court to remove an attorney who has been convicted of a felony or misdemeanor, and providing that "the record of his conviction shall be conclusive evidence," contemplates a conviction in a court of record; and the docket of a justice of the peace is not conclusive.

#### 15 Nev. 58-59. **LONKEY v. COOK.**

**Mechanics lien law—Rights of subcontractor.**—Cited in *Jarvis v. State Bank*, 22 Colo. 816, 55 Am. St. Rep. 184, 45 Pac. 508, to point that the statutory rights of a subcontractor cannot be destroyed by contractor in contract with owner waiving rights to lien; *Aste v. Wilson*, 14 Colo. App. 329, 59 Pac. 848, and *McFadden v. Stark*, 58 Ark. 14, 22 S. W. 886, discussing right of sub-contractor under mechanics lien law; *Henry etc. Co. v. Evans*, 97 Mo. 61, 10 S. W. 873, 3 L.R.A. 336, to point that there is no constitutional objection to enforcement of the mechanic lien by subcontractor; *Laird v. Moonan*, 32 Minn. 362, 20 N. W. 355, construing laws 1878, c. 90 giving mechanic lien to subcontractor; *Smith v. Oregon S. L. & U. N. R. Co. (The Victorian)*, 24 Ore. 140, 41 Am. St. Rep. 850, 32 Pac. 1045, in construing the Oregon mechanic lien law as to rights of subcontractors and material men.

Cited in reference note in 20 L.R.A. 564, to point that *Hunter v. Truckee Lodge*, 14 Nev. 24, was approved and followed in the principal case in construction given to mechanic lien law as to rights of subcontractor and material men to direct lien.

## 15 Nev. 59-63. BURNS v. RODEFER.

Cited in *Hopkins v. Nashville etc. Ry. Co.*, 96 Tenn. 439, 34 S. W. 1036, 32 L.R.A. 363, to point that nonsuit should be granted where evidence is such that, admitting all the facts proved and all reasonable deductions from them to be true, the plaintiff, on all the proof, ought not to recover.

## 15 Nev. 64-74, 37 Am. Rep. 458. STATE v. FOLEY.

Witness — Competency aa. — Cited in *State v. Roberts*, 28 Nev. 378, 82 Pac. 104, to point that prior to enactment of § 3472, Civil Practice Act, person convicted of infamous crime could not be a witness; *Palmer v. Cedar Rapids etc. Ry. Co.*, 113 Iowa, 448, 85 N. W. 758, to point that conviction in another jurisdiction cannot be shown for purpose of disqualifying witness; *State v. Grant*, 79 Mo. 127, 49 Am. Rep. 224, holding that the legislature may not restore the competency of a witness rendered incompetent by reason of conviction of felony.

— Pardon, effect on competency of. — Cited in *Redd v. State*, 65 Ark. 485, 47 S. W. 121, in discussing effect of pardon on competency of witness; *Singleton v. State*, 38 Fla. 304, 56 Am. St. Rep. 132, 21 So. 23, 34 L.R.A. 255, discussing without deciding whether restoration to civil rights restores competence to one convicted of infamous crime; *State v. Peters*, 43 Ohio St. 650, 4 N. E. 87, discussing what is a pardon and effect of full pardon; *Commonwealth v. House*, 10 Pa. Super. Ct. 265, discussing effect of a full and unconditional pardon; *Hunnicut v. State*, 18 Tex. App. 518, 51 Am. Rep. 332, to point that pardon may be granted after expiration of offense and competency as witness restored.

Cited in reference notes in 59 Am. Dec. 579, to point that a pardon not only relieves a person from imprisonment, but also removes all the disabilities resulting from the criminal act; 59 Am. Dec. 578, a pardon which is confined to one offense cannot be extended to another; 59 Am. Dec. 576, pardon is not vitiated by the misstatement of the date of the conviction, if it is possible to show that it was intended to cover and does cover the offense of which the record shows that witness to be guilty; 59 Am. Dec. 575, prisoner may be pardoned even after his term of imprisonment has expired.

## 15 Nev. 74-100. STATE v. PRITCHARD.

*State v. Pritchard*, 16 Nev. 101, same case on second appeal.

Challenge for implied bias. — Followed in *State v. Hing*, 16 Nev. 309, on point that challenge for implied bias is not subject of exception; *State v. Vaughan*, 23 Nev. 236, 39 Pac. 734, on point that allowance for challenge of implied bias is not subject of exception; cited in *State v. McMahon*, 17 Nev. 370, 30 Pac. 1061, to point that acceptance of juror without objection, with knowledge of unqualified opinion, objection cannot be raised after verdict; *Clayton v. Commonwealth*, 81 Va.

795; *Clanton v. State*, 13 Tex. App. 152, a person who would not, upon murder, inflict capital punishment is not competent as juror.

Court may excuse juror without challenge. — Cited in *United States v. Jones*, 69 Fed. 976, to point that for good cause shown court may, without challenge from either party, excuse juror on his own motion before he is sworn.

Peremptory challenge. — Cited in *State v. Hunter*, 118 Iowa, 691, 92 N. W. 874, to point right to exercise peremptory challenge is not lost until jury is sworn; *State v. Peel*, 23 Mont. 363, 75 Am. St. Rep. 532, 59 Pac. 171, to point that either party may use challenge upon any juror in the box, so long as he has one to use before jury finally accepted.

Cited in reference note in 41 Am. Dec. 463, to point that in Massachusetts a peremptory challenge of a juror in a capital case must be taken before the juror is examined as to his interest, bias, and opinions.

**15 Nev. 101-114. BROPHY MIN. CO. v. BROPHY & DALE G. & S. MIN. CO.**

Adverse possession. — Cited in *McDonald v. Fox*, 20 Nev. 368, 23 Pac. 235, to point that possession must be hostile in its inception; actual, peaceable, open, notorious, continuous, and uninterrupted for the period prescribed by the state.

Cited in reference note in 13 L.R.A. (N.S.) 52, to point that open, notorious, unequivocal, and exclusive possession of real estate, under an apparent claim of ownership, is constructive notice to all the world of whatever claim the possessor asserts, whether such claim is legal or equitable in its nature.

Deed given as security. — Cited in *Gruber v. Baker*, 20 Nev. 462, 23 Pac. 860, 9 L.R.A. 304, to point that deed given as security is an absolute deed as regards third persons; *Greenwood Building etc. Ass'n v. Stanton*, 28 Ind. App. 553, 63 N. E. 576, to point that right of redemption is cut off by conveyance of grantee to bona fide purchaser without notice; *Exon v. Dancke*, 24 Ore. 117, 32 Pac. 1047, construing Hills and L. § 3029, holding continued possession by grantor to be notice of unrecorded defeasance held by him; *Harrington v. Miller*, 4 Wash. 812, 31 Pac. 327, discussing proper parties to action to foreclose a mechanics lien, and who was the "owner" under circumstances in case, a deed claimed to have been given as security merely.

Cited in reference notes in 97 Am. Dec. 650, to point that a bona fide purchaser of a legal title is not affected by any equity founded either on a trust, or an encumbrance of which he has no notice, actual or constructive; 104 Am. St. Rep. 346, on the other hand, the authorities are numerous to the effect that possession by grantor after a full conveyance of the property is not constructive notice to subsequent purchasers and encumbrance of any rights reserved in the land by him or

of any secret equities in his favor; 13 L.R.A.(N.S.) 59, the presumption that a purchaser of lands in possession of a stranger to the vendor's title takes with full notice of the legal equitable rights of such possessor, and in subordination to them, can be overcome or rebutted only by clear and explicit proof on the part of the purchaser, or those claiming under him, of diligent, unavailing efforts on the part of the vendee to discover or obtain actual notice of any legal or equitable rights in the premises of the party in possession; 13 L.R.A.(N.S.) 117, possession of land is notice to a purchaser of the possessor's title does not apply to a vendor remaining in possession after giving a full record deed, so as to require a purchaser from his grantee to inquire whether he had reserved any interest in the land conveyed, since, so far as the purchaser is concerned, the vendor's deed is conclusive, he having declared thereby that he makes no reservation; and he is estopped from setting up any secret arrangement by which his grant is impaired.

**15 Nev. 114-141. DREXLER v. TYRRELL.**

Revenue act—Nonpayment of license.—Cited in *Mandlebaum v. Gregovich*, 17 Nev. 95, 45 Am. Rep. 433, 28 Pac. 122, as to right of traveling merchant to collect for goods sold without having acquired license by § 67 of Revenue Act; *Gilmore v. Roberts*, 79 Wis. 455, 48 N. W. 523, to point that court deals with taxes only and not with secret purposes which may never be carried into effect.

Mortgage canceled to escape tax—New mortgage invalid.—Cited in *First Nat. Bank v. Kreig*, 21 Nev. 407, 32 Pac. 642, by counsel to point that where mortgage canceled to escape tax and new mortgage taken in its place, latter mortgage could not be enforced; disapproved in *Waterbury v. McKinnon*, 146 Fed. 739, 77 C. C. A. 294; *Callicott v. Allen*, 31 Ind. App. 565, 67 N. E. 197; *Nichols v. Weed Sewing Machine Co.*, 27 Hun, 206, and *Crowns v. Forest Land Co.* 99 Wis. 106, 74 N. W. 547, holding fact that lender of money resident of state procures note and mortgage securing same to be executed in name of another resident of foreign country for purpose of evading taxation on the mortgage, constitutes no defense in action to foreclose; cited in dis. op. of McIver, J., in *Brown v. Newell*, 64 S. C. 73, 41 S. E. 851, with approval upon point, but without having access to case.

Claim founded on illegal or immoral act.—Cited in *Sheldon v. Pruessner*, 52 Kan. 590, 35 Pac. 203, 22 L.R.A. 712, to point that court will not lend aid to man who founds his cause of action upon illegal or immoral act.

**15 Nev. 143-145. REESE G. & S. MIN. CO. v. RYE PATCH CONSOL. M. M. CO.**

*Reese G. & S. Min. Co. v. Rye Patch Mill. & Min. Co.* 15 Nev. 341, same case on second appeal.

**15 Nev. 146-147, 37 Am. Rep. 466. EX PARTE WHITE.**

Sunday — Judgment rendered on. — Cited in *Stone v. United States*, 64 Fed. 678, 12 C. C. A. 451, as to validity of judgment rendered on Sunday; *Styles v. Harrison*, 99 Tenn. 129, 63 Am. St. Rep. 324, 41 S. W. 333, to point that no valid judgment can be rendered on Sunday.

Cited in reference note in 63 Am. St. Rep. 324, to point that a criminal judgment of a justice of the peace rendered on Sunday is void.

— Verdict received and entered on. — Cited in *Stone v. United States*, 167 U. S. 196, 42 L. ed. 134, 17 Sup. Ct. Rep. 785, to point verdict may be received and entered on Sunday whatever may be the rule as to judgment; *Ex Parte Tice*, 32 Ore. 191, 49 Pac. 1041, holding that consent of defendant does not confer on court authority to discharge jury on Sunday for failure to agree; distinguished arguendo in *Hovey v. Sheffner*, 16 Wyo. 254, 93 Pac. 305, 15 L.R.A.(N.S.) 237, holding discharge of jury in criminal case on Sunday is unlawful and therefore equivalent to acquittal will not entitle prisoner to discharge on habeas corpus.

**15 Nev. 147-157. OVERMAN SILVER MIN. CO. v. CORCORAN.**

Eminent domain. — Cited in *Oury v. Goodwin*, 3 Ariz. 272, 26 Pac. 381, discussing constitutionality of statute authorizing exercise of eminent domain for mining purposes; *Douglass v. Byrnes*, 59 Fed. 31, to point that mining is public purpose within constitution authorizing exercise of eminent domain; *Byrnes v. Douglass*, 83 Fed. 47, 27 C. C. A. 399, to point that principal case approves *Dayton Mining Co. v. Seawell*, 11 Nev. 394, and declares the settled law of state as to exercise of power of eminent domain for mining purposes; *Highland Boy Gold Min. Co. v. Strickley*, 116 Fed. 856, 54 C. C. A. 186, to point that it is prerequisite to exercise of power of eminent domain to show that it is necessary to use of property to carry on the business of quasi public corporation seeking it; *Brown v. Gerald*, 100 Me. 362, 109 Am. St. Rep. 526, 61 Atl. 790, 70 L.R.A. 477, to point that mining is public use; *Butte etc., Ry. Co. v. Montana etc., Ry. Co.* 16 Mont. 526, 50 Am. St. Rep. 519, 41 Pac. 239, 31 L.R.A. 305, as upholding appropriation of land for mining tunnel as proper exercise of power of eminent domain; *Helena Power etc. Co. v. Spratt*, 35 Mont. 124, 68 Pac. 775, 8 L.R.A.(N.S.) 571, as upholding taking of land for mining shaft by eminent domain; *Kansas etc. Ry. Co. v. Northwestern Coal etc. Co.* 161 Mo. 310, 84 Am. St. Rep. 724, 61 S. W. 688, 51 L.R.A. 943, as to power to take land by eminent domain for railroad to coal mine; *Salt Lake City v. Salt Lake City Water etc. Co.* 24 Utah, 285, 67 Pac. 577, 61 L.R.A. 653, as to obligation of two public uses to stand together, when they can do so without serious impairment to either which cannot be compensated in damages.

Cited in reference notes in 63 Am. Dec. 106, to point that under a



statute allowing condemnation of land necessary for mining purposes, the lands sought to be condemned were the most eligible and convenient for the erection of expensive machinery and sinking a shaft, and no other lands could have been selected, except at great expense, and at places inaccessible to a railroad or to wagon roads, without which the business of the mining company could not be successfully conducted; it was held that a necessity existed for the condemnation of the land in controversy; 102 Am. St. Rep. 818, that magnitude of the interests to be benefited has been held to be of great importance in determining whether the proposed use is of such a public character as to warrant the exercise of the right of eminent domain; 1 L.R.A.(N.S.) 210, as affirming *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394, in affirming an order condemning land for the erection of machinery and sinking of a shaft for the development of the petitioner's mine; 15 L.R.A.(N.S.) 618, in principal case the court followed *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394, in affirming an order condemning land for the erection of machinery and the sinking of a shaft for the development of a gold mine; 22 L.R.A.(N.S.) 38, as to what constitutes a public use.

**Lode or vein.** — Cited in *Book v. Justice Min. Co.* 58 Fed. 111, as to difficulty of court ascertaining truth regarding existence or non-existence of lode or vein in attempt to ascertain fact regarding same in trial; *Book v. Justice Min. Co.* 58 Fed. 121, in discussing definition of what constitutes lode or vein; *United States v. King*, 9 Mont. 31, 22 Pac. 499, discussing what evidence will establish the existence of lode.

Cited in reference note in 7 L.R.A.(N.S.) 820, to point that a proper discovery is a prerequisite to the vesting in a competent locator of a complete possessory title to a lode-mining claim.

**Witness** — **Latitude in examination of.** — Cited in *Justice Min. Co. v. Barelay*, 82 Fed. 557, as to giving wide latitude for purpose of ascertaining reasons upon which conclusions of witness based.

#### 15 Nev. 158-164. LEE v. McLEOD.

Cited in *McLeod v. Lee*, 17 Nev. 110, 28 Pac. 125, as to submitting special questions to jury; *McLeod v. Lee*, 17 Nev. 111, 28 Pac. 125, as to pleadings in principal case; *McLeod v. Lee*, 17 Nev. 113, 28 Pac. 126, as to point where dam was erected in Walker river.

**Error of court.** — Cited in *McLeod v. Lee*, 17 Nev. 116, 28 Pac. 127, as to error of court in deciding regular character and height of dam; *McLeod v. Lee*, 17 Nev. 120, 28 Pac. 128, regarding point where trial court erred in ruling that part of issue had been adjudicated in former suit.

**Jury** — **Receiving evidence out of court.** — Cited in *Jackson v. United States*, 102 Fed. 486, 42 C. C. A. 452, discussing the effect of jury receiving evidence out of court and proper method of bringing the matter before court of review.

**Appeal.**—Cited in *State v. Norton*, 69 S. C. 460, 48 S. E. 466, on appeal from verdict of conviction alleging error and allowing stenographer to read to jury testimony of witness the point cannot be brought before the appellate court except on proper exception thereof; *Harbert v. Atlanta etc. Ry. Co.* 78 S. C. 551, 59 S. E. 649, to point that reasons why punitive damages should not be recovered should have been brought to attention of trial court in order to afford opportunity of ruling on question.

**Misconduct of jury—New trial for.**—Cited in *Fletcher v. Hale*, 22 W. Va. 49, to point that where new trial is asked for on account of irregularity or misconduct of jury it must appear party seeking new trial called attention of court to same at time it was first discovered, otherwise defendant will have been held to have consented to and waived all irregularity on account of misconduct.

**15 Nev. 164-167. STATE EX REL. AH CHEW v. RISING.**

**Mandamus.**—Cited in *State ex rel. Schaw v. Noyes*, 25 Nev. 49, 58 Pac. 950, in holding relator must fail; *Hardin v. Guthrie*, 26 Nev. 252, 66 Pac. 745, mandamus is never granted in anticipation of supposed omission of duty, however, strong presumption person ought to be coerced.

Cited in reference note in 98 Am. St. Rep. 896, to point that there is no default in the performance of a legal duty in refusing a jury trial, and no threats or predetermination can take the place of such default before the arrival of the time when the duty should be performed.

**15 Nev. 167-184. RICORD v. CENTRAL PAC. R. CO.**

**Malicious prosecution.**—Cited in *Reno Water Co. v. Leete*, 17 Nev. 208, 30 Pac. 708, as to authority to begin suit for corporation; *Fenstermaker v. Page*, 20 Nev. 290, 21 Pac. 322, as to what must be shown to maintain action for malicious prosecution; *Pennsylvania Co. v. Weddle*, 100 Ind. 140; *Boogher v. Life Association*, 75 Mo. 324, 42 Am. Rep. 416, and *Gulf etc. Ry. Co. v. James*, 73 Tex. 24, 15 Am. St. Rep. 752, 10 S. W. 749, to point that action of malicious prosecution or false imprisonment may be maintained against corporation.

Cited in reference notes in 26 Am. St. Rep. 131, to point that courts will not exonerate a corporation from responding in damages for a wrong done by it, on the ground that it had no authority or power to do it; and will therefore hold it liable for a malicious prosecution under substantially the same rules of law as apply against private persons; 14 L.R.A. 795, railroad company is liable for a malicious prosecution instituted by its attorneys and officers against one on a charge of having stolen its property.

**—Probable cause.**—Cited in *Thomas v. Muehlmann*, 92 Ill. App. 576, to point that commitment by or conviction of justice of peace only

prima facie evidence of probable cause; *Darnell v. Sallee*, 7 Ind. App. 584, 34 N. E. 1021, as to fact of binding over by justice sitting as committing magistrate being adjudication of existence of probable cause for action for prosecution; *Sweeney v. Perney*, 40 Kan. 104, 19 Pac. 329, in discussing question whether proof of arrest, commitment and indictment is prima facie evidence of conviction in action of malicious prosecution; *Ross v. Hixon*, 46 Kan. 552, 26 Am. St. Rep. 125, 26 Pac. 955, 12 L.R.A. 761, to point as to whether or not proof of arrest, committal, and indictment is prima facie proof of probable cause; *Ross v. Hixon*, 46 Kan. 553, 26 Am. St. Rep. 125, 26 Pac. 955, 12 L.R.A. 761, holding finding of committing magistrate that offense has been committed is only prima facie evidence of probable cause in action for malicious prosecution; *Stamper v. Raymond*, 38 Ore. 35, 62 Pac. 26, in discussing question whether commitment or judgment of conviction in justice's court is prima facie evidence of probable cause in action for malicious prosecution.

Cited in reference note in 18 L.R.A.(N.S.) 51, to point that citing principal case as among those cases viewing the defense as going to question of probable cause; *Ravenga v. Mackintosh*, 16 Eng. Rul. Cas. 756.

**Reward.**—Cited in *Central R. & B. Co. v. Cheatham*, 85 Ala. 298, 7 Am. St. Rep. 51, 4 So. 830, as to corporation offering standing reward; *Norwood etc. Co. v. Andrews*, 71 Miss. 645, 16 So. 262, as to right of corporation to incur liability for reward offered.

**Public administrator—Liability of sureties.**—Cited in *State ex rel. Scott v. Greer*, 101 Mo. App. 676, 74 S. W. 883, in discussing liability of public administrator and suit on bond against sureties.

**Embezzlement—Indictment.**—Cited in reference note in 98 Am. Dec. 152, to point that under statutes which speak of money or property "intrusted by his master or employer to the servant," the indictment should allege that the money embezzled was intrusted to the defendant by his employers. 98 Am. Dec. 152, note.

Cited in reference note in 98 Am. Dec. 160, to point that the distinction taken by the supreme court of Nevada seems a very proper one. It is there maintained that where a clerk, by authority of his master, collects a bill and fraudulently converts the money, the offense of embezzlement is complete, and if afterwards he collects a second bill, and fraudulently converts its proceeds, this constitutes a second offense; and that though he may commit more than one embezzlement of his employer's money, and if he does, may be separately indicted for each separate offense, yet, if the money from different persons was all collected before any portion of it was converted, then he committed but one offense.

15 Nev. 184-187. **STATE v. ON GEE HOW.**

No citation.

15 Nev. 188-195. **STATE v. PEARCE.**

Homicide—Evidence for defendant.—Cited in *State v. Middleham*, 62 Iowa, 154, 17 N. W. 447, discussing right of accused to show he knew deceased to be quarrelsome and dangerous.

Cited in reference notes in 124 Am. St. Rep. 1029, to point that if there is the slightest evidence reasonably tending to show that the killing was in self-defense evidence of the violent and dangerous character of the deceased should be admitted; 3 L.R.A.(N.S.) 353, the bad character for peace and quietness of the person killed is not admissible in evidence in a prosecution for homicide, in the absence of a plea of self-defense or of a showing of justification or excuse; 3 L.R.A.(N.S.) 354, an overt act in the nature of an assault by a violent and bloodthirsty person may justify more prompt action upon the part of the person against whom it is made, as a necessary means of self-defense, than would be required if he were an ordinary person, and the character of the deceased for violence is therefore always a vital issue when self-defense is pleaded; 3 L.R.A.(N.S.) 355, fact that the deceased was a dangerous and bloodthirsty man has already been established by evidence in a prosecution for homicide, and is not disputed, refusal to admit additional proof to that effect is not error; 3 L.R.A.(N.S.) 362, fact deceased was turbulent, violent, and desperate is competent in a prosecution for homicide which occurred under such circumstances as to render it doubtful whether the act was committed maliciously or from a well-grounded apprehension of danger; 14 L.R.A.(N.S.) 708, if the circumstances of the killing do not present any question of self-defense, all evidence of the character of the deceased is inadmissible; 14 L.R.A.(N.S.) 710, in homicide case the questions relative to the character of the deceased, as to whether he was of peaceable and quiet disposition, or was a quarrelsome, violent or dangerous man, were objectionable as permitting the witness to testify as to isolated facts instead of general reputation; but, inasmuch as the circumstances of the killing did not present any question of self-defense, all evidence of the character of the deceased was inadmissible, so it was unnecessary to pass upon the propriety of the offered evidence.

Judgment—Action on by assignee.—Cited in *Mandlebaum v. Greigovich*, 24 Nev. 158, 50 Pac. 856, to point that assignee of judgment is proper person in action thereon.

Character of witness—Extent of testimony.—Cited in *People v. Van Gaasbeck*, 189 N. Y. 416, 82 N. E. 730, 22 L.R.A.(N.S.) 650, to point that witness to character, testimony should not go beyond reputation.

Cited in reference notes in 103 Am. St. Rep. 397, to point that it seems to be the general rule that evidence of defendant's good character should be restricted to the trait of character involved in the accusation against the defendant; 90 L.R.A. 614, evidence of particular facts as to the defendant's reputation is incompetent; the pasol

for defendant must show his general reputation; 14 L.R.A.(N.S.) 726, witnesses to the good character of the one accused of crime are not allowed to speak from personal knowledge of his traits and disposition; 22 L.R.A.(N.S.) 662, in a murder case, questions asked witnesses as to their individual knowledge of the good character and disposition of the defendant for peace and quietness were held incompetent.

#### 15 Nev. 195-214. THOMPSON v. POWNING.

**Instruction.**—Cited in *State v. Buralli*, 27 Nev. 54, 71 Pac. 536, to point that judgment will not be reversed for refusal to give instruction where it appears from record that law of case has been laid down properly and fairly by trial judge; *Burgh v. Southern Pac. Co.* 104 Pac. (Nev.) 238, to point that it is not error for court to refuse to give instruction which is in part wrong, and may so modify it as to conform to pleading.

**Libel—Privileged matter.**—Cited in *Cox v. Strickland*, 101 Ga. 493, 28 S. E. 661, to point that defamatory matter is not privileged because published in form of advertisement or news, or because furnished by correspondent or copied from another paper; *Haley v. Sentinel Co.* 133 Wis. 24, 126 Am. St. Rep. 930, 113 N. W. 426, as holding not libelous to print plaintiff's own complaint in the libel action on trial.

Cited in reference notes in 104 Am. St. Rep. 131, to point that a fair and impartial account of the proceedings in a court of justice is, as a general rule, a justifiable publication; 104 Am. St. Rep. 138, proprietors of newspapers are not entitled to claim justification in publishing items of news or detail current events that are libellous, no matter whether furnished by correspondence, reported by other persons or copied from other papers; 116 Am. St. Rep. 815, any written statement imputing to an officer or of integrity or lack of those qualities necessary for proper performance of duties in office, or a failure to properly perform duties of his office are libellous per se.

—**Malice.**—Cited in *Sheen v. Peoria Journal Co.* 53 Ill. App. 273, in discussing evidence for purpose of showing malice in action for libel; *Henry v. Moberly*, 23 Ind. App. 313, 51 N. E. 500, to point that where obligator is libelous per se malice is presumed and proof is not necessary to entitle plaintiff to recover.

Cited in reference notes in 69 Am. Dec. 65, to point that in an action of libel, if the article is ambiguous or the intentions of the publishers doubtful, evidence of express malice is admissible to enhance the damages; 92 Am. Dec. 637, evidence is admissible on behalf of defendant in slander to repeal malice in mitigation not of actual damages but of exemplary damages.

—**Complaint.**—Cited in *Lauder v. Jones*, 13 N. D. 540, 101 N. W. 911, in discussing decisive question upon objection that complaint in cause in action of libel does not constitute action.

**15 Nev. 215-234. MORESI v. SWIFT.**

Pleading, mistake in—Who may take advantage of.—Cited in *Mendes v. Freiters*, 16 Nev. 395, to point that mistake in declaring upon account stated, defendant alone can take advantage of error; *May v. Disconto Gesellschaft*, 211 Ill. 316, 71 N. E. 1003, to point that regularity of affidavit on attachment cannot be taken advantage of by creditor or empaneled where rights have been acquired pendente lite; *Leppel v. Beck*, 2 Colo. App. 395, 31 Pac. 187, to point sufficiency of affidavit in attachment cannot be attacked collaterally; *Mentzer v. Ellison*, 7 Colo. App. 327, 43 Pac. 468, to point that irregular affidavit on attachment does not render the attachment void and can be assailed by defendant only and not collaterally by a stranger.

Instruction.—Cited in *State v. Levigne*, 17 Nev. 442, 30 Pac. 1086, as to when court must change as requested; *Dixon v. Ahern*, 19 Nev. 429, 14 Pac. 601, to point that defendant was entitled to instruction applicable to his theory, and which evidence tended to support; *Doyle v. Burns*, 123 Iowa, 505, 99 N. W. 201, in holding erroneous instruction because it neglected to state that statement must have been intentional or knowingly false, and that they should have been as to material matters; *First National Bank v. Minneapolis etc. Elevator Co.*, 11 N. Dak. 288, 91 N. W. 440, to point that in a cautionary instruction to jury as to false testimony it must state that false testimony must be as to material fact.

Appeal.—Cited in *Dennis v. Caughlin*, 22 Nev. 453, 41 Pac. 768, 29 L.R.A. 731, holding such errors only as appellant complains of can be considered on appeal.

Mortgagee — Right to take possession. — Cited in *Marsh v. Wade*, 1 Wash. 544, 20 Pac. 580, discussing right of mortgagee taking possession of mortgaged chattel before other right or lien attaches.

Bona fide purchaser — Proof. — Cited in reference note in 70 Am. Dec. 141, to point that party claiming as bona fide purchaser without notice and for valuable consideration, must affirmatively prove the payment of the consideration by other evidence than the receipt upon the deed.

**15 Nev. 284-259. STATE v. CALIFORNIA MIN. CO.**

Affirmed in *State v. California Min. Co. etc.*, 15 Nev. 259, in all material respects the same.

Taxes.—Affirmed in *State v. California Min. Co. etc.* 15 Nev. 310, as to tax and penalty causing but one cause of action; cited in *State v. Consolidated Virginia Min. Co.* 16 Nev. 438, to point that § 3 of act to discontinue litigation in certain tax suits is unconstitutional; *State v. Central Pac. R. Co.* 21 Nev. 269, 30 Pac. 692, to point that taking judgment for part of tax is bar to action for balance due; *Sawyer v. Dooley*, 21 Nev. 399, 32 Pac. 440, holding act of 1891, p. 56 constituta-

tional; *County of Sacramento v. Central Pac. R. Co.* 61 Cal. 255, in discussing power of district attorney to compromise suit for delinquent taxes.

**Special law.**—Cited in *State v. Consolidated Virginia Min. Co.* 16 Nev. 443, in defining special law; affirmed in *State v. Consolidated Virginia Min. Co.* 16 Nev. 450, on point of act being special law; cited in *Ex Parte Pittman*, 99 Pac. (Nev.) 703, to point that legislature may enact law which applies only to certain cases, if the basis of classification is reasonable.

**Retrospective laws.**—Cited in *Esmer v. Spaulding*, 17 Nev. 309, 30 Pac. 900, on point that constitution does not prohibit retrospective laws.

#### 15 Nev. 259. *STATE v. CALIFORNIA MIN. CO.*

Cited in *State v. Consolidated Virginia Min. Co.* 16 Nev. 438, holding *Stats.* 1879, p. 143, unconstitutional.

#### 15 Nev. 259-265. *CHASE v. CHASE.*

**Trespass—Uninclosed land.**—Cited in *Monroe v. Cannon*, 24 Mont. 325, 31 Am. St. Rep. 445, 61 Pac. 866, discussing question of trespass upon uninclosed lands; *Ely v. Rosholt*, 11 N. Dak. 561, 92 N. W. 865, and *Hecht v. Harrison*, 5 Wyo. 286, 40 Pac. 308, discussing right to recover for damages by trespassing stock wandering onto uninclosed land of another; *Poindexter v. May*, 98 Va. 150, 34 S. E. 973, 47 L.R.A. 592, in discussing constitutionality of fence law; *Martin v. Platte Valley Sheep Co.* 12 Wyo. 453, 76 Pac. 575, as to rule respecting cattle running at large.

Cited in reference notes in 49 Am. Dec. 250, to point that common-law rule, requiring the owners of domestic animals to keep them at home, is not applicable to the condition of the country in many of the states, and not in accordance with the customs of the people or with the course of legislation releasing the animals running at large and to the maintenance of fences, and that such owner incurs no liability by permitting his cattle to range at will on uninclosed lands where there is no general statute or local regulation prohibiting it; 49 Am. Dec. 251, where an owner of land is bound by agreement, prescription, or statute to maintain a fence, through defects in which his neighbor's cattle enter upon his land and do damage, without the fault of the owner of such cattle, he cannot recover therefor; 81 Am. St. Rep. 448, it seems to be a matter of indifference whether the lands are cultivated or uncultivated; if in fact, such lands are unprotected by a sufficient or any fence, a cattle owner is not liable for injury done to crops by his stock running at large; 32 L.R.A. 55, in Nevada damages from trespassing cattle cannot be recovered where the field is not enclosed by fence prescribed by statute as the rule of common law is repugnant to the law of Nevada.

Cited in reference note in 3 Eng. Rul. Cas. 121.

**15 Nev. 265-271. SADLER v. IMMEL.**

Appeal—Duty to person finding.—Cited in *Langworthy v. Coleman*, 18 Nev. 444, 5 Pac. 67, as to duty of appellate court to presume finding to support judgment.

Cited in reference note in 45 L.R.A. 179, to point that Bankrupt Act of 1867 did not render general deeds of assignment for benefit of creditors void; and that where bankrupt proceedings were not instituted, such deeds were, with few exceptions, held valid.

**15 Nev. 271-275. MACE v. LIDDLE.**

Mandamus.—Cited in *State v. Boerlin*, 30 Nev. 477, 98 Pac. 404, to point that mandamus will not lie to review, regulate, revise or annul official discretion or judgment of board of county commissioners after the event.

**15 Nev. 276-292. WELLS, FARGO & CO. v. WELTER.**

No citation.

**15 Nev. 293-302. BASSETT v. MONTE CHRISTO G. & S. MIN. CO.**

Corporation—Holding meeting outside state.—Cited in *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 106, 55 S. W. 992, to point that where directors of corporation are restricted by charter or by laws of state in holding meetings of corporate character to limits of state, exercising such power beyond limits of state is void.

—Mortgaging property outside state.—Cited in reference note in 6 L.R.A. 565, to point that corporation may, unless forbidden by law, issue bonds and mortgage its property outside of the state creating it.

**15 Nev. 302-304. CEDAR HILL CONSOL. G. & S. MILL. & MIN. CO. v. LITTLE G. & S. MIN. CO.**

No citation.

**15 Nev. 304-308. STATE EX REL. FARIS v. HATCH.**

No citation.

**15 Nev. 308-312. STATE v. CALIFORNIA MIN. CO.**

Affirmed in *State v. Consolidated Virginia Min. Co.* 15 Nev. 312, as to authority of district attorney to extend time for payment of penalties due in a suit for delinquent taxes.

**15 Nev. 312. STATE v. CONSOLIDATED VIRGINIA MIN. CO.**

No citation.

**15 Nev. 313-340. SOLEN v. VIRGINIA & T. R. CO.**

Judgment—For interest.—Distinguished in *Mandlebaum v. Grego-*



vich, 24 Nev. 159, 50 Pac. 850, as not an action upon a judgment which did not call for any interest; *Mandlebaum v. Gregovich*, 24 Nev. 160, 50 Pac. 851, as to right to enter upon judgment for interest silent as to that matter.

— Suit on. — Cited in *Wells, Fargo & Co. v. Vansickle*, 112 Fed. 401, to point that to commence suit upon judgment in absence of provision to contrary is not barred or suspended by issuance of execution; *Stevens v. Stone*, 94 Tex. 417, 36 Am. St. Rep. 842, 60 S. W. 959, as to actions upon judgments; *Citizens' Nat. Bank v. Lucas*, 26 Wash. 424, 90 Am. St. Rep. 753, 67 Pac. 254, 56 L.R.A. 815, as having been overruled in the later case of *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 Pac. 849, as to time when statute of limitations commence to run on domestic judgment.

Execution, for interest. — Cited in *Moran v. Hagerman*, 69 Fed. 481, and *Hagerman v. Moran*, 75 Fed. 99, 21 C. C. A. 242, to point that where judgment does not include interest execution cannot.

**15 Nev. 341-345. REESE G. & S. MIN. CO. v. RYE PATCH CONSOL. MILL. & MIN. CO.**

Appeal — Notice. — Cited in *Spoffard v. White River Valley Land etc. Co.* 24 Nev. 185, 51 Pac. 116, as to practice in taking and perfecting appeal; followed in *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 272, 52 Pac. 576, on point that filing of the notice of appeal must precede or be contemporaneous with the service thereof; cited in *State v. Preston*, 30 Nev. 804, 95 Pac. 919, to point that notice of appeal must be filed before service upon opposing counsel, or the appeal will be fatally defective; *State v. Brown*, 30 Nev. 497, 93 Pac. 872, in discussing practice on appeal from justices' courts; in dis. op. of *Sweeney, J.*, in *State v. Brown*, 30 Nev. 504, 98 Pac. 874, as to filing notice of appeal before service thereof; *State v. District Court*, 34 Mont. 115, 115 Am. St. Rep. 524, 35 Pac. 872, to point that rendering appeal effectual, the notice must be filed preceding or contemporaneous with the service of the copy.

**15 Nev. 345-378. STATE v. McLANE.**

Appeal — Reversal. — Cited in *State v. Johnson*, 16 Nev. 39, to point that verdict will not be reversed because of failure of court to caution them on evidence of codefendant where jury were not misled upon point; *State v. Maher*, 25 Nev. 470, 62 Pac. 236, to point that it is not reversible error to give instruction requested where same has already been given in substance and in terms as clear, full and favorable as those in which it is asked to be repeated; *State v. Burali*, 27 Nev. 54, 71 Pac. 536, to point that verdict will not be reversed for failure of judge to give instruction asked, when it appears from record that the law of the case was laid down properly and fairly by the trial judge.

— Affidavit as to irregularity. — Cited in *Smith v. Wells Estate*

Co. 29 Nev. 416, 91 Pac. 316, to point that court will not receive affidavits to show irregularity of proceeding not regularly certified.

Joint indictment—Separate trial.—Cited in *State v. Johnny*, 29 Nev. 217, 87 Pac. 7, to point that defendant jointly indicted desiring separate trial must make motion power of jury is commenced; *Metz v. State*, 46 Neb. 549, 65 N. W. 190, to point that motion for separate trial comes too late when made after selection of jury.

Cited in reference note in 5 L.R.A. 836, to point that the proper time to make the demand is before the formation of the jury.

Change of venue.—Cited in *State v. Dwyer*, 29 Nev. 426, 91 Pac. 305, in holding motion for change in venue on discussion.

Instruction.—Cited in *Bunce v. McMahon*, 6 Wyo. 36, 42 Pac. 26, in discussing instruction to jury what shall be their conduct in case they are satisfied any particular witness has wilfully sworn falsely.

Cited in reference note in 19 L.R.A.(N.S.) 806, to point that an instruction in reference to the testimony of defendants who were jointly indicted and tried together for murder, each of whom sought to exculpate himself and impute the crime to the other, that the jury could not believe them both, because they were wholly inconsistent as to the principal fact in the case does not transgress a statutory and constitutional prohibition against charging jurors as to matters of fact, since the court may state the testimony as well as declare the law to jurors.

Evidence in criminal trials—Mutual incrimination.—Cited in reference note in 72 Am. Dec. 547, to point that in a criminal trial the defendants testified each in his own behalf, and the court charged that they could not both be believed because of the inconsistency as to the principal fact in the case. This was not error.

#### 15 Nev. 379-383. EWING v. JENNINGS.

Cited in *Horton v. New Pass etc. Min. Co.* 21 Nev. 191, 27 Pac. 379, to point that granting or refusing to set aside default is sound discretion.

#### 15 Nev. 383-385. SOUTHERN CROSS G. & S. MIN. CO. v. EUROPA MIN. CO.

Mines and mining—Reference to monuments.—Cited in *Brady v. Husby*, 21 Nev. 455, 33 Pac. 802, on point that it is the record and not the notice of location of mining claim that must contain reference to natural object of permanent monument.

—Record.—Cited in *Ford v. Campbell*, 29 Nev. 588, 92 Pac. 208, as to recordation being necessary, to valid location of mining claim; *Peters v. Tonopah Min. Co.* 120 Fed. 589, and *Thompson v. Spray*, 72 Cal. 533, 14 Pac. 185, record of notice of location of mining claim is not necessary unless law of state and rules and regulations of mining district require it.

Cited in reference note in 7 L.R.A.(N.S.) 864, to point that under this statute, no record of the location of a mining claim is necessary unless the laws of the state or territory, or the rules and regulations of the mining district in which the claim is located, require it.

— **Markings, etc.** — Cited in *Book v. Justice Min. Co.* 58 Fed. 113, and *Oregon King Min. Co. v. Brown*, 119 Fed. 56, 56 C. C. A. 626, in marking on ground by stakes, monuments, mounds and written notice whereby boundaries of location of mining claim can readily be traced is sufficient; *Souter v. Maguire*, 78 Cal. 546, 21 Pac. 184, to point that "brushing out" the lines so person can go through and placing notice in center of claim defining claim is sufficient marking; *Howeth v. Sullenger*, 113 Cal. 550, 45 Pac. 842, to point that stakes and stone monuments set at corner and at center of each end line is sufficient marking of boundaries thereof; *Eaton v. Norris*, 131 Cal. 565, 63 Pac. 867, in discussing what constitutes sufficient marking of boundaries of mining claim.

Cited in reference note in 7 L.R.A.(N.S.) 859, to point that as a general rule stakes and stone monuments placed at each corner of a mining claim, and at the center of the end lines, is a sufficient marking of the boundary lines under the Federal statutes.

— **Notice of Location.** — Cited in *Smith v. Newell*, 86 Fed. 57, the location notice, nailed on discovery stake, and places within the parallelogram of claim giving all information that marks on corner stakes would have given is sufficient marking of claim; *Duncan v. Fulton*, 15 Colo. App. 153, 61 Pac. 248, in discussing certificate of location and permanent boundaries of mining claim; *Seidler v. Lafave*, 5 N. M. 49, 20 Pac. 791, in discussing sufficiency of location notice of mining claim.

Cited in reference note in 7 L.R.A.(N.S.) 874, to point that notice of location of a mining claim recorded in the district records sufficiently complies with the law where it calls for stone monuments at each corner of the claim, and describes it as bounded by four other claims.

— **Discovery — Assays.** — Cited in reference note in 7 L.R.A.(N.S.) 831, to point that the testimony of an assayer as to the result of assays of rock taken from a mining claim is competent as tending to prove a discovery of a vein, though the rock was taken long after the date of the location.

#### 15 Nev. 385-389. STATE v. NORTHERN BELLE MILL. & MIN. CO.

**Taxes.** — Cited in *State v. Sadler*, 21 Nev. 18, 23 Pac. 800, to point that irregularity of officer is defense in action to collect taxes only to extent that party has been injured thereby; *State v. April Fool Min. & Mill. Co.* 26 Nev. 90, 64 Pac. 3, as to power of assessor to reassess; *State v. Carson & C. R. Co.* 29 Nev. 504, 91 Pac. 935, to point that section 1098 Compiled Laws is merely directory; *Buswell v. Board of Supervisors*, 116 Cal. 354, 48 Pac. 227; *Stieff v. Hartwell*, 35 Fla. 611,

17 So. 901, and *State v. Buchanan*, 24 W. Va. 386 (delivery of copy of personal-property book), to point that where statute requires public officer to do certain things regarding the rights and duties of others within specified time is merely directory unless the statute makes it clear that time fixed is by way of limitation; *Miller v. Kern County*, 150 Cal. 800, 90 Pac. 121, to point that failure to make affidavit to assessment roll within time prescribed by statute does not make either illegal.

Cited in reference note in 11 L.R.A. 818, to point that the preponderance of authority establishes that either debt or assumpsit may be sustained for the recovery of taxes, as debt lies for a sum of money certain, due by statute.

**Appeal.**—Followed in *State v. Langan*, 105 Pac. (Nev.) 576, on point that appellate court cannot review evidence to determine sufficiency to support judgment in absence of motion of statement of motion for new trial.

**Mining claim—Monuments.**—Cited in *Baxter Mountain etc. Min. Co. v. Patterson*, 3 N. M. 274, 3 Pac. 743, in discussing sufficiency of monument placed upon mining claim.

#### 15 Nev. 389-394. **LIGHTLE v. BERNING.**

**Exception and objection.**—Ground of to be stated.—Cited in *Langworthy v. Coleman*, 18 Nev. 443, 5 Pac. 66, and *Schwartz v. Stock*, 26 Nev. 150, 65 Pac. 355, to point that ground of objection and exception must be stated or it will not be considered on appeal.

#### 15 Nev. 394-400. **COSCIA v. KYLE.**

**Mining claim.**—Cited in *Nash v. Muldeon*, 16 Nev. 410, as to right of sheriff to take claims; *Alexander v. Archer*, 21 Nev. 28, 24 Pac. 375, to point that since decision in principal case statute has been amended; *Taylor v. Hill*, 115 Cal. 145, 46 Pac. 922, in discussing labor lien and sufficiency of notice of claim to debtors.

#### 15 Nev. 401-407. **MERRILL v. DIXON.**

**Mining claim—Location.**—Cited in dis. op. of De Witt, J., in *Shreve v. Copper Bell Min. Co.* 11 Mont. 336, 28 Pac. 320, discussing sufficiency of location of mining claim and discovery of mineral thereon; *Davis v. Wiebold*, 139 U. S. 520, 35 L. ed. 243, 11 Sup. Ct. Rep. 633, as to intention of Congress in excluding mineral lands in grant to Pacific railroad company.

Cited in reference note in 7 L.R.A.(N.S.) 795, to point that in excluding mineral land from the lands granted by that act, Congress intended to exclude only such as were valuable for mining purposes; and the mere fact that the land contained copper, gold, and silver bearing quartz is not sufficient to impress it with the character of mineral land within the meaning of the reservation.

**15 Nev. 407-416. STATE v. LOPEZ.**

**Murder.**—Cited in *Ex Parte Curnow*, 21 Nev. 36, 24 Pac. 431, to point that there may be murder without any intention to kill.

Cited in reference notes in 63 L.R.A. 356, to point that any death consequent upon the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary shall be deemed murder in the first degree; 63 L.R.A. 358, the general and almost universal rule is that a criminal intent, or an intent to kill, is not a necessary ingredient of the crime of murder in the first degree, under the statutes making the killing of a human being murder in the first degree when perpetrated by a person engaged in the commission of a felony, or of certain designated felonies; such a killing is murder in the first degree though it is casual and unintentional; 63 L.R.A. 866, taking money from the person of another is not necessarily robbery, and an instruction in a prosecution for murder under Nev. Comp. Laws, § 2327, making a homicide in the commission of a burglary murder in the first degree, that killing in the attempt to take money is murder in the first degree, is inaccurate and improper.

—**Instruction.**—Cited in *State v. Williams*, 28 Nev. 407, 82 Pac. 353, sustaining instruction to effect that all murder committed in perpetrating robbery is in first degree.

—**View by jury.**—Cited in *State v. Perry*, 121 N. C. 536, 61 Am. St. Rep. 685, 27 S. E. 997, as to practice on view by jury.

Cited in reference notes in 92 Am. Dec. 343, to point that the jury go out for the single purpose of viewing the place, and not for the purpose of hearing any oral explanations or comments, even from the person appointed by the court to show it to them; 42 L.R.A. 377, under Nevada criminal practice act, §§ 377, 378, authorizing a view of the premises in a criminal case, the order of the court should specify the place to be inspected, and designate some person who knows the place to point it out to the jury, and the person so designated and no other except the officer in charge, should conduct the jury to the spot and leave them to make their own observations without comment or explanation; 42 L.R.A. 382, where a view is taken in a criminal prosecution, and the jury upon arriving at the premises which they are to inspect find a person there who was not sworn as a witness in the case, and who in response to questions addressed to him by members of the jury points out to them all the special features of the premises, it is a denial of the right of the defendant to be confronted with the witnesses against him, and is a ground for a new trial unless it is clear that no injury resulted; 42 L.R.A. 384, under Nev. Crim. Prac. Act, § 877, providing that whenever in the opinion of the court it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any material fact occurred, it may order the jury to be conducted in a body in the custody of the sheriff to the place which shall be shown to them by a person appointed by the court

for that purpose, and § 378, providing that no person shall be suffered to speak to the jury on any subject connected with the trial, they go for the single purpose of viewing the place, and not for the purpose of hearing any oral explanation or comments, even from the person appointed by the court to show it to them.

15 Nev. 416-418. TAFT v. KYLE.

No citation.

15 Nev. 418-421. HOBART v. WICKS.

Water right. — Cited in *Union Mill. etc. Co. v. Dangberg*, 81 Fed. 115, and *Anderson v. Basaman*, 140 Fed. 23, to point that person entitled to given quantity of stream may take same at any point on stream and may change point of diversion at pleasure as well as character of use made of water if rights of others are not affected thereby.

Cited in reference note in 30 L.R.A. 678, to point that if a person obtains his title from the government a third person has appropriated the right to take water from a stream flowing through the land at points both above and below the land of the patentee at his convenience, the latter cannot compel him to desist from diverting the water at the upper point and compel him to confine his appropriation to the lower one.

15 Nev. 422-425. LACHMAN v. WALKER.

Homestead. — Distinguished in *Smith v. Richards*, 2 Idaho, 468 (3 Idaho, 502) 21 Pac. 420, in holding that judgment lien acquired, upon filing of declaration of homestead, subjects property to sale under execution; *Nevada Bank v. Treadway*, 17 Fed. 893, 8 Sawy. 456, discussing the homestead law and exemption of homestead from sale.

Cited in reference note in 93 Am. Dec. 403, to point that under the Nevada statute, parties claiming the benefit of the homestead law must file a written declaration claiming the premises as a homestead.

15 Nev. 426-428. TULL v. ANDERSON.

Followed in *Earles v. Gilliam*, 20 Nev. 47, 14 Pac. 587, on point that statement on motion for new trial must be filed within the statutory time.

15 Nev. 428-443. FISHBACK v. MILLER.

Fraudulent contract. — Cited in *Wilson v. Higbee*, 62 Fed. 726, to point that seller may let buyer cheat himself *ad libitum* but must not actually assist in cheating him; *Stevenson v. Marble*, 84 Fed. 33, to point that it is not necessary to rescission of contract to fraudulent representation that complaining party relied solely upon such representation; *Hicks v. Stevens*, 121 Ill. 194, 11 N. E. 243, as to presumption of purchaser relying on facts; *David v. Moore*, 46 Or. 156, 79 Pac. 417, as to representation made by seller of real property in respect to

title, of which buyer has no knowledge and no means at hand of obtaining knowledge.

Cited in reference notes in 18 Am. St. Rep. 559, to point that it is not necessary that the false representation should have been the sole inducement to the contract; a person who has by misrepresentation induced another to enter into a contract will not generally be heard to deny the materiality; and if the party deceived can show that the misrepresentation had a substantial effect in inducing the contract, it will be sufficient; 6 L.R.A. 374, where representations of the seller were material, the law will presume that the buyer relied upon them; 37 L.R.A. 610, the doctrine of caveat emptor does not apply where the seller makes express representations in respect to matters of which the buyer has no knowledge and no means at hand of obtaining knowledge.

**15 Nev. 444-450. TOOMBS v. CONSOLIDATED POE MIN. CO.**

Breach of contract.—Cited in *Alden v. Karriek*, 11 Colo. 198, 17 Pac. 508, discussing remedies of vendor for breach of contract of sale, *Ray v. Hodge*, 15 Or. 25, 13 Pac. 601, in holding that action could not be maintained on contract of lease of mine without proving defendant failed to make reasonable efforts to operate mine in view of outlay attending it and prospects of development.

**15 Nev. 450-452. GOLDEN FLEECE G. & S. MIN. CO. v. CABLE CONSOL. G. & S. MIN. CO.**

Statement on motion for new trial.—Followed in *Earles v. Gilham*, 20 Nev. 47, 14 Pac. 587, on point that statement on motion for new trial must be filed within the statutory time.

Mines and mining—Re-location.—Cited in reference note in 62 Am. St. Rep. 903, to point that a claim may be relocated if either forfeited or abandoned.

**15 Nev. 452-461. ALLEN v. REILLY.**

Referred to arguendo in *State v. Board of Education*, 19 Wash. 16, 67 Am. St. Rep. 711, 52 Pac. 320, 40 L.R.A. 319, as a miscitation in brief.

Appeal—Presumption as to regularity.—Cited in *Marshall v. Golden Fleece G. & S. Min. Co.* 16 Nev. 168, to point that every presumption is in favor of the regularity of the trial court.

Pleading.—Cited in *Gillson v. Price*, 18 Nev. 118, 1 Pac. 463, holding estoppel relied upon as defense must be pleaded and proved.

Cited in reference note in 66 L.R.A. 532, to point that a denial traversing the complaint was held bad as a negative pregnant, and as a conclusion of law.

Judge—Disqualification.—Cited in *Bryan v. State*, 41 Fla. 659, 26 So. 1027, to point that mere bias or prejudice is not ground of disqualification of judge at common law and that state statutes have not included such as ground of disqualification of criminal court judges;

In *Re Davis's Estate*, 11 Mont. 19, 27 Pac. 345, in discussing disqualification of judge under provisions of § 170 of Code of Civil Procedure; *Johnson v. State*, 31 Tex. Crim. 461, 20 S. W. 986, discussing provision of Art. 576, of Code Crim. Proc. holding defendant cannot obtain change of venue on ground of prejudice of judge before whom proceedings commenced.

Cited in reference note in 97 Am. Dec. 539, to point that judge has personal knowledge of his personal feelings toward a party to the suit better than any one else, and may act upon such knowledge, and if it is necessary it will be presumed in support of the judgment, by the higher court, that he did act upon such knowledge.

Lost note.—Cited in reference notes in 45 Am. Dec. 574, to point that in an action against the maker of a lost negotiable note, which was past due at the time of the loss, the defendant is not entitled to claim indemnity; 94 Am. St. Rep. 473, where a note or bill is lost, as was before pointed out, a bond of indemnity is necessary only if it is negotiable; *Wright v. Wright*, 54 N. Y. 437, but where it is not shown to have been negotiable, the courts will not presume it so, and indemnity need not be given.

15 Nev. 461-464. **CHILD v. SINGLETON.**

Community property.—Cited in *Adams v. Baker*, 24 Nev. 169, 77 Am. St. Rep. 799, 51 Pac. 254, as to right of husband to mortgage community property.

Homestead.—Cited in reference notes in 93 Am. Dec. 403, to point that *Hawthorne v. Smith*, 3 Nev. 182, is distinguished in principal case on point that parties claiming the benefit of homestead law must file written declaration claiming premises as homestead; 95 Am. St. Rep. 913, where by statute certain requirements must be complied with before the homestead exemption attaches, the husband alone may convey until so done, as where it must be recorded or a claim filed.

15 Nev. 464-474. **TOGWINI v. KYLE.**

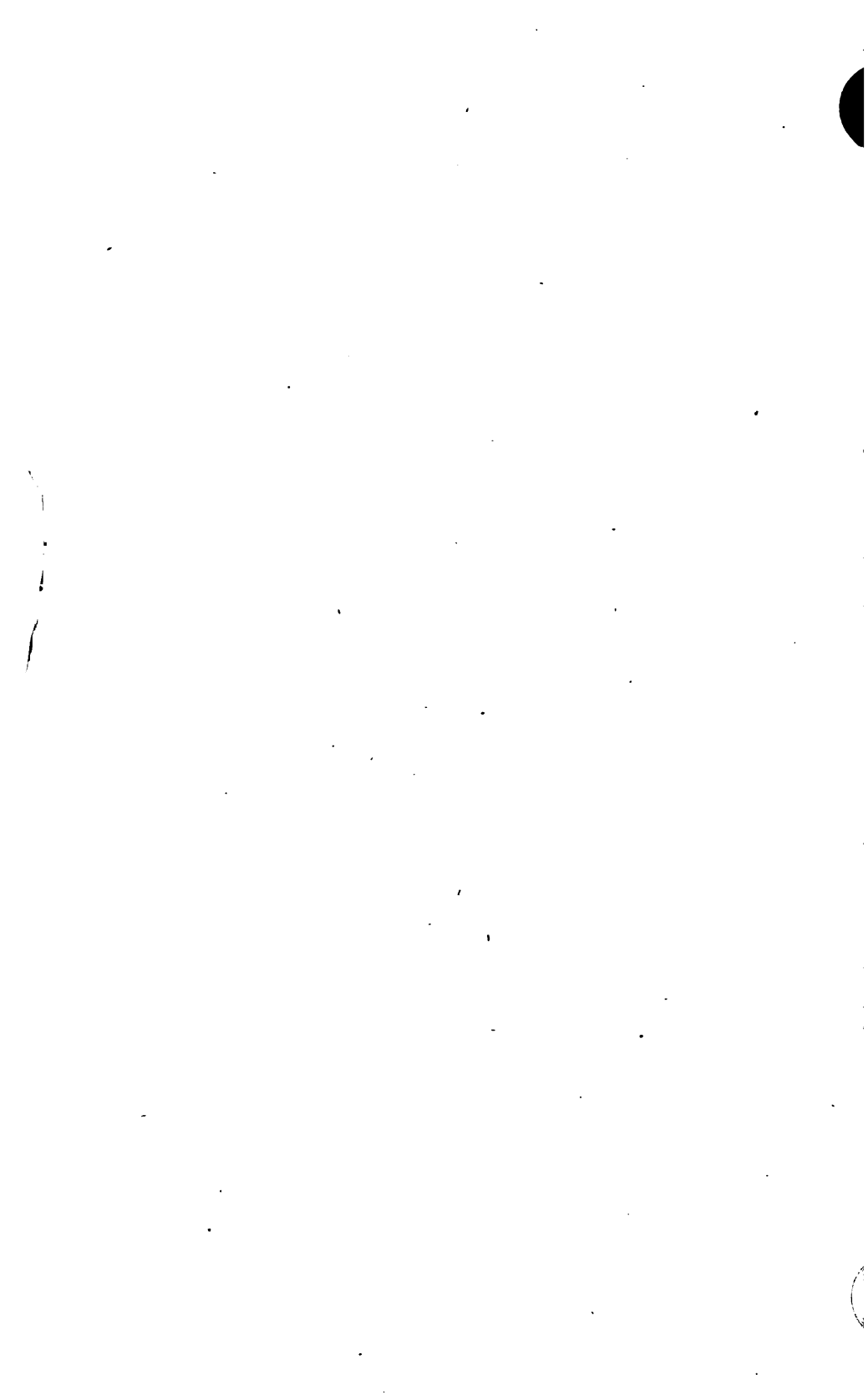
Cited in reference note in 56 Am. Dec. 842, to point that *McDaniel v. Baca*, 2 Cal. 326, 56 Am. Dec. 339, is cited to point that where fraud is charged, express proof is not required, but it may be inferred from strong presumptive evidence.

15 Nev. 475-483. **HIXON v. PIXLEY.**

Cited in reference note in 22 L.R.A.(N.S.) 852, to point that the general rule was applied to a mining partnership, and it was held that, if the evidence satisfied the jury that the plaintiff was aware of the previous partnership, and that she had no knowledge of the dissolution, and was induced to deal with the partnership upon the faith and belief that the retiring partner was still a member thereof, then it is not incumbent upon her to show that she would not have so dealt but for that belief.

Cited in reference note in 19 Eng. Rul. Cas. 757.







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# REPORTS OF CASES

DETERMINED IN THE

# SUPREME COURT

OF THE

STATE OF NEVADA,

DURING THE YEAR 1881-2.

REPORTED BY

CHAS. F. BICKNELL, CLERK OF SUPREME COURT

AND

HON. THOMAS P. HAWLEY, ASSOCIATE JUSTICE

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Volume 16.

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WITH NOTES ON NEVADA REPORTS.

A facsimile reprint of the original volume

by

BANCROFT-WHITNEY CO.,

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SAN FRANCISCO, CAL.

1911.

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## JUSTICES OF THE SUPREME COURT.

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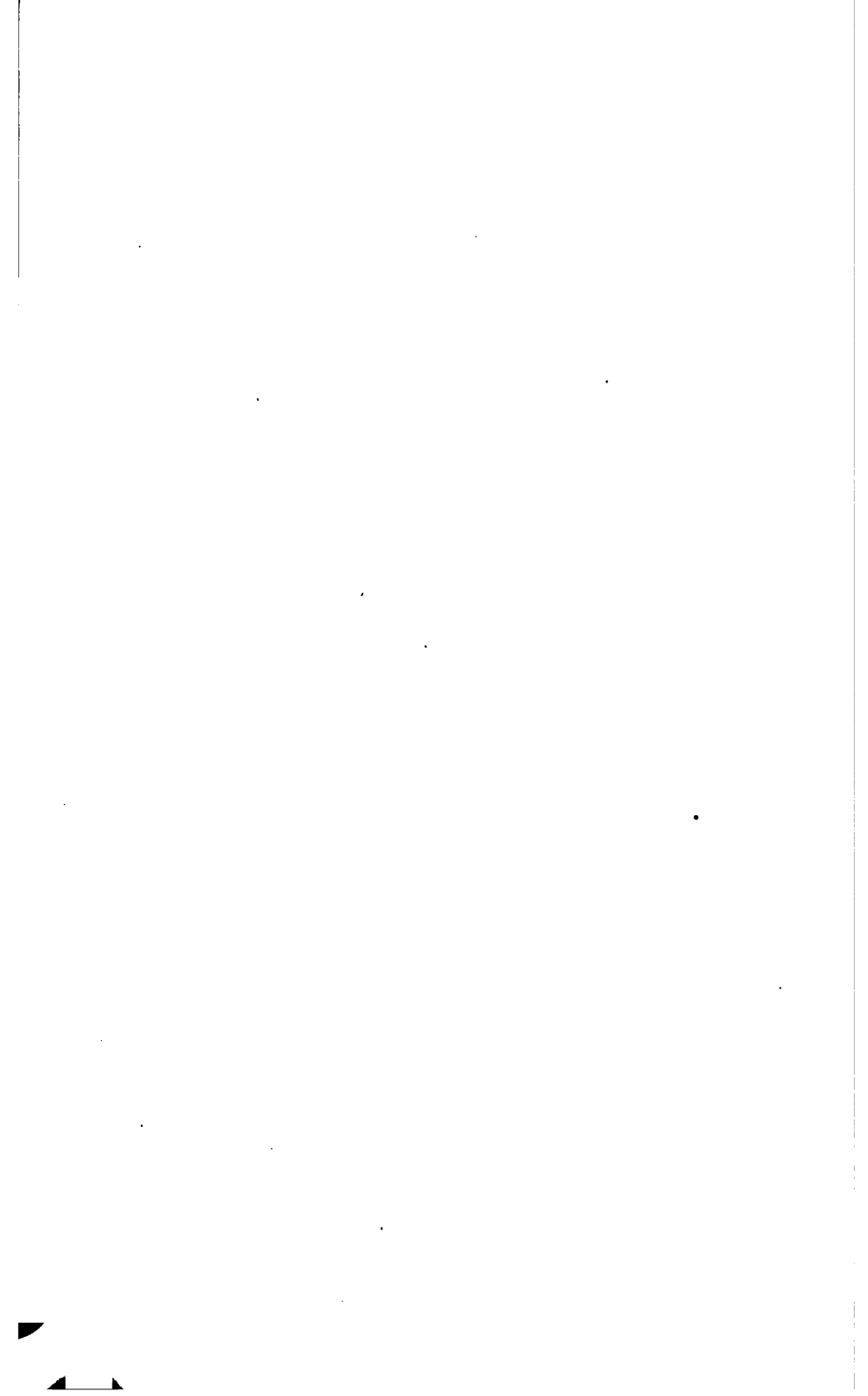
HON. ORVILLE R. LEONARD.....CHIEF JUSTICE.  
HON. THOMAS P. HAWLEY.... } ASSOCIATE JUSTICES.  
HON. CHARLES H. BELKNAP... }

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## OFFICERS OF THE COURT.

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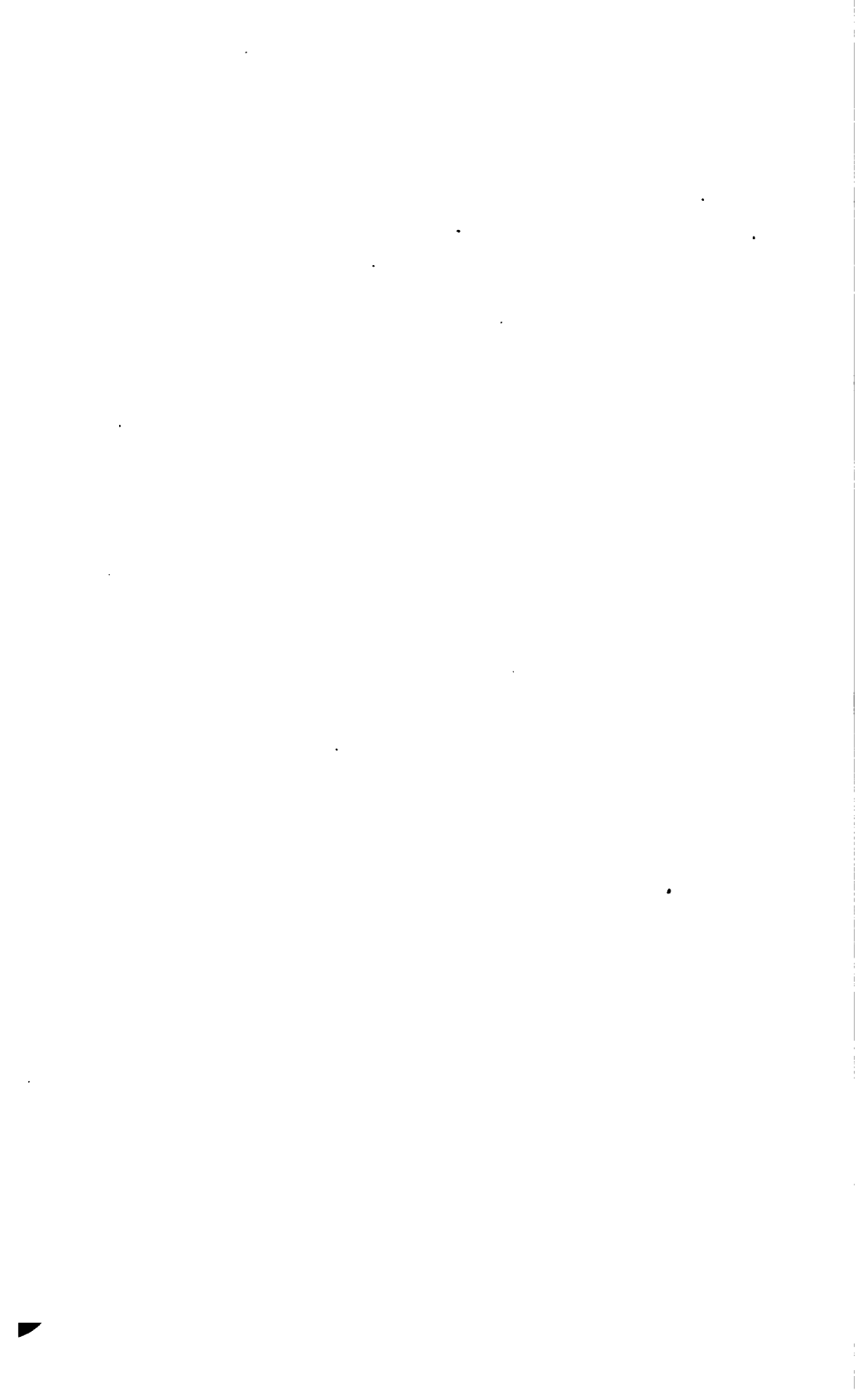
HON. M. A. MURPHY.....ATTORNEY GENERAL.  
CHAS. F. BICKNELL ..... CLERK.  
S. T. SWIFT ..... BAILIFF.



**DISTRICT JUDGES OF THE STATE OF  
NEVADA 1881.**

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**FIRST DISTRICT .....HON. RICHARD RISING.**  
**SECOND DISTRICT .....HON. S. D. KING.**  
**THIRD DISTRICT .....HON. W. M. SEAWELL.**  
**FOURTH DISTRICT .....HON. W. S. BONNIFIELD.**  
**FIFTH DISTRICT .....HON. D. C. MCKENNEY.**  
**SIXTH DISTRICT .....HON. HENRY RIVES.**  
**SEVENTH DISTRICT .....HON. J. H. FLACK.**





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# RULES

OF THE

## BOARD OF PARDONS.

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1. The regular meetings of the board shall be held on the second Monday of January, April, July, and October of each year.

2. Special meetings may be called by the Governor at any time when the exigencies of any case demand it, notice thereof being given to each member of the board.

3. No application for the remission of a fine or forfeiture, or for a commutation of sentence or pardon, shall be considered by the board unless presented in the form and manner required by the law of the state, "approved February 20, 1875."

4. In every case where the applicant has been confined in the state prison, he or she must procure a written certificate of his or her conduct during such confinement, from the warden of said prison, and file the same with the secretary of this board, on or before the day of hearing.

5. All oral testimony offered upon the hearing of any case must be presented under oath, unless otherwise directed by a majority of the board.

6. Action by the board upon every case shall be in private, unless otherwise ordered by the consent of all the members present.

7. After a case has once been acted upon, and the relief asked for has been refused, it shall not, within twelve months

thereafter, be again taken up or considered upon any of the grounds specified in the application under consideration, except by the consent of a majority of the members of the board; nor in any case except upon new and regular notice as required by law in case of original application.

8. In voting upon any application the roll of members shall be called by the secretary of the board, in the following order:

First. The Attorney General.

Second. The Junior Associate Justice of the Supreme Court.

Third. The Senior Associate Justice.

Fourth. The Chief Justice.

Fifth. The Governor.

Each member, when his name is called, shall declare his vote "for" or "against" the remission of the fine or forfeiture, commutation of sentence, pardon, or restoration of citizenship.

9. No document relating to a pending application for pardon or commutation of sentence, or to a prior application which has been denied, shall be withdrawn from the custody of the clerk after filing, unless by consent of the board.

10. Applications for pardon or commutation of sentence must be filed with the clerk at least two days, before the regular meeting of the board, at which the application is to be considered.

**R U L E S**  
**OF**  
**THE SUPREME COURT**  
**OF**  
**THE STATE OF NEVADA.**

---

**RULE I.**

1. Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

2. The supreme court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counselors at law. Such committee will consist of the district judge and at least two attorneys resident of the district.

The examination by the committee so appointed shall be conducted and certified according to the following rules:

The applicant shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination.

The examination shall embrace the following subjects:

1. The history of this state and of the United States;
2. The constitutional relations of the state and federal governments;

3. The jurisdiction of the various courts of this state and of the United States;

4. The various sources of our municipal law;

5. The general principles of the common law relating to property and personal rights and obligations;

6. The general grounds of equity jurisdiction and principles of equity jurisprudence;

7. Rules and principles of pleadings and evidence;

8. Practice under the civil and criminal codes of Nevada;

9. Remedies in hypothetical cases;

10. The course and duration of the applicant's studies.

3. The examiners will not be expected to go very much at large into the details of these subjects, but only sufficiently so, fairly to test the extent of the applicant's knowledge and the accuracy of his understanding of those subjects and books which he has studied.

4. When the examination is completed and reduced to writing, the examiners will return it to this court, accompanied by their certificate showing whether or not the applicant is of good moral character and has attained his majority, and is a *bona fide* resident of this State; such certificate shall also contain the facts that the applicant was examined in the presence of the committee; that he had no knowledge or intimation of the nature of any of the questions to be propounded to him before the same were asked by the committee, and that the answers to each and all the questions were taken down as given by the applicant without reference to any books or other outside aid.

5. The fee for license must in all cases be deposited with the clerk of the court before the application is made, to be returned to the applicant in case of rejection.

#### RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) thirty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

#### RULE III.

1. If the transcript of the record be not filed within the time prescribed by Rule II., the appeal may be dismissed



on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored the dismissal shall be final, and a bar to any other appeal from the same order or judgment.

2. On such motion, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of the filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record; or, if he has made such request that he has not paid the fees therefor, if the same have been demanded.

RULE IV.

1. All transcripts of record in civil cases shall be printed on unruled white writing-paper ten inches long by seven inches wide, with a margin, on the outer edge, of not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and one half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica solid is the smallest letter and most compact mode of composition allowed.

2. Transcripts in criminal cases may be printed in like manner as prescribed for civil cases; or, if not printed, shall be written on one side only of transcript paper, sixteen inches long by ten and one half inches in width, with a margin of not less than one and one half inches wide, fastened or bound together on the left sides of the pages by ribbon or tape, so that the same may be secured, and every part conveniently read. The transcript, if written, shall be in a fair, legible hand, and each paper or order shall be separately inserted.

3. The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover.

4. No record which fails to conform to these rules shall be received or filed by the clerk of the court.

#### RULE V.

The written transcript in civil causes, together with sufficient funds to pay for the printing of the same, may be transmitted to the clerk of this court. The clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be *prima facie* evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file.

#### RULE VI.

The expense of printing transcripts, on appeal in civil causes and pleadings, affidavits, briefs, or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode.

#### RULE VII.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required, or may produce the same duly certified, without such order. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy is produced at the time, must be

accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions or objections to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, and must be noted in the written or the printed points of the respondent, and filed at least one day before the argument, or they will not be regarded.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made and the cause shall proceed as in other cases.

RULE X.

1. The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; provided, that all civil cases in which the appeal is perfected, and the statement settled, as provided in Rule II., and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

2. When the transcript in a criminal cause is filed, after the calendar is made up, the cause may be placed thereon at any time, on motion of the defendant.

3. Causes shall be placed on the calendar in the order in which the transcripts are filed with the clerk.

RULE XI.

1. At least six days before the argument, the appellant shall furnish to the respondent a printed copy of his points

and authorities, and within two days thereafter the respondent shall furnish to the appellant a written or printed copy of his points and authorities.

2. On or before the calling of the cause for argument each party shall file with the clerk his printed points and authorities, together with a brief statement of such of the facts as are necessary to explain the points made.

3. The oral argument may, in the discretion of the court, be limited to the printed points and authorities filed, and a failure by either party to file points and authorities under the provisions of this rule, shall be deemed a waiver by such party of the right to orally argue the cause.

4. No more than two counsel on a side will be heard upon the oral argument, except by special permission of the court, but each defendant who has appeared separately in the court below, may be heard through his own counsel.

5. At the argument, the court may order printed briefs to be filed by counsel for the respective parties within such time as may then be fixed.

6. In criminal cases it is left optional with counsel either to file written or printed points and authorities or briefs.

#### RULE XII.

In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper, and in the same style and form (except the numbering of the folios in the margin) as is prescribed for the printing of transcripts.

#### RULE XIII.

Besides the original, there shall be filed ten copies of the transcript, briefs, and points, and authorities, which copies shall be distributed by the clerk.

#### RULE XIV.

All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

#### RULE XV.

All motions for a rehearing shall be upon petition in writing, and presented within ten days after the final judg-

ment is rendered, or order made by the court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the court below shall be issued until the expiration of the ten days herein provided, and decisions upon the petition, except on special order.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

RULE XVII.

No paper shall be taken from the court-room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a *supersedeas*. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

## RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree which is sought to be reviewed, except under special circumstances.

## RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each fifty miles, or fraction of fifty miles, from Carson.

## RULE XXIV.

In all cases where notice of a motion is necessary, unless for good cause shown the time is shortened by an order of one of the justices, the notice shall be five days.

REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,

JANUARY TERM, 1881.

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[No. 1,034.]

THADDEUS B. ROYCE, APPELLANT, v. J. C. HAMPTON, ADM'ER, ETC., ET AL., RESPONDENTS.

**EQUITABLE RELIEF—NEGLIGENCE.**—Courts of equity will not grant relief to a party who has had an opportunity to be heard in a court of law without a showing that he was prevented from being heard by the wrongful acts of the prevailing party, unmixed with any negligence or fault on his part.

**IDEM—MISREPRESENTATIONS.**—Courts of equity will not grant relief to a party upon the ground of misrepresentations made to him, unless he shows that he relied and acted upon them believing them to be true.

**IDEM—DECREE OF DISTRIBUTION—LACHES OF CLAIMANT—POVERTY NO EXCUSE.**—Where a claimant has knowledge of the proceedings for the settlement of an estate, of the time fixed for a decree of distribution, that the estate is valuable, that his claim of relationship is denied, that the administrator failed to answer his letters, and where all the proceedings were regular and legal in form and without any fraud, concealment, or misrepresentation: *Held*, that the fact that the claimant was in delicate health and in poor circumstances is not sufficient to excuse him from making an effort to appear in the proceedings and assert his rights.

**ESTATES OF DECEASED PERSONS—DUTY OF ADMINISTRATORS.**—Administrators should be held to the utmost good faith and strict performance of official duty. They are, however, mere creatures of the statute, and are only bound to perform such duties as are imposed upon them by the law.

**IDEM.**—Where the decree of distribution is not made upon the petition of the administrator, he is not bound to notify the court that there are other parties, besides the petitioner, who claim to be heirs of the estate.

## Statement of Facts.

**IDEM—DUTY OF PETITIONER.**—It is the duty of the petitioner for a decree of distribution to inform the court as to all heirs of the estate entitled to share in the distribution thereof; but when petitioner claims to be the sole heir of the estate, and regularly pursues the course required by the statute in giving notice, etc., he is not guilty of fraud upon the court, because he does not state the names of other parties who claim to be heirs of the estate.

**SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS.**—The evidence reviewed and held to be sufficient to support the findings that plaintiff "was guilty of negligence and laches which are unexcused."

**APPEAL** from the District Court of the First Judicial District, Storey County.

The findings referred to in the opinion of the court are as follows:

19. "That for upwards of five months before the said decree of distribution was made, plaintiff suspected that said William John Ford and defendant (J. C. Hampton) intended to cheat him (plaintiff) out of the estate of said Oliva Rosanna Ford, and knew that said William John Ford claimed that plaintiff was no relation to him (Ford)."

20. "That said plaintiff new, before the nineteenth day of October, 1875, that said estate of said Oliva Rosanna Ford was in process of settlement and distribution, and was about to be distributed in said district court, but never appeared, or offered to appear, or made any effort to appear, either in person or otherwise, in said estate proceedings, or any of them, in said district court."

22. "That plaintiff was not prevented from taking, and did not fail to take, steps to appear in said district court, in said estate matter and proceedings, by reason of any representations whatever, by letter or otherwise, of said J. C. Hampton, defendant herein, as administrator or otherwise, or said William John Ford; and plaintiff did not appear, or take steps to appear, in said estate proceedings, in said district court, by reason of any concealment practiced by said J. C. Hampton or said William John Ford, touching the value of the estate of said Oliva Rosanna Ford, or of any of the proceedings therein in said district court."

26. "That plaintiff knew it to be his duty to be repre-



## Argument for Appellant.

sented by counsel or to appear in person in said estate proceedings in said district court, and has failed to excuse his negligence for not appearing, or being represented therein."

27. "That plaintiff did not rely or act upon any of the representations concerning the value of the estate of said Oliva Rosanna Ford made to him by said William John Ford or J. C. Hampton, as administrator, or otherwise."

*Lewis & Deal, and J. H. Graham, for Appellant:*

I. The scope of inquiry by courts of chancery as to what constitutes fraud is much broader than that of courts of law, nor are they hampered by the inflexible rules which circumscribe the investigations of the latter. Any element of unfair dealing, any unconscionable advantage obtained, any deception practiced, any concealment of a fact which should in good conscience be revealed, the mental and other conditions of the parties, the relationship of the parties to each other, are all matters which will be considered by a court of chancery in determining whether fraud has been committed. (Kerr on Fraud and Mistake, 43, 44; Freeman on Judgments, sec. 486; *Reigal v. Wood*, 1 Johns. Ch. 402; 2 J. J. Marsh. 405; 17 Barb. 202; 1 Storey's Eq. Jur., secs. 119, 122, 133, 140, 146, 147, 222, 234, 323, 439; 9 Pick. 113-125; 2 Perry on Trusts sec. 924; 1 Stock. 246; 5 Ire. Eq. 123; 7 Eng. Ch. 200; 15 Id. 331-332; Lewin on Trusts, 330, 331; 6 Miss. 365; 6 J. J. Marsh. 258.)

II. There is nothing in our constitution or laws making the probate jurisdiction exclusive. When such is not the case, courts of equity have always interfered when fraud has been perpetrated or undue advantage has been taken. (*Clarke v. Perry*, 5 Cal. 59; *Wilson v. Roach*, 4 Id. 362; *Deck v. Gerke*, 12 Id. 433; *Griggs v. Clark*, 23 Id. 429; *Wright v. Miller*, 1 Sanf. Ch. 103-119; 1 Story's Eq. Jur., sec. 531-543; also 184, n.)

III. Under the authorities, the facts of this case clearly constitute such a fraud as will justify setting aside the decree. (*Hoitt v. Holcom*, 23 N. H. 535; 4 J. J. Marsh. 491; 13 N. J. L. 26; Smith's Manual, 60; *Heyden v. Heyden*, 46 Cal. 340; 3 Green's (N. J.) Eq. 465.) That mere

## Argument for Appellant.

concealment of a material fact, which it is the duty of a party to make known, constitutes fraud, is borne out by all the authorities. (Smith's Manual, 61; *Belden v. Henriques*, 8 Cal. 87; 1 Perry on Trusts, 178; 2 Id. 924; Lewin on Trusts 336; Willard on Ex. 406.)

IV. The probate act makes it the duty of the executor and administrator to make known to the court all persons claiming to be heirs. (1 Comp. L. 485, 538, 637, 742, 496, 542, 638, 639, 655.) The court is required to appoint an attorney to represent and guard the rights of absent heirs (1 Comp. L. 641, 644, 717, 740, 742.)

V. In an ordinary action at law the parties must appear and protect their own interests, or they will be chargeable with default. But in probate proceedings it is made the duty of executors and administrators, and also of the court to protect the rights of all parties claiming an interest in the estate of deceased persons. Nothing can be taken by default; and when absent heirs do not appear it is the bounden duty of the court to appoint an attorney to represent their interests. (Williard on Ex. 406; *Wright v. Miller*, 1 Sanf. Ch. 119; *Carneal v. Wilson*, 3 Litt. (Ky.) 80, 90, 91; 33 N. Y. 25.)

VI. Royce was not guilty of any laches. The probate act nowhere requires an heir to appear, but on the contrary has made all provisions for the protection of his rights without such appearance. If it was the intention of the legislature to bar all rights when the persons claiming them failed to appear in court under the published notices, why should it have made provision for the protection of the rights of such persons in cases where there is no appearance by them by the giving of special notice, the appointing of an attorney for them, and the requirement that the administrator shall notify the court who the heirs are? It is perfectly manifest that the legislature contemplated the protection of the rights of all persons, whether they appear or not. In this case had Hampton and Ford not been guilty of fraud by concealing Royce's claim from the court his rights would have been as fully guarded as if he had appeared in person. Unless it can be said that the plaintiff

knew that the administrator was disregarding his duty under the law—that he was committing a fraud on the court—there was no reason why he should make any appearance, because he had the right to believe that his rights would be as well protected in his absence as they would if he appeared in court. Hampton's letter of November, 1875, was calculated to make Royce believe that there was not sufficient property left after the fire to justify him in incurring the expense of an appearance in court, and that of itself should justify the setting aside of a decree. (*Hayden v. Hayden*, 46 Cal. 340.) Courts of equity take into consideration the condition of the party, his indigence, bodily and mental condition.

*C. H. Belknap*, for Respondents:

I. When a party has once an opportunity of being heard and neglects to do so, he must abide the consequences of his neglect. A court of equity can not relieve him, though the judgment is manifestly wrong. It is a general rule that parties are to be held to the exercise of caution and diligence in the management of their lawsuits, and are not to be allowed a double opportunity of presenting their defenses. A complainant in equity seeking to avoid the effect of a judgment against him at law, must, therefore, always disclose a sufficient excuse for not making his defense in the original action. (Freeman on Judgments, secs. 485, 486, 502; Story Eq. Jur., sec. 1574; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Foster v. Wood*, 6 Johns. Ch. 89; *Lancing v. Eddy*, 1 Id. 50; *Dobson v. Pierce*, 12 N. Y. 165; *Stillwell v. Carpenter*, 59 Id. 423; *Smith v. Nelson*, 62 Id. 287.)

II. The probate acts of California and of this state are similar, and require that an order of distribution shall be obtained in the same manner as an order for the sale of real estate. (*Boyd v. Blankman*, 29 Cal. 19.)

III. The order of distribution was conclusive as to the rights of the parties. (*Loring v. Steineman*, 1 Met. 207; *Bates v. Ryberg*, 40 Cal. 465; *Estate of Stephen A. Wright*, 49 Id. 550; *Estate of Alfred G. Pritchett*, 51 Id. 568.)

IV. Courts of equity will not relieve parties to whom misrepresentations have been made unless such misrepresentations have been relied upon. (Story's Eq. Jur., 11th ed., secs. 191-200 (a); *Whiting v. Hill*, 23 Mich. 405; *Bowman v. Carithers*, 40 Ind. 90.)

By the Court, HAWLEY, J.:

The plaintiff, Royce, a brother of Oliva Rosanna Ford, deceased, seeks to set aside a decree of distribution of his sister's estate, made by the district court of Storey county, on the third day of October, 1876, upon the ground of fraud, concealment, and misrepresentation upon the part of J. C. Hampton, who was administrator of her estate, and of William John Ford, her husband, who was by said decree declared to be the sole heir at law of said estate. All of the proceedings in the settlement of the estate were regular and legal in form. The court, before which this cause was tried without a jury, found that there was no fraud, concealment, or misrepresentation upon the part of the administrator, or of the husband of the deceased, and that plaintiff, by not appearing in the proceedings of said estate, "was guilty of negligence and laches which are unexcused." Appellant claims that these findings are not sustained by the evidence.

It is a cardinal principle that courts of equity will not grant relief to a party who has had an opportunity of being heard in a court of law without a showing that he was prevented from doing so by the wrongful acts of the prevailing party, unmixed with any negligence or fault on his part. The general rule is thus stated by Freeman in his work on judgments: "To entitle a party to relief from a judgment or decree, it must be made evident that he had a defense upon the merits; and that such defense has been lost to him, without such loss being 'attributable to his own omission, neglect, or default.' The loss of a defense, to justify a court of equity in removing a judgment, must, in all cases, be occasioned by the fraud or act of the prevailing party, or by mistake or accident on the part of the losing party, unmixed with any fault of himself or his agent." (Sec. 486.)

1. Does the evidence show that plaintiff was guilty of

negligence and laches which are unexcused? It appears that Mrs. Ford died intestate on the eleventh day of June, 1875; that on the twelfth of July following, J. C. Hampton was appointed administrator of her estate; that plaintiff advised of these facts shortly after they occurred, and notified that the estate was worth seventy-five thousand dollars; that the plaintiff, thereafter, wrote four letters to the administrator, dated, respectively, October 19, 1875, November 20, 1875, February 20, 1876, and April 9, 1876, which were received by due course of mail within about one week after they were written, making inquiries about the estate and proceedings therein, and representing himself to be a brother of the deceased; that on the twenty-third of February, 1876, one G. T. Dennis, at the request of plaintiff, addressed a letter to Mr. Hampton; that Hampton answered the first letter written by plaintiff, and the letter written by Dennis, and made no reply to the other letters; that on the fourteenth of July, 1875, Mr. Ford, in answer to a letter received from plaintiff's wife, addressed a letter to the plaintiff and, among other things, said: "Now, Thaddeus, concerning our property, it is in the hands of an administrator. We owe somewhat in the neighborhood of twelve thousand dollars, with two per cent. interest per month, but I think that at the expiration of a year from date everything will be easy with good management, and the debts mostly paid. Rose always wanted to look out for your boys, and God knows that as I loved her, and hope for his love, I will carry out her wishes to the best of my ability. But at the present time nothing can be done until after the time allowed for the administration of the estate by our district court, and thinks are at present in a muddle on account of not keeping books, which, if they had been kept, would not have been a pressure on her brain while living, nor have given vultures a chance to prey on our estate after her death."

Conceding, for the purposes of this opinion, that the letters written by Hampton, and Ford's letter of July 14, were calculated to mislead the plaintiff and conceal from him the true condition of the estate and of the proceedings had

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Opinion of the Court—Hawley, J.

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therein, it becomes necessary to determine whether, as a matter of fact, the plaintiff relied upon these representations. His testimony shows that he did not. Speaking of the value of his sister's estate he says: "I heard from Mrs. Terrill that she was worth about seventy-five thousand dollars;" this was "before her death and after her death." In reply to the question of defendants' counsel, "Did you ever learn anything to the contrary?" he answered: "I did not." If he was mistaken in giving this testimony and had the right to believe from Hampton's letter that his sister's property after the fire of October, 1875, was "a pile of smoldering ruins," still it affirmatively appears that he did not rely upon the letter he received from Hampton, and that he was not misled by the letter of Ford. He admits that he received letters from Mr. Ford after the letter of July 14, stating in substance that he (Ford) did not recognize any relationship between himself and the plaintiff, and requested plaintiff not to call him brother; and that from these letters and from the failure of Hampton to reply to his letters he suspected something was wrong. He says: "I supposed, of course, they were endeavoring in some way to beat me out of the estate my sister intended me to have."

A court of equity will not relieve a party upon the ground of misrepresentations made to him, unless he shows that he relied and acted upon them believing them to be true. Now, with knowledge upon his part, several months before the decree of distribution was made, that the estate was valuable; that Mr. Ford did not recognize any relationship; that Mr. Hampton failed to answer his letters, and that the estate was in process of settlement and distribution, what efforts did the plaintiff make to have his rights protected? He resided in the state of Pennsylvania, and was a farmer by occupation. He applied to two or three of his friends in that state to assist him. It does not appear that either he, or they, took any steps to make an appearance in the court where the proceedings were pending; that he, or they, ever communicated with any lawyer in this state to ascertain whether or not any arrangements could be made to have his claim presented to the court, and to have his legal rights then and there heard and determined.

The only excuse which he offers is that he was "in rather poor circumstances and in poor health;" that he was "scant of money and hard to get along; that he had no means to go to Virginia City \* \* \* or to send some one there." It is not shown that plaintiff's mental faculties were impaired, as claimed by his counsel. His deposition is quite lengthy, and, although there are discrepancies in some material portions of it, he seems to have remembered dates and events, and to have given his testimony in an ordinarily intelligent manner. The only testimony, in addition to his own, upon this point, is "that Royce was a person of delicate health, and subject to frequent and violent epileptic fits; and that said Royce was a man in poor and needy circumstances; and was such in the year 1874, and ever since has been poor and in delicate health."

These facts, however important they might have been in determining this case upon its merits, had the plaintiff shown that he had relied upon the representations of Hampton and Ford, and had thereby been misled to his prejudice, are not sufficient to excuse him, upon his knowledge of the condition of affairs, as before stated, from making an effort to appear in the proceedings in the district court. He could, notwithstanding his poverty and ill-health, have written letters and ascertained the names of prominent and reliable attorneys residing in Virginia City. He could have communicated with the attorneys, setting forth the facts, and could, doubtless, have secured their services upon reasonable terms. His financial circumstances and poor health are not shown to have been in any better condition after the decree of distribution than before, and he is now represented by able counsel. It is, therefore, fair to presume that he could have procured counsel as well before as after the settlement of his sister's estate if he had made an effort to do so.

The law aids those who are vigilant, and not those who sleep upon or slumber over their rights. Courts "cannot obliterate the recognized rules of law, requiring of all persons the diligence and attention demanded of a prudent man in the transaction of his own business, and establish a



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measure of care and diligence for each particular case." (*Boyd v. Blankman*, 29 Cal. 43.)

The facts found by the court in its nineteenth, twentieth, twenty-second, twenty-sixth, twenty-seventh, and twenty-eighth findings, relative to the negligence of plaintiff, are, in our opinion, fully sustained by the evidence.

2. Counsel for appellant argue that notwithstanding this negligence upon the part of their client the decree should be set aside because Hampton, as administrator, and Ford, the husband, committed a fraud upon the court in concealing from it the fact that plaintiff *claimed* to be a brother of the deceased. The record shows that Hampton, soon after his appointment as administrator, was made aware of the fact that plaintiff claimed to be a brother of Mrs. Ford, deceased; that he was about the same time notified by Mr. Ford that plaintiff was a bastard, and was not entitled to any share of the estate. These facts he communicated to Messrs. Mesick and Seely, attorneys for the estate. He seems to have acted in good faith in administering upon the estate. The evidence "shows that in all of said estate proceedings he acted entirely under the advice of the said attorneys."

Upon the trial of this cause it was expressly admitted by counsel for plaintiff "that no actual fraud, concealment, or misrepresentation had been in any wise intended by defendant, J. C. Hampton, in the estate proceedings of said Oliva Rosanna Ford in said district court, either upon said court or plaintiff."

The only question, therefore, which presents itself upon this branch of the case, is whether or not it was the official duty of the administrator to notify the court that Royce had written letters to him claiming to be an heir of the estate? Administrators should be held to the utmost good faith and strict performance of official duty. But they are mere creatures of the statute, and are only bound to perform such duties as are imposed upon them by the law. The decree of distribution in the estate of Mrs. Ford was not made upon the petition of the administrator, and we know of no provision of the law that required him, under the cir-



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umstances shown to have existed, to notify the court that Royce claimed to be an heir of the estate.

With reference to the husband of the deceased, upon whose petition the decree was made, but little need be said. If he knew that Royce was an heir of the estate, it was his duty to inform the court of this fact. But the truth is that Ford claimed to be the sole heir of the estate. He verified his petition setting forth this fact, and caused the notice thereof to be published to the world in the manner provided by the statute of this state.

It is true that the evidence shows that prior to the death of his wife, when visiting the plaintiff at his home in Pennsylvania, during the year 1874, Ford "recognized said Royce as his wife's brother and talked of him as such publicly and openly." The fourteenth finding of fact, in so far as it states that Mr. Ford "always claimed that plaintiff Royce was not the lawful brother of said Oliva Rosanna Ford," is not sustained by the evidence. But the fact is that after the death of his wife and prior to the month of November, 1875, and always thereafter, he claimed that no relationship existed. Upon the cross-examination of the plaintiff, when defendants' counsel called for the production of the letter of Mr. Ford to plaintiff, denying any relationship, "plaintiff's counsel states that the letter is lost and cannot be found, \* \* \* that a copy of that letter is not here." Thereupon defendants' counsel asked plaintiff this question: "In that letter Ford distinctly stated, did he not, that he recognized no relationship between himself and you, and requested you not to call him brother?" The plaintiff answered as follows: "He said something similar to that; that was the substance of it."

With the exceptions already noted, and perhaps in a few other minor and unimportant particulars, the findings of fact necessary to support our conclusions are sustained by the evidence, and support the conclusions of law arrived at by the district court.

The judgment of the district court is affirmed.

By BEATTY, C. J.: I concur in the judgment.

This case was decided before BELKNAP, J., took his seat.

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Opinion of the Court—Hawley, J.

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case, offers himself as a witness in his own behalf, it is proper for the court to instruct the jury in relation to his credibility, especially if it has been assailed by counsel or is clouded by the circumstances of the case. His credibility, however, is to be determined in the same manner as that of any other witness. It is the exclusive province of the jury to determine from the evidence in the case, and from the appearance and manner of the witness, what credit, if any, is due to his testimony. In determining this question the jury have the right to consider the circumstances under which the witness gives his testimony, and the inducements and temptations which would ordinarily influence a person in his situation. (*People v. Cronin*, 34 Cal. 195; *State v. Hymer*, 15 Nev. 49.)

But the instructions should only inform the jurors as to what matters it would be proper for them to consider in determining the credibility of the witness. Beyond this the judge has no right to go. He should not state to the jury his estimate of the witness, or give his opinion as to the weight to be attached to his testimony. He should declare the law. The jury should find the facts.

The latter portion of the instruction is clearly erroneous. It is not true that "there is in every criminal case a greater or less temptation for a defendant to testify \* \* \* falsely in his favor."

If the defendant is guilty there may be a temptation to swear falsely; but whether there is such an inducement or temptation is, always, a question for the jury, and not for the court, to determine. If the defendant is innocent it will generally be to his interest to tell the truth, and there can seldom be any inducement or temptation for him to testify falsely.

For the reasons already stated, it was, also, erroneous and prejudicial to the defendants for the court to say "that jurors should in every instance consider the testimony of a defendant with great caution."

The principles we have announced are sustained by numerous authorities. (*State v. Larkin*, 11 Nev. 330; *Greer v. State*, 53 Ind. 421; *Pratt v. State*, 56 Id. 182; *Veatch v.*

## Points decided.

*State*, Id. 584; *Rafferty v. People*, 72 Ill. 37.; *Roach v. People*, 77 Id. 31; *People v. Arnold*, 40 Mich. 715; *Moses v. State*, 58 Ala. 118; *Hogsett v. State*, 40 Miss. 527.)

2. The example referred to in the third instruction of the court introduced an unnecessary, if not false, quantity in the definition of the term "reasonable doubt," and ought not to have been given. It is always safer for the court to confine its instructions to the well-settled rules of law than to indulge in unnecessary illustrations which are often liable to confuse and mislead the jury.

3. The court did not err in admitting the testimony of the witness Jones relative to the admissions made by the defendant, O'Brien, *alias* Murphy, in relation to his and Johnson's participation in the robbery. The court expressly charged the jury that the statement of O'Brien, as testified to by the witness Jones, could not be considered against the defendant Johnson, in determining his guilt or innocence, but that it could be considered in determining the defendant O'Brien's guilt or innocence. The court ought to have made this statement when the testimony of Jones was admitted. But it is evident from the instructions given by the court, that the jury were not misled upon this point. (*State v. McLane et al.*, 15 Nev. 345.)

The judgment of the district court is reversed and the cause remanded for a new trial.

[No. 1,019.]

JAMES NESBITT ET AL., RESPONDENTS, v. JOHN CHISHOLM ET AL., APPELLANTS.

**FINDINGS MUST BE EMBODIED IN STATEMENT.**—The findings of the district court will not be considered upon appeal unless they are embodied in the statement.

**STATEMENT OF MOTION FOR NEW TRIAL—WHEN NOT STATEMENT ON APPEAL.**—When an appeal is taken from the judgment alone, the statement on motion for a new trial will not be considered as a statement on appeal, unless there is a stipulation to that effect.

**PRESUMPTIONS IN FAVOR OF JUDGMENT.**—When nothing is shown to the contrary, this court will presume that the judgment is sustained by the findings, and that the findings were justified by the evidence.

## Opinion of the Court—Leonard, C. J.

RIGHTS OF PARTIES WHO HAVE NOT APPEALED NOT CONSIDERED.—A decree in favor of persons, not parties to the suit, who have not appealed, will not be considered or reviewed by this court.

APPEAL from the District Court of the Sixth Judicial District, Lincoln County.

The facts appear in the opinion.

*A. B. O'Dougherty and T. W. Healy*, for Appellants.

*T. W. W. Davies*, for Respondents.

By the Court, LEONARD, C. J.:

The decree in this case canceled and annulled a certain deed executed by defendant W. L. McKee, as sheriff of Lincoln county, in this state, to his co-defendant, John Chisholm, conveying certain property therein described: and it was further ordered, adjudged, and decreed, that the title to said property was vested, in certain designated proportions, in defendant Chisholm, plaintiffs, and three other persons not parties to the suit. Defendants moved for a new trial; the motion was overruled, and this appeal is taken from the decree only.

What purport to be the findings of fact and conclusions of law, by the court, are contained in the transcript, but are not embodied in the statement on motion for new trial. They could not, therefore, be considered, even though, on this appeal, we could consider such statement. (5 Nev. 252.) But the statement on motion for new trial must be disregarded, because the statute does not authorize such statement to be considered as a statement on appeal from the judgment alone, unless there is a stipulation of counsel to that effect. (*Williams v. Rice*, 13 Id. 235.)

There being no such stipulation, it follows that there is nothing before us for review except the judgment roll. Such being the case, the only error complained of that can be noticed is that the decree is at variance with the relief sought in the complaint. It is said that the complaint merely asks the court to decree the cancellation of the deed to Chisholm, and to order and adjudge that the sheriff,



McKee, convey the property to plaintiffs, while the court distributed the same in a manner not warranted by law or the evidence or by the relief sought. Nothing appearing to the contrary, every reasonable presumption in favor of the correctness of the decree must be indulged in by this court. We must presume that it is sustained by the findings, and that the latter were justified by the evidence.

Bearing in mind the facts just stated, do the pleadings sustain the decree? Certain interests in the property were decreed to be vested in Snodgrass, Rice, and Picking, respectively, who were not parties to the suit. It certainly would have been better if the court had brought them in as parties, and in the absence of such proceeding it is certain that the portion of the decree adjudging that stated interests are vested in them is a nullity, especially so far as they are concerned.

But the complaint is ample to sustain that part of the decree annulling the deed from McKee to Chisholm, as well as the portion adjudging the interests to which plaintiffs and Chisholm were entitled. And presuming that the proportions awarded to them are correct, and that the defendant Chisholm received his full share according to the evidence, he can not complain because the court adjudged that other parties were entitled to the balance, even though the latter are not so entitled. (*Dick v. Caldwell*, 14 Nev. 169.)

But there is a final answer to the alleged error of the court in determining the proportions belonging to the three persons not parties to the suit, which is, that no appeal is taken therefrom. Defendants only appealed "from the decree \* \* \* *in favor of the plaintiffs* in said action, and against said defendants, and from the whole thereof." The only portions of the decree in favor of plaintiffs are those annulling the sheriff's deed, and adjudging the title of a certain portion of the property to be vested in plaintiffs.

As to the portions of the decree in favor of persons not parties to the suit, no appeal could have been taken; but

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were it otherwise, there is no appeal in this case, as to them, because they were never served with notice of appeal, or otherwise treated as respondents.

The decree appealed from, so far as it affects the parties to the suit, is affirmed.

[No. 1,039.]

THE STATE OF NEVADA, RESPONDENT, v. ANTOINE  
VASQUEZ, APPELLANT.

CRIMINAL LAW—TESTIMONY OF DEFENDANT—INSTRUCTIONS.—The court instructed the jury, that in all cases the testimony of the defendant, in his own behalf, should be received "with great caution; for when one is being tried for a capital offense, the temptation to pervert or distort the facts in favor of himself is very great." *Held*, erroneous.

VERDICT RECOMMENDING DEFENDANT TO THE MERCY OF THE COURT—DUTY OF JURY.—*Held*, that the court should have disregarded the request of the jury for instructions as to their duty in recommending the defendant to the mercy of the court. The duty of the jury is to find a verdict as to the guilt or innocence of the defendant.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts appear in the opinion.

*R. M. Beatty*, for Appellant.

*M. A. Murphy*, Attorney General, for Respondent.

By the Court, LEONARD, C. J.:

Appellant was convicted of murder of the second degree. This appeal is taken from the judgment and from an order overruling a motion for new trial. At the trial appellant testified in his own behalf, and in substance stated that, at the time of the homicide, he and Garcia, the deceased, were friends; that he had no reason for killing him, and no desire to do so, and that Garcia's death was the result of an unintentional discharge of his pistol.

The court instructed the jury, if they believed from the evidence, that the deceased met his death by the uninten-

tional discharge of the pistol they must acquit the defendant; but the following instruction was also given:

"You are instructed that in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the court.

"The foregoing is a copy of the law of this state giving defendants the privilege of testifying in their own behalf; and from it you will observe that you are the sole judges of the *degree of credibility which such testimony shall receive*; and you are instructed that you are at liberty to believe all the testimony of the defendant, or you are at liberty to disbelieve the whole thereof, or you may believe a portion of his testimony and disbelieve a portion. In all cases, jurors should receive such testimony with great caution—for when one is being tried for a capital offense the temptation to pervert or distort the facts in favor of himself is very great."

In our opinion, the recent decision of this court in the case of *The State v. Johnson and O'Brien*, is decisive of this appeal, and that on principle, as well as upon the authority of that case, the last portion of the instruction quoted can not be upheld. Courts can not so charge a jury as to impress upon their minds that any witness has testified falsely. Jurors may be informed as to the matters to be considered in determining the credibility of witnesses, but they can not be instructed, directly or indirectly, that any witness has perverted or distorted the facts. And when a defendant in a criminal case makes himself a witness, he has the right to have his testimony received and considered according to the rules adopted in relation to other witnesses. The last part of the instruction under consideration advised the jury to look upon the testimony of defendant with suspicion because he was charged with a capital offense. An innocent person may be charged with crime. If so, his case is indeed a rare exception, if he is tempted to distort the facts, because truth will then serve him best.

## Argument for Appellant.

We think, also, that the court should have disregarded the request of the jury for an instruction as to their rights and duties in recommending the defendant to the mercy of the court. The sole duty of the jury is to declare by their verdict whether the defendant is guilty or not guilty.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

[No. 1,008.]

G. W. G. FERRIS, APPELLANT, v. THE CARSON  
WATER COMPANY, RESPONDENT.

**CONTRACT—DAMAGES FOR BREACH OF—PRIVITY—PROPERTY DESTROYED BY FIRE.**—The owner of property which is destroyed by fire, can not maintain an action to recover damages from a water company, on the ground that the property was destroyed by the failure of the water company to furnish a supply of water as required by the terms of its contract with the town, there being no privity of contract between the parties to the action.

**IDEM—INTEREST IN PROPERTY MUST BE CERTAIN AND SUBSTANTIAL.**—The owner of property destroyed by fire, upon assignment, sought to recover damages upon the ground that the municipality had such an interest in the property as to give it a right of action: *Held*, that the right of taxation vested in the municipality did not create an interest in the property but only an expectation dependent upon contingencies, and that this was too remote to be the foundation of a right of action.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

*N. Söderberg*, for Appellant:

I. Defendant is estopped by the contract from denying the interest of the city in the property, or its authority to make the contract. Having made and ratified the contract and taken the benefits which it confers, defendant must also bear the obligations which it imposes. (*Herman on Estoppels*, secs. 467–471, 473, 474; *Stevenson v. Newnham*, 13 C. B. 302; *Atkinson v. Newcastle and G. W. Co.*, 6 Ex.



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Argument for Appellant.

(Law Rep.) 404; *People v. Common Council of Utica*, 65 Barb. 9, 21; *Argenti v. San Francisco*, 16 Cal. 255.)

II. The city had an insurable interest in the property. It had a reasonable expectation of gain in the shape of taxes to be derived from the property which was destroyed. (3 Kent's Com., 3d. ed., 275-278; May on Insurance, secs. 76, 102, 109; Bliss on Life Ins. 35-37; *State v. Rhoades*, 7 Nev. 434; *Morrell v. Trenton Mut. Life and Fire Ins. Co.*, 10 Cush. 282.)

III. By the contract between the city and defendant the latter insured the property against loss by fires caused by its own failure to furnish water, or by its misconduct in preventing water from flowing to the hydrants. (*Atkinson v. N. & G. W. Co.*, *supra*.)

IV. The measure of the city's damages is the value of the property destroyed through defendant's negligence. (*Richmond v. Dubuque & S. C. R. R. Co.*, 26 Iowa, 191; *Philadelphia, Wilmington etc. R. R. Co. v. Howard*, 13 How. 808, 326, 343, 344; *Hoy v. Grenoble*, 34 Pa. St. 9; *Hendricks v. Stewart*, 1 Tenn. 476; *Rodgers v. Mechanics' Ins. Co.*, 1 Story, 603; *Lawson v. Price*, 45 Md. 123; Sedg. on Dam. 106, (104), 112 (109), 115 (112), 116.)

V. Defendant's negligence was the natural and proximate cause of the injury. (3 Parsons on Contracts, 179; *Milwaukee etc. R. R. Co. v. Kellogg*, 94 U. S. 469.)

VI. The city's demand was assignable. (Burrill on Assignment, sec. 100, and cases cited.)

VII. The city was competent and authorized to act as the agent of its inhabitants. (Story on Agency (1874), sec. 7; *People v. Com. Council of Utica*, 65 Barb. 21.)

VIII. A third party may maintain an action on a contract made with another for his benefit. (1 Parsons on Contracts, 466 *et seq.*; 3 U. S. Dig. 524, sec. 2444; *Alcalde v. Morales*, 3 Nev. 132; *Bristow et al. v. Lane et al.*, 21 Ill. 194.)

IX. Defendant owed a duty to the community and to plaintiff, to use reasonable care and diligence not to frustrate means in use to extinguish an existing fire. (Wharton on Negligence, 98; *Mott v. Hudson R. R. Co.*, 8 Bosw. 355.)

*R. M. Clarke*, for Respondent:

I. Neither the city nor appellant has an action against respondent for the value of premises destroyed. The city had no interest in the property destroyed as owner, nor had it any present interest of any kind. The mere right of future taxation can not lay the foundation to support a present demand of the kind in question.

II. The appellant had no action in his own right for respondent's failure to fulfill its contract with the city. He was not a party to that contract. He did not stand in privity with the city, and can not sue respondent upon a contract in which he had no legal interest. (*Davis v. Clinton Water Works Co.*, 54 Iowa, 59; *Kahl v. Love*, 37 N. J. L. 5; *Atkinson v. Newcastle etc. Water Co.*, L. R., 2 Ex. Div. 441; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; *Vrooman v. Turner*, 69 N. Y. 280; Wharton on Negligence, secs. 438, 440; *Sher. & Redf. on Neg.*, sec. 54.)

By the Court, BELKNAP, J.:

The complaint in this case contains two counts, to each of which the defendant demurred generally. The demurrer was sustained by the district court, and the case comes before us upon an exception to this ruling. In one count it is alleged that the defendant entered into a contract with the town of Carson City, a municipal corporation, on behalf of and for the benefit of its inhabitants, to supply it with water for the extinguishment of fires. That for this purpose fire plugs were established at various places in the town, and, among other places, at a point within a convenient distance of plaintiff's building. That a fire occurred in premises adjoining plaintiff's, and by reason of the failure of defendant to keep the pipes connecting with the fire plugs charged with water under sufficient pressure, as was its duty under the contract, the fire communicated to plaintiff's building and destroyed it. That in consideration of the contract and of moneys paid thereunder by the town of Carson City to de-

defendant, it became liable unto plaintiff for the damages arising from the neglect above mentioned.

The question presented by this count is whether, upon a breach of contract between the municipality and the water company, the plaintiff, whose property was destroyed through the failure of defendant to perform its obligation, has a right of action for damages.

It will be observed that plaintiff is not a party to the contract. It is a general rule of law that a stranger to a contract can not claim its benefits in an action upon it. An exception to the rule exists in favor of persons for whose benefit a contract has been made, and it is urged in support of the declaration that as this contract was made for the benefit of plaintiff and the other taxpayers and residents of the town, the case falls within the exception.

But a third person, not a party to a contract and for whose benefit it may have been made, does not in all cases have a right of action upon it. To entitle him thereto, there must be some privity between him and the promisee, and some obligation or duty owing from the latter to him, which would give him a legal or equitable claim to the benefit of the promisee or an equivalent from him personally. "A legal obligation or duty owing from the promisee to him" (the person for whose benefit the contract is made) "will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration with the promisee, the obligation of the promisee furnishing an evidence of the interest of the latter to benefit him, and creating a privity by substitution with the promisor." (*Trooman v. Turner*, 60 N. Y. 284.)

Other exceptions doubtless exist, but the plaintiff's case is within none of them.

The board of trustees of the town, in the exercise of a discretionary power conferred upon them by the legislature, contracted for a supply of water for the extinguishment of fires. The plaintiff, in common with the other residents of the town, enjoyed the advantages of this contract. He had an indirect interest in the performance of the contract by the water company, as had all of the property-holders of

the town, but such an interest is not sufficient to constitute the privity, either directly or by substitution, which must exist in order to give him a right of action upon the contract. (*Davis v. Clinton Water Works*, 54 Iowa, 59; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24.)

The other count sets forth, in addition to the matter above stated, that prior to the destruction of the plaintiff's premises he had been accustomed to pay, and but for defendant's negligence aforesaid would have continued to have paid, a large amount of money annually for taxes to the town of Carson City. That by reason of the failure of defendant to perform its obligation, the town of Carson City was damaged in the sum of one thousand dollars by diminution of its taxable property.

An assignment and ownership in plaintiff of the demand and right of action of the town against the defendant is set forth. The question presented by this count is whether the municipality had such an interest in the property destroyed as to give it a right of action against the defendant. We have not been referred to any authority supporting this declaration, and we apprehend none can be found. The cases to which we have been referred in support of the theory that the town had such an interest in the property as would entitle it to recovery upon this count are insurance cases, and are inapplicable to the question here presented. There is a wide difference between the interest that will entitle a party to recover in an action for a tort and an insurable interest.

"An insurable interest," said the supreme court of Iowa, in *Warren v. The Davenport Fire Insurance Co.*, 31 Iowa, 468, "is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re*; or *jus ad rem*. Yet such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducting the existence of a loss to him from the occurrence of the injury to it."

In actions of the character of the present one the interests



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in the property destroyed, in order to be the basis of an action, should be certain and substantial. The right of taxation vested in the authorities of the city by the legislature did not create an interest, but rather an expectation, which was subject to have been defeated by contingencies that may have arisen, and was altogether too remote to be the foundation of a right of action.

The order and judgment of the district court are affirmed.

[No. 1,030.]

R. V. BORDEN, RESPONDENT, v. C. T. BENDER, APPELLANT.

STATEMENT ON MOTION FOR NEW TRIAL—AUTHENTICATION OF.—A certificate of the clerk to the effect that no amendments to the statement have been filed, is such an authentication as is required by section 197 of the civil practice act.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

W. Webster, for Appellant:

The statement on motion for a new trial is not sufficiently authenticated. (*Doyle v. Seawell*, 12 Cal. 425; *Paige v. O'Neal*, Id. 492; *Linn v. Twist*, 3 Id. 89; *Quivey v. Gambert*, 32 Id. 304; *Vilhac v. Biven*, 28 Id. 409; *Cosgrove v. Johnson*, 30 Id. 509.

Haydon & Queen, for Respondent.

By the Court, BELKNAP, J.:

The statement on motion for new trial in this case is accompanied by the certificate of the clerk of the district court to the effect that no amendments were filed. The only question presented upon this appeal is whether this is such an authentication of a statement on motion for new trial as is contemplated by section 197 of the practice act. This section, among other things, provides: "When the state-

## Points decided.

ment is agreed to, it shall be accompanied with the certificate, either of the parties themselves, in fact, or their attorney, that the same has been agreed upon and is correct. When settled by the judge or referee, it shall be accompanied with his certificate that the same has been allowed by him and is correct. When no amendments have been filed the statement shall be accompanied with the certificate of the clerk of that fact."

The evident purpose of the statute in requiring the statement to be accompanied with one of the certificates mentioned is, that it shall thereby be authenticated. When no amendments are offered, the correctness of the proposed statement is assumed. The fact that no amendments are filed is required to be proven by the certificate of the clerk and this certificate accompanying the statement authenticates it. (*White v. White*, 6 Nev. 20; *Overman S. M. Co. v. American M. Co.*, 7 Id. 312.)

The order of the district court granting respondent a new trial is affirmed.

[No. 1,047.]

THE STATE OF NEVADA, RESPONDENT v. AH CHEW.  
APPELLANT.

**INDICTMENT—STATUTORY OFFENSE—NEGATIVE EXCEPTIONS.**—In an indictment for a statutory offense, it is only necessary to state the negative to an exception to the statute, when the exception is such as to render the negative of it an essential part of the definition or description of the offense charged.

**IDEM.**—It is the nature of the exception, and not its locality, that determines the question whether it should be stated in the indictment or not.

**OPIUM ACT—CONSTITUTIONALITY OF.**—Section 1 of the Opium Act (Stat. 1877, 89) does not conflict with any of the provisions of the constitution of this State.

**IDEM—RESTRICTION UPON SALES OF OPIUM.**—Under the police power and in the interest of good morals, the good order and peace of society, for the prevention of crime, misery, and want, the legislature has authority to place such restrictions upon the sale or disposal of opium as will mitigate, if not suppress, its evils to society.

**JURY LAW—FOURTEENTH AMENDMENT—TREATY WITH CHINA.**—The jury law of this State does not conflict with the fourteenth amendment of the constitution of the United States, or with sections 1977, 1978, Rev.

## Argument for Appellant.

Stat. U. S., or with article 6 of the treaty between the United States and China of July 28, 1868.

**IDEM—RIGHT OF CITIZENSHIP—NOT CONFERRED UPON UMINAMEN.**—The right of citizenship is not conferred by the amendments to the constitution of the United States, or the treaty between the United States and China, upon the Mongolian race, except such as are born within the United States.

**IDEM—CITIZENS MAY BE EXCLUDED AS JURORS.**—The privilege, or duty, of being a juror is not always an incident of citizenship.

**IDEM—EQUAL PROTECTION TO PERSONS.**—The State has the right to prescribe the qualifications of its jurors, provided it does not discriminate against persons because of their race or color. A mixed jury in a particular case is not essential to the equal protection of the law, and is not guaranteed by the fourteenth amendment to the constitution of the United States.

**SUFFICIENCY OF EVIDENCE.**—Held, that there was some evidence to sustain the verdict of the jury.

**APPEAL** from the District Court of the Sixth Judicial District, Eureka County.

The testimony in this case was, briefly, to the effect that Frank Connor, acting in concert with the officers of Eureka county, called at the defendant's house about two o'clock A. M., knocked at the door and woke up the defendant, and told him that he (Connor) was very sick and must have some opium. Defendant at first refused to get up, but after some threats upon the part of Connor, he got up. When he came to the door Connor handed him fifty cents and told him to go and get some opium. Defendant got the opium, gave it to Connor, and was thereafter immediately arrested by the sheriff.

*E. R. Garber and Alexander Wilson, for Appellant:*

I. The law under which the venire was issued is unconstitutional and void. (14th Amendment Constitution U. S.; secs. 1977, 1978, Rev. Stat. U. S.; Treaty with China July 28, 1868; *Strader v. West Virginia*, 100 U. S. 303.) The civil rights of a Mongolian or yellow person are identical with those of an African, or black person, and are protected by the constitutional amendments and the acts of congress in relation thereto, in precisely the same manner as the rights of an African. The discrimination of our jury

## Argument for Appellant.

law is against a person because of his race or color. The right which a state may claim, to restrict the jury list to citizens, is a right which can not be exercised when by its exercise persons of a peculiar race or color are in any way excluded from the full and equal benefit of all laws by reason of their race or color alone.

II. The effort of the legislature to regulate the sale and disposal of opium went beyond its power and transgressed the bounds of its authority. Since its discovery, opium has held its place in the commercial world as valuable property. Acknowledged to be so, it was entitled to and did receive the same protection and was accompanied by the attributes and incidents which pertain to all recognized subjects of property, and certainly comes within the protection of the provisions of the constitution, and it does not lie in the power of the legislature to condemn it, either directly or constructively, or to disturb an interest in it, or to pass any act the result of which diminishes or destroys its value. So long as opium is property, every incident necessary to perfect the right of property is conceded. The right of transfer or disposal is inseparable from this right. We can not imagine the right of property without the accompanying power of disposal. This act destroys the interest and value in all opium held in this state by others than druggists and apothecaries; and this is accomplished when the holder or owner is denied the right of disposal. (*Wynehamer v. The People*, 13 N. Y. 378; 1 Bl. Com. 138; 2 Kent's Com. 320, 326.)

III. The act impairs the obligation of a contract. Opium is exclusively an imported article, and the importer paying a duty to the United States for the privilege of importing it, there results a contract between the United States and the importer, that in consideration of the import duty, the United States agrees to, and guarantees to the importer, the right to use and dispose of his imported article in the usual manner of trade. No state legislature can nullify and set aside this right granted to the importer. In this case we see that the legislature has attempted to do this; and it is further found outside of its jurisdiction in this very matter.



making an effort to regulate a branch of commerce, a province peculiar and exclusive to the congress of the United States.

IV. It is special legislation in the interest of a designated class, inasmuch as the sale of opium is restricted to druggists and apothecaries, and they are given a monopoly of the opium trade, to the exclusion of all the world.

V. The indictment is insufficient, and does not state an offense, in this, that it does not show that the defendant therein is not within the exception mentioned in the act. (Whart. Am. Cr. L., sec. 379, and authorities there cited.)

*M. A. Murphy*, Attorney General, for Respondent.

By the Court, HAWLEY, J.:

Appellant was indicted, tried, and convicted of a felony for a violation of section 1 of the "act to regulate the sale or disposal of opium," etc. (Stat. 1877, 69.) This section provides that "it shall be unlawful for any person or persons, as principals or agents, to sell, give away, or otherwise dispose of any opium in this state, except druggists and apothecaries, and druggists and apothecaries shall sell it only on the prescription of legally practicing physicians." The charging part of the indictment reads as follows: "The said defendant, Ah Chew, on the 30th day of April, A. D. 1880, or thereabouts, and before the finding of this indictment, at the county of Eureka, in the state of Nevada, did unlawfully and feloniously sell and dispose of opium, of the value of fifty cents, United States silver coin, to one Frank Connor, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nevada."

1. Appellant's counsel argue that this indictment does not state an offense, because it does not show that the defendant is not within the exceptions specified in the statute. They claim the rule to be, that if there is an exception in the enacting clause, the prosecution must negative the exception and state in the indictment that the defendant is not within it. The principle decided in *State v. Robey*, 8 Nev. 321, is adverse to this rule.

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There are cases cited in Wharton's Cr. L., secs. 378, 379, where the language employed would seem, at first blush, to sustain the position contended for by appellant. But from a careful examination of all the authorities upon this subject, we are of opinion that it is only necessary in an indictment for a statutory offense, to negative an exception to the statute, when that exception is such as to render the negative of it an essential part of the definition or description of the offense charged. It is the nature of the exception, and not its locality, that determines the question whether it should be stated in the indictment or not. The question is, as stated in *State v. Abbey*, "whether the exception is so incorporated with, and becomes a part of the enactment, as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. 'It is the nature of the exception, and not its location,' which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except' as they may be used in the statute. In either case, the only inquiry arises, whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated, it should be negated, otherwise it is a matter of defense." (29 Vt. 66.) (See also *Metzker v. People*, 14 Ill. 101; *Stanglein v. State*, 17 Ohio St. 461; *State v. Miller*, 24 Conn. 522; *State v. Glynn*, 34 N. H. 422; *State v. Wade*, Id. 491.)

The exception mentioned in section 1 does not define or qualify the offense created by the statute. The defendant can not complain that he has not been fully informed of the nature and cause of action against him. A *prima facie* case is stated in the indictment "in such manner as to enable a person of common understanding to know what is intended." (1 Comp. L. 1858.)

The question is one not only of pleading but of evidence, and where the exception need not be negated it need not be proven by the prosecution. If the defendant was a drug-

ist, or an apothecary, and sold the opium upon the prescription of a legally practicing physician, it would be a defense. These facts would be peculiarly within his knowledge, and could be established by him "without the least inconvenience, whereas if proof of the negative were required the inconvenience would be very great." (1 Greenl. on Ev., Sec. 79.)

2. Section 1 of the statute above referred to does not conflict with any of the provisions of the constitution of this state. It does not interfere with the existing rights of property. It does not impair the obligation of any contract, and is not special legislation in the interest of a designated class.

It has universally been held to be the duty of every state to protect its citizens, and advance the safety, happiness, and prosperity of its people; and there is no doubt as to the power of the legislature to pass laws, like the one under consideration, designed to promote the health and protect the morals of the community at large. Statutes to regulate the sale of intoxicating liquors; to prevent and prohibit their sale to minors, to Indians, to habitual drunkards; and to close saloons on the Sabbath and on election days, have been passed in many, if not all, of the states, and have always been upheld and sustained by the several state courts and by the supreme court of the United States. (*License Cases*, 5 How. 504.)

It is not denied that the indiscriminate use of opium by smoking or otherwise tends in a much greater degree to demoralize the persons using it, to dull the moral senses, to foster vice and produce crime, than the sale of intoxicating drinks. If such is its tendency, it should not have unrestrained license to produce such disastrous results. A law prohibiting the indiscriminate traffic in this poisonous drug, and placing the trade under such regulations as to prevent abuses in its sale, violates no constitutional restraints. Under the police power, recognized in the theory and asserted in the practice of every state in the union, in the interest of good morals, the good order and peace of society, for the prevention of crime, misery, and want, the legislature has

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authority to place such restrictions upon the sale or disposal of opium as will mitigate if not suppress its evils to society.

*Wynehamer v. The People*, 13 N. Y. 378, upon which appellant relies, is not opposed to the views we have expressed. The decision in that case was based upon the ground that the act there under consideration confiscated and destroyed property lawfully acquired by the citizen in intoxicating liquors, and provided for its seizure and destruction without due process of law. The opinions of the various justices in that case expressly recognized the right of the legislature to regulate the sale and disposal of intoxicating liquors "upon such views of policy, of economy or morals, as may be addressed to its discretion." The subsequent decisions in that state have always recognized the right of the legislature to control and regulate the traffic in intoxicating drinks.

Wright, J., in delivering the opinion of the court in *Metropolitan Board of Excise v. Barrie*, upon this subject says: "The right to legislate on a subject so deeply affecting the public welfare and security has not heretofore been questioned or denied, and it could not well be, for it would have been to deny the powers of government inherent in every sovereignty to the extent of its dominions. A state is not sovereign without the power to regulate all its internal commerce as well as police. The legislature exercises and wields these sovereign police powers as it deems the public good to require. It is a bold assertion, at this day, that there is anything in the state or United States constitution conflicting with or setting bounds upon the legislative discretion or action in directing how, when, and where a trade shall be conducted in articles intimately connected with the public morals or public safety or public prosperity; or, indeed, to prohibit and suppress such traffic altogether, deemed essential to effect those great ends of good government. \* \* \* Is it not an absurd proposition, that such a law, by its own mere force, deprives any person of his liberty or property within the meaning of the constitution or that it infringes upon either of these secured private



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rights? Yet this is the only ground its violators can occupy to raise any question as to its validity. They are restrained of no liberty, except that of violating the law, by engaging in a forbidden traffic; and the assumption is not even plausible that the act works a deprivation of property to any one." 34 N. Y. 666.)

The supreme court of Delaware, in *State v. Almond*, 2 Houston, 612, declared the act (for the suppression of intemperance) prohibiting the sale of intoxicating liquor for any other than "mechanical, chemical, and medicinal purposes only, and pure wines for sacramental use," to be constitutional.

The *Wynehamer* case was there elaborately reviewed, and it was shown that each of the justices who decided against the constitutionality of the prohibitory liquor law of New York based his opinion on grounds of objection that were not applicable to the Delaware act, and sustained the principle of restrictive legislation to the full extent required to support its validity. After an examination of many authorities upon the subject under consideration, we are prepared to reiterate and indorse the statement of Wright, J., in the opinion from which we have quoted, that: "No one heretofore has questioned, on constitutional grounds, the validity of such an enactment, or called upon the judiciary to declare it void, and, perhaps, would not at this time, except as emboldened by the inconsiderate dicta of some of the judges in the case of *Wynehamer v. The People*."

3. Appellant contends that the court erred in overruling his challenge to the panel of trial jurors, "because the law under which the venire was drawn is unconstitutional and void, in this: that it conflicts with the fourteenth amendment of the constitution of the United States, with sections 1977 and 1978 (Rev. Stat. U. S.), and article 6 of the treaty between the United States and China, of July 28, 1868."

This position is wholly untenable. It can not be maintained upon any sound reasoning, and is not supported by any authority. In construing the constitutional amendments and the civil rights bill, courts have always considered the history of the times when they were adopted, the

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general objects sought to be accomplished, and that they were designed to remedy. Their object was to give to the African the civil rights which the white people of the United States enjoyed, and to give to that race the protection of the general government in that enjoyment, even if it should be denied by any state.

The amendments were primarily designed to give to all persons of the African race within the United States the right to prevent their future enslavement, to make them free, to prevent discrimination against their rights as free men, and to secure to them the privileges of the ballot. The language used necessarily extends some of the provisions to all persons of every race and color; but their primary purpose is so clearly in favor of the African race, that it would require a very strong case to make them apply to any other. (*Slaughter-house Cases*, 16 Wall. 37; *S. v. West Virginia*, 100 U. S. 303; *Virginia v. Rives*, 100 U. S. 319; *Ex parte Virginia*, Id. 339.)

The amendments did not confer the right of citizenship upon the Mongolian race, except such as are born in the United States. The treaty between the United States and China did not confer upon the Chinese, coming into the country, the right of citizenship. The same section of the constitution guaranteed to the Chinese subjects certain "privileges, immunities, and exemptions in respect to travel or residence," but it contains the following proviso: "But nothing herein contained shall be held to confer naturalization upon the subjects of China in the United States." (Section 1.)

The statute of this state provides that "every white male elector of the state \* \* \* is a qualified juror in any county in which he reside." (1 Comp. L. 1051.) This statute does not deprive appellant of any right secured to him by the constitution, laws, or treaty. The Mongolian or yellow race, to which appellant belongs, are denied the right to serve as jurors because they are aliens, and not on account of their color. There is no discrimination in the statute against any person because of his race or color.

Appellant had all the privileges guaranteed to the subjects of the most favored nation. He had the same

as an unnaturalized white person from England, Germany, or any other foreign country. No greater rights could have been secured to him in the circuit court of the United States. The qualification of jurors is the same in the United States courts as in the state courts. (Rev. Stat. U. S., sec. 800; Stats. U. S., 1874-5, p. 336, sec. 4.) The privilege, or duty, of being a juror is not always an incident of citizenship. There are citizens of the United States that are in the respective states denied the right to sit as jurors in the trial of civil or criminal cases.

Women are citizens, but they are not, under the constitution and laws of this state, "qualified electors." They have no right to vote or hold any office. Yet they have the same right to a fair and impartial trial by jury as any other person. Some of the states limit the age of male citizens who are declared competent to serve as jurors. Yet it has never been held that a citizen over or under the prescribed age was denied any right secured to him by the constitution and laws of the United States. All persons, whether male or female, old or young, citizens or aliens, white, black, or yellow, are equally protected in the right of trial by a fair and impartial jury, indifferently selected, without discrimination because of their race or color.

The statute of West Virginia, which was called in question in *Strauder v. West Virginia*, *supra*, reads as follows: "All white male persons, who are citizens of this state shall be liable to serve as jurors." The supreme court of the United States declared this law to be unconstitutional, because it singled out and expressly denied to the colored race "all right to participate in the administration of the law as jurors, *because of their color*, though they are citizens and may be in other respects fully qualified."

In the discussion of the questions there involved, the court expressly recognized the general principles we have announced, and declared, that every state has the right to prescribe the qualifications of its jurors, provided it does not discriminate against persons because of their race or color. This is the language used: "We do not say that within the limits from which it is not excluded by the



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amendment a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the fourteenth amendment was ever intended to prohibit this. Looking at its history, it is clear that it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discrimination against those who belong to it."

The argument that equal protection to persons can only be secured by allowing persons of the same race or color to act as jurors in cases affecting their interests, is fully answered by the supreme court of the United States in the case of *Virginia v. Rives, supra*, in reply to the application of two colored persons to have their cause removed from the state court to the circuit court of the United States. The statute of Virginia provided that all male citizens twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the constitution and laws, are liable to serve as jurors. The law of that state, like the law of this state, did not discriminate against any person because of his race or color. Petitioners alleged that the grand jury that indicted them, and the petit jury that tried them, were composed wholly of the white race, and that no one of their race had ever been allowed to serve as jurors, in the county where they were tried, in any case in which a colored man was interested. The court say that these assertions "fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected. Nor did the refusal of the court, and of the counsel for the prosecution, to allow a modification of the venire, by which one third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right secured to them by



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Points decided.

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law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them or to any person, by the law of the state, or by any act of congress, or by the fourteenth amendment of the constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the state court, viz., a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia or by any federal statute. It is not, therefore, guaranteed by the fourteenth amendment or within the purview of section 641."

The question whether any person of the Mongolian race can become a naturalized citizen of the United States is not involved in this case, and does not, therefore, merit any discussion.

4. The evidence in this case was very slight and in some respects very unsatisfactory. But we are not prepared to say that there was no evidence to sustain the verdict of the jury.

The judgment of the district court is affirmed.

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[No. 1,040.]

THE STATE OF NEVADA, RESPONDENT, v. AH GONN,  
APPELLANT.

OPIUM ACT CONSTITUTIONAL—INDICTMENT SUFFICIENT.—Judgment affirmed upon the authority of *The State of Nevada v. Ah Chew*, ante, 50.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

Alexander Wilson, for Defendant.

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*M. A. Murphy*, Attorney General, for Respondent.

By Court, HAWLEY, J.:

The questions raised by appellant are substantially the same as were presented in the case of *The State v. Ah Chew*, ante, 50.

Upon the authority of that case the judgment of the district court is affirmed.

[No. 1,048.]

THE STATE OF NEVADA, RESPONDENT, v. CHING GANG, APPELLANT.

OPIMUM ACT—SALE BY PHYSICIANS.—To make a defense for the sale of opium by a practicing physician complete, the defendant must show that he comes within the provisions of the "act to prevent the practice of medicine and surgery by unqualified persons" (Stat. 1875, 47.)

APPEAL from the District Court, Sixth Judicial District, Eureka County.

The facts appear in the opinion.

*Alexander Wilson* and *C. G. Hubbard*, for Appellant.

*M. A. Murphy*, Attorney General, for Respondent.

By the Court, HAWLEY, J.:

This case is similar to that of *The State v. Ah Chew*, ante, 50. The only question which is not disposed of by the opinion in that case is as to the correctness of the ruling of the court in refusing to allow the defendant, who was a witness in his own behalf, to answer the question, "Are you a practicing physician?" The defendant had the right to show, if he could, that he was a legally practicing physician, and that he sold the opium as a prescription. But in order to make his defense complete it was necessary for him to show that he came within the provisions of the "Act to prevent the practice of medicine and surgery by unqualified persons." (Stats. 1875, 47; *Ex parte Spinney*, 10 Nev. 323.)

The record shows that when the question was asked, the

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counsel for the state objected to the defendant's answering it unless "he showed a compliance with the laws of the state." When this objection was made, we think it was the duty of the defendant to state, if it was the truth, that he proposed to show a compliance with the law. Having failed to make any such statement, and failed to offer any further proof, we are of opinion that the court did not err in sustaining the objection.

The judgment of the district court is affirmed.

[No. 1,063.]

### EX PARTE ANTOINE LORRAINE.

**HABEAS CORPUS—FUGITIVE FROM JUSTICE.**—To hold a fugitive from justice to await the requisition of the governor of another state, it must affirmatively appear from the complaint filed before the committing magistrate in this state: 1. That a crime has been committed in the other state. 2. That the accused has been charged in that state with the commission of such crime. 3. That he has fled from justice, and is within this state. (1 Comp. L., 2278-2283.)

**DEED—PROPERTY BROUGHT INTO THIS STATE.**—To hold a fugitive from justice, upon the ground that the money taken by him, in committing a robbery, was brought into this state, there must be a complaint charging him with this offence substantially in the language of the statute.

**HABEAS CORPUS before the Supreme Court.**

The facts sufficiently appear in the opinion.

A. C. Ellis, for Petitioner.

H. F. Bartine, District Attorney of Ormsby County, for state.

By the Court, HAWLEY, J.:

In order to hold a fugitive from justice to await the requisition of the governor of another state, it must affirmatively appear from the complaint filed before the committing magistrate in this state: 1. That a crime has been committed in the other state. 2. That the accused has been charged in that state with the commission of such crime. 3. That he has fled from justice and is within this state.

## Points decided.

(Criminal Pr. Act, secs. 651-653; 1 Comp. L., 2278-2286.)

The complaint upon which petitioner was arrested accused him of having committed the crime of robbery in Alpine county, California, on the twenty-eighth of February 1881. The commitment recites the same facts. Neither the complaint, warrant of arrest, nor commitment avers that he is *charged* with such crime in the state of California. The proceedings in so far as they are based upon the provisions of the criminal practice act relating to fugitives from justice are entirely null and void. (*Matter of Edwin Heyward*, 1 Sandf. 701; *Matter of Leland*, 7 Abb. (N. S.) 64; *Matter of Rutter*, Id. 68; *State v. Hufford*, 28 Iowa, 391 *Ex parte White*, 49 Cal. 433.)

It is, however, claimed that petitioner should be held to await the requisition of the governor of the state of California under the provisions of section 67 of the act concerning crimes and punishments (1 Comp. L. 2373), because, as claimed by the prosecution, the money taken by petitioner was by him brought into this state.

It would be necessary, in order to authorize the magistrate to commit petitioner under this provision of the statute to have a complaint filed setting forth the offense substantially in the language of the statute. Upon this point it is proper for us to state that we have examined the testimony taken before the committing magistrate, and that, in our opinion, it is not sufficient to warrant the detention of the petitioner upon this ground.

The petitioner must be discharged from custody. It is so ordered.

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[No. 1,022.]

THE IOWA MINING COMPANY, APPELLANT, v. THE  
BONANZA MINING COMPANY, RESPONDENT.

DISMISSAL OF ACTION FOR FAILURE TO PROSECUTE—WHEN RIGHTS ARE  
WAIVED BY FILING A DEMURRER AND ANSWER.—Plaintiff, in an action to determine the question of the right of possession to certain mining ground for which the defendant had applied for a patent, failed to pro-

## Argument for Appellant.

ecute its suit with reasonable diligence, by delay in serving the summons. Defendant made no motion to dismiss the case until after service of summons, and after it had appeared in the action, by attorneys, and filed a demurrer and an answer to plaintiff's complaint: *Held*, that, by raising the issues of law and fact, the defendant waived its right to move for a dismissal of the action upon the ground that the summons had not been served within a reasonable time.

DEM—WAIVER OF THE WAIVER TO DISMISS.—When defendant moved to dismiss the case, the plaintiff consented to a hearing of the motion upon its merits: *Held*, that plaintiff by not moving to dismiss the defendant's motion, waived the irregularities and waiver of defendant.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

*Elliott and Thomas*, for Appellant;

I. Even though the court should be of the opinion that there has been a want of diligence on the part of appellant in the prosecution of this action, yet now that it is at issue on the merits, on the calendar and ready to be set for trial, the respondent having neglected to make its motion to dismiss before it appeared in the action and before it was at issue, the court will say that it is too late now to entertain such motion, and that the case should now go on and be tried on its merits. No suit to determine the question of title to mining ground, after it is at issue, should be dismissed upon a mere technicality like that presented in this case. Indeed, it should not be dismissed at all, where it is at issue before the motion is made, and where the plaintiff is ready and desires to have it tried on its merits. A conclusive reply to such a motion as this is: "The case is at issue and the plaintiff is ready and desires to go on with the trial on the merits of the case." (*Reynolds v. Page*, 35 Cal. 301-302; *Grigsby v. Napa Co.*, 36 Id. 589; *Eldridge v. Kay*, 36 Id. 49.)

II. There is no law requiring the summons and complaint to be served within any specific time after commencing the action. After a defendant has been properly served with a summons and certified copy of the complaint in an action, it is incompetent for him to object that he was not

that the action be dismissed for want of prosecution with reasonable diligence by plaintiff; that plaintiff take nothing thereby, and that defendant have and recover of plaintiff its costs, taxed at twenty-one dollars and five cents."

On the fourth day of November, judgment was entered accordingly. This appeal is taken from the judgment, from an order denying the motion for a new trial, and from the order of dismissal. Appellant's third assignment of error is as follows: "Insufficiency of evidence to justify the decision and judgment of the court, in this: that said motion to dismiss for want of prosecution, with reasonable diligence, was not made until service of the summons in the action was had on the defendant, and a demurrer and an answer filed by the defendant therein. This action was at issue, on the calendar, and ready to be set for trial on the merits, before the motion to dismiss for want of reasonable diligence in the prosecution was made."

The question first presented for our consideration, then, is this: Conceding that appellant did not prosecute the action with reasonable diligence, as required by section 2326, Rev. Stats. U. S., and that the action ought to have been dismissed, if respondent had taken the proper steps therefor before demurring and answering, was it error to enter a judgment of dismissal under the circumstances detailed above? By raising issues of law or fact, or both, did respondent waive its right to move for a dismissal of the action? Respondent claimed the mining ground described in the complaint adversely to appellant, and under the statute above referred to it was required, "within thirty days after filing its adverse claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment." The same section also provided that "a failure so to do shall be a waiver of his adverse claim."

The court below held that the action had not been prosecuted with reasonable diligence, and, consequently, that the adverse claim had been waived. But did not respondent, by its action, waive appellant's waiver?



Section 333 of the civil practice act provides that, if the appellant shall omit to make a statement within twenty days after the entry of judgment, he shall be deemed to have waived his right thereto. It can not be doubted under that statute, that a failure to make a statement on appeal within the time limited is as much a waiver of the right to make such statement at any time as, under the United States statute, a failure to prosecute this action with reasonable diligence was a waiver of appellant's adverse claim.

In *Johnson v. Wells, Fargo & Co.*, 6 Nev. 228, there was a statement on motion for new trial, and the appeal was taken from an order denying that motion and from the judgment. There was, in addition, a stipulation to this effect: "It is stipulated in the above action that the statement on motion for new trial herein, as on file and settled, shall be also the statement on appeal, and may be used and referred to with like effect as if the same had been duly filed and settled as a statement on appeal herein." The stipulation was not made until *twenty-four* days after the order denying the motion for new trial, and the respondent objected to a consideration of the statement, because "no statement on appeal was filed or served within twenty days after the motion for new trial was overruled;" citing section 332 of the civil practice act, which provides that, "when the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, prepare such statement."

Inasmuch as the appeal had been taken from the order denying the motion for new trial, as well as from the judgment, the court held that, under section 197, the statement on motion for new trial might be used and treated as a statement on appeal. But the court gave an additional reason why, in that case, the statement might be considered as a statement on appeal, as follows:

"If, however, there was any necessity for considering the statement in the record as a statement on appeal, distinct from its statutory office as a statement on new trial, the stipulation would allow it; for, although by failure to make the

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statement within twenty days after the entry of the judgment, appellant would, in the absence of any agreement to the contrary, be held to have waived the same (Stat. 1891, sec. 333, p. 248), yet such waiver could be waived by the opposite party in any case; and has been so here, if there is any meaning or force in language."

The doctrine announced by the court in that case, in considering the effect of the stipulation alone, without the effect of the statute (section 197), applies with great force here. There the respondent did not agree to waive the laches of the appellant, or what would have been such without section 197 of the practice act, but he did agree to what was inconsistent with the idea that he desired, or proposed, to take advantage of them. In the absence of section 197, the court say he might have treated appellant's failure to answer and serve statement within twenty days as a waiver of his right to do so at all. But instead of proceeding thus, he agreed that the statement filed at the time stated should be the statement on appeal, and might be used as such. In other words, he waived the irregularity complained of, admitting it to be such. In this case, if without saving his right to move for a dismissal, respondent had agreed to writing that the cause should be tried according to the rules and practice of the court upon such issues of law and fact, or either, as it might raise, there would have been a waiver of all prior delay on the part of appellant in making service, and we are of opinion that filing and serving its general demurrer on the eleventh of September, three days before the expiration of the time allowed by law for appearing and otherwise proceeding in the action, and subsequently answering, as before stated, before moving or giving any legal notice of motion to dismiss, also constituted a waiver of delay in the prosecution of the action. When the general demurrer was filed and served there was no attempt to preserve the right to move for a dismissal, and all that was ever done before answering was this: On the thirteenth of September, two days after the demurrer had been filed and served, the attorney of respondent gave appellant's attorneys verbal notice in open court that respondent would move to dismiss the action.



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stated; and on the same day the demurrer was  
own fourteen days were granted in which to answer,  
ve was given respondent to move to dismiss. In  
to the verbal notice in open court, it is enough to  
That it came too late, being two days after the  
d serving of the demurrer; 2. It was a case where-  
en notice was required and verbal notice was nuga-  
Civ. Pr. Act, secs. 491 *et seq.*; *Pratt v. Rice*, 7 Nev.

in certain circumstances, nothing to the contrary ap-  
we might presume, in support of the judgment, that  
notice was expressly waived when the verbal notice  
in open court; but here it is evident that there  
such waiver, because, subsequently, legal notice was  
accordance with an order of the court shortening the  
refor.

the time of the notice given in court respondent did not  
when it would make its motion, and the time had not  
shortened. Such being the case, respondent could  
be given notice of any definite time when the motion  
be made; and, as we understand the facts to be, the  
as to the effect simply, that respondent at some sub-  
date would move to dismiss. Although given in  
court, that notice, without a sufficient waiver of writ-  
ice, was of no more consequence than it would have  
given upon the public streets. It was purely gra-  
and neither bound nor affected either party.

is nothing before us to show that appellant waived  
notice of motion to dismiss, and if such was the  
is incumbent upon respondent to show it by the

*White v. White*, 6 Nev. 25, respondent moved this court  
the statement, etc., from the transcript, on the  
that there was no authentication or identification.  
ellant replied that the objection came too late; that  
g to call the attention of the court below to the de-  
explained of, and arguing the motion for new trial  
merits, respondent waived her objection. Quoting  
pting the language of the court in *McWilliams v.*

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*Hirschman*, 5 Nev. 265, the court said: "The only then, upon which it can be claimed that this objection was not raised in this court is, that it was waived by the appellant in the court below. There is, however, not the record before us to warrant the conclusion that it was waived. For aught that appears here, the objection was made at the proper time. It will not be claimed that it was incumbent on the appellant here to show that he waived the objection. It is always the duty of the appellant, wishing to avoid the consequence of error in legal proceedings, upon the ground of waiver by the opposite party, to show such waiver, and not upon the person insisting upon the objection to establish the negative." So, in this case, conceding that it was error to dismiss the action, unless the right to do so therefor was in some manner saved by respondent's filing and serving its answer, we think it incumbent upon respondent to show that written notice was waived by the appellant, before it can claim the benefit of the verbal ruling given in open court, as a saving act.

As before stated, after the demurrer was withdrawn, and leave for answering was given, and leave to move to dismiss was granted, but no specified time in which to make the motion was stated; and if it is true, that respondent should have given notice of its intended motion before filing its answer, in some other manner saved its right to so move, before the ruling, it is fair to presume that the court expected it would do so when additional time for answering was given.

Again, if, after demurring, respondent had the right to move for dismissal there was no reason for obtaining the order of the court to do so, for the right was absolute without the order of the court, and getting leave did not rest upon the court's right, if that had once been waived by demurring; and if there had been no waiver, the granting of leave neither gave respondent any additional rights, nor excused it for not moving before moving to dismiss, or in some manner saving its right to do so thereafter. In other words, answering the motion respondent did, was a complete waiver of previous delay, and the same act would have been so, had no leave to move been granted, and dismissal been granted.

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counsel for respondent say it was necessary to file an answer before moving to dismiss, "in order to show that there was a meritorious defense to the action, and that it was upon the answer, as well as upon the affidavits and the testimony, that the motion was granted." Counsel for respondent is certainly in error. Under the statute, if appellant did not prosecute the action with reasonable diligence, it waived its adverse claim; and upon showing unreasonable delay, respondent was entitled to a dismissal without the slightest proof of title or right of possession in itself. Appellant by its laches had waived its adverse claim, it was too late to right to maintain the action, even though respondent had not have the right of possession.

According to the rules of practice of the court below, when the answer was filed, it was the privilege of appellant to set the cause set for trial on the sixth day of October, or for some day during the October term. Respondent waived that fact when it answered, and, we think, by answering as well as demurring, without necessity, it consented that the cause might be tried upon the issues of law and fact thereby raised, in accordance with the rules and practice of the court.

Demurring and answering were tantamount to saying to respondent and appellant that it was ready and willing to try the issues, and that it did not desire to take advantage of any irregularity subsequently made the ground of a motion to dismiss. They were challenges to trial notwithstanding the irregularity. The irregularity was waived. "An irregularity is in the doing of some act at an unreasonable time, in an improper manner, as in omitting to do something which is necessary for the due and orderly conduct of the trial. It may, therefore, properly be defined to be a want of adherence to some prescribed rule or mode of proceeding, and may arise in every stage of an action, from the service of the summons to the entry of satisfaction after judgment and execution. There is a marked, and in many respects important and substantial distinction, between defective practical proceedings, which constitute mere irregularities, or such as render the proceeding a total nullity

and altogether void. Where the proceeding adopted prescribed by the practice of the court, and the error merely in the manner of conducting it, such an error is an irregularity, and may be waived by the lapses or frequent acts of the opposite party; but where the proceeding is altogether unwarranted, totally dissimilar to that which the law authorizes, then the proceeding is a nullity, and can not be made regular by any act of either party. (See *Waite's Prac.* 629.) The failure to prosecute this case with reasonable diligence consisted entirely in an unreasonable delay in obtaining service upon respondent. Being such, it was, we think, only an irregularity in the time of proceeding. If the statute provided that summons should be served within one month or one year after issuance, and that a failure to make such service should be deemed a waiver of the claim set up in the complaint, thereafter would be irregular, but nothing more; seasonably sought, relief could be had; but should respondent appear generally and answer the allegations in the complaint, without any reservation of his right to move to dismiss, such action would undoubtedly be a waiver, and he would thereafter seek in vain to take advantage of the irregularity.

Filing an answer under such circumstances, without taking a step in the cause, which from its nature, would assume the propriety of trying instead of dismissing the case, would be a waiver of any objections to going to trial on the issues raised.

If, without service of summons, respondent had appeared and answered, denying all the material allegations in the complaint, and after so doing had moved to dismiss the case, can be no doubt that the motion would have been granted. Its answer would have been a notice, voluntarily given, of a willingness to proceed with the trial. We are satisfied that the same result follows from demurring and answering as was done in this case.

The following authorities sustain the conclusion reached at upon this branch of the case: *Pearson v. Rawlings*, 107 77, wherein Lord Kenyon said: "It is the universal principle



the court, that where there has been an irregularity, if a party overlook it and take subsequent steps in the cause, it can not afterwards revert back to the irregularity and set it to it." See, also, *D'Argent v. Vivant*, Id. 330; *Mayor v. Lyons*, 24 How. Pr. 282; *Higley v. Lant et al.*, 3 How. Pr. 612; *Buel v. Dewey*, 22 How. Pr. 344; *Warren v. ...*, 37 N. H. 348; *Dale v. Radcliffe*, 25 Barb. 334; *Bartholomew v. Hubbard*, 3 Code R. 171; *Baker v. Curtiss*, 7 How. Pr. 344; *Belt v. Blackburn*, 28 Md. 240; *Crull et al. v. Keener*, 18 Wis. 66; *Pryce v. Security Ins. Co.*, 29 Wis. 274; *Upper Meriden Trans. Co. v. Whittaker*, 16 Id. 222; 4 *Waite's Prac.* 100, *seq.*

It is true that although we are satisfied that it would have been proper to dismiss the action had appellant protected its legal rights after respondent's waiver of the delay in the service of the summons, we are here met by another fact which justifies the order and judgment of the court.

The record shows that respondent, notwithstanding its failure to appear before the case was set for trial, did move to dismiss the action by filing and serving upon appellant's attorneys written notice of such motion. Service of the notice with affidavit attached was duly acknowledged. They were received without objection, and so far as the record shows, they were acted upon by appellant's attorneys.

The motion was heard on the eighteenth of October, 1879, with both plaintiff and defendant appearing in open court and answering themselves ready for said hearing." No application to dismiss the motion, because it came too late or for any other reason, was made. Respondent, without objection, read and filed in evidence affidavits and documentary evidence in support of the motion, and appellant did the same in opposition thereto. The motion was argued by counsel on both sides and submitted to the court for its decision. Upon these facts, the principles enunciated in the latter part of this opinion are equally applicable here. Although respondent had waived the delay in serving the summons, still the fact existed after as well as before denying and answering, that the summons was not served long after its issuance, and that the action had not

## Argument for Relator.

been prosecuted with reasonable diligence. If appellee was willing to have the motion heard and decided, or not object thereto upon proper ground, it in turn waived respondent's waiver, and can not now object to an order of judgment of the court which are supported by the evidence submitted. The record does not merely fail to show appellant objected in season to a consideration of the motion, but it shows affirmatively that it did not do so, that it consented to a hearing of the motion upon its merits thus waiving the previous irregularities of respondent. This is sufficient evidence to support the order and judgment, they are affirmed.

[No. 1,056.]

THE STATE OF NEVADA, EX REL. J. J. QUINN  
THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, RESPONDENT.

**ASSAULT—FINE AND IMPRISONMENT—COSTS.**—Relator was convicted of assault. The judgment imposed a fine of five hundred dollars, the costs at three hundred dollars and fifty cents, and ordered relator be imprisoned, as by statute provided, for the fine: *Held*, that section of the act concerning crimes and punishments (1 Comp. L. 2352) authorized the imposition of the fine, and section 674 of the criminal justice act (Id. 2299) authorized the judgment for costs.

**IDEM—JUDGMENT, HOW ENFORCED.**—Relator could be imprisoned for fine. The judgment for costs can be enforced only by execution.

**IDEM—COST BILL.**—The criminal practice act does not provide for a bill. The court has the power to tax the costs from an examination of the fees charged by the respective officers.

**CERTIORARI—LEGALITY OF COSTS—NOT REVIEWABLE.**—If the court erred in allowing any costs that were not taxable against the relator, it was an excess of jurisdiction, and its action, in this respect, can not be reviewed upon certiorari.

CERTIORARI before the Supreme Court.

The facts appear in the opinion.

C. S. Varian, for Relator:

The action of the court in allowing costs is reviewable by certiorari. There is no statute restricting the office

Opinion of the Court—Hawley, J.

writ of certiorari, except in civil cases. The grant of writ to this court, found in the constitution, relates to this writ as it was at common law. At common law its office was to correct errors. (Bac. Abr., Title Certiorari; Blackstone, book 4, 320, 321; *People v. Turner*, 1 Cal. 152; *St. v. Young*, 4 Otto, 259; *Hyden v. State*, 40 Ga. 476; *Ham v. State*, 32 Id. 111; *Peters v. State*, 9 Id. 109.)

*W. A. Murphy*, Attorney General, for Respondent.

By the Court, HAWLEY, J.:

Relator contends that the district court exceeded its jurisdiction in rendering the following judgment: "Defendant, J. J. Quinn, having been duly convicted of the crime of an assault, it is hereby ordered, adjudged, and decreed that said J. J. Quinn do pay a fine of five hundred dollars, gold coin, and costs of this action, amounting to three hundred dollars and fifty cents, making in all eight hundred dollars and fifty cents, gold coin; and it is further ordered that the defendant be confined in the common jail of Washoe County, Nevada, one day for each two dollars of said fine, or, as the whole, or any part thereof, shall remain unpaid."

From the views we entertain of this case, it is unnecessary to decide the question, argued by relator's counsel, whether the amendment to section 1 of the act in relation to fines (Stat. 1867 44), as made in the amended act (Stat. 1869, 96), is unconstitutional or not. There are other sections of the statute, against which no objections have been made, that gave the court authority to render the judgment. Section 46 of the act concerning crimes and punishments (1 Stat. L. 2352), authorized the imposition of the fine, and section 674 of the criminal practice act (1 Id. 2299), authorized the judgment for costs. The imprisonment of relator was only for the fine. He could not be imprisoned for the costs. (Const., art. 1, sec. 14; *Thompson v. State*, 16 Ind. 109.) The judgment for costs can only be enforced and executed in the same manner "as costs in civil cases," that is, by execution.



Opinion of the Court—Leonard, C. J.

sec. 11; *Dominges v. State*, 7 S. & M. 475; 1 Bish. C. 2d ed., secs. 1092–1093; 1 Nev. 27; 25 Cal. 400.)

IV. There was no sufficient proof that the witness examined in the presence of the defendant. (3 Gre. sec. 11; 1 Bish. Cr. Pro. sec. 1093; Crim. Pr. Act, sec. 1093.)

V. There is no evidence that the magistrate required the witness, Mercer, any surety for his appearance at the trial of the cause. The intention of the statute was to compel the attendance of the witness at the trial. The defendant had a right to presume that the magistrate would perform his duty and obey the plain mandate of the law.

VI. There was no sufficient evidence that the witness was absent from the state at the time of the trial, to justify the court in admitting the evidence.

VII. There was an absolute failure of proof to show that the case, entered by defendant, was the property of the Central Pacific railroad company. And the court should have given the instruction asked by the defendant, refused by the court. (29 Cal. 257; 28 Ind. 321; 6 N. H. 12 Id. 601; 2 Bish. Cr. Pro., sec. 137; 48 Cal. 551.)

*M. A. Murphy*, Attorney General, for Respondent.

I. The deposition was properly admitted. (1 Cal. 1779–1799.)

II. The testimony of Lane was sufficient to satisfy the court that the witness Mercer was without the state. (Com. L., vol. 3; 2 and 3 Stark. N. P. 379, star note 209; 1 Greenl. Ev., sec. 163.)

By the Court, LEONARD, C. J.:

Appellant was convicted of the crime of burglary in the first degree, at Elko, a smoking-car of the Central Pacific railroad company, attached to an eastern-bound train of said company, with intent to commit petty larceny by burglary, and feloniously taking, stealing, and carrying away a coat, together with certain articles in the pockets of the property of one A. W. Mercer, and of the value of twenty-five dollars. He appeals from the judgment.



Opinion of the Court—Leonard, C. J.

A certificate of the articles of incorporation of said Central Pacific railroad company was offered in evidence and admitted, to prove its corporate existence, but it was not read or exhibited to the jury; and it is claimed that, had it been read to the jury, there was no evidence upon which the jury could act, that the company was incorporated as charged in the indictment:

There is no complaint, nor was it objected at the trial, that the certificate was not what it purported to be, or that it was incompetent evidence of the fact sought to be proved by it. It was admitted without objection. From its admission under such circumstances, the jury had a right to presume the instrument was what it purported to be—namely, a certificate of the incorporation of the Central Pacific railroad company. Confessedly, then, there was ample evidence admitted upon this point to support the verdict and judgment, and there is none against it. We must, therefore, consider the verdict established that the company was, in fact and in law, a corporation.

Proceeding, then, for the sake of the argument, that the certificate should have been read to the jury, still, the failure to do so, does not justify us in disturbing a judgment, which, upon this point, is fully supported by the facts. If there was an error it was one without prejudice to the defendant. If the certificate had been read, the verdict, so far as this question is concerned, ought to have been what it is.

There was sufficient evidence that the car was the property of the Central Pacific Railroad Company, as alleged in the indictment. It was upon the track of that company, attached to its eastern-bound train, and in its possession, occupancy, and control. Such being the facts, ownership was properly laid in the Central Pacific Company, although the legal title was in another, which fact, however, from the testimony of Mr. Coddington, is at least disputable, although, on cross-examination, he was unable to testify positively on the subject, upon his own knowledge. *Sh. Crim. Proceed.*, sec. 188; *Markham v. The State*, 2 Nev. 2.)

Opinion of the Court—Leonard, C. J.

3. At the trial, a deposition of said A. W. Mercer, taken at appellant's preliminary examination, was offered and admitted in evidence, against the objections of his attorney, now insists that such admission was error for many reasons. That Mercer's testimony was material, is not disputed. It was the only evidence in the case tending to prove the ownership of the property taken from the car by appellant, alleged in the indictment. It was material for other reasons, which need not be stated.

We think the certificate of the justice shows that the witness was examined and cross-examined in the presence of appellant, and that it is otherwise sufficient to warrant the admission of the deposition under proper circumstances.

It is urged by counsel for appellant that it was error to admit the deposition without showing that the witness, Mercer, entered into a written recognizance to appear and testify at the trial, as required by the statute (C. L., 1779, which provides, in substance, that, "on holding the defendant to answer, the magistrate shall take from each of the material witnesses examined before him, a written recognizance that he will appear and testify at the trial, court or court-house, that he will forfeit the sum which may be ordered by the court." In view of our conclusion upon one point of objection made by counsel, it becomes necessary to decide the question: Was it the intention of the legislature of 1861 to make the giving of a recognizance a condition precedent to an admission of the deposition, when the witness is out of the state, dead, or when his personal attendance cannot be had in court? (C. L. 1779.) No authorities are cited by either side, and so far as we are informed, the question is *res integra*.

In the criminal practice act of 1861 (sec. 167) the magistrate was required to take from each of the material witnesses examined before him, on behalf of the people, a written recognizance to appear and testify at the trial, that he would forfeit the sum of five hundred dollars (Stat. 1861, 453.) At that time the statute made no provision for the admission of depositions taken at preliminary examinations, nor was such provision made until 1871.

Opinion of the Court—Leonard, C. J.

Section 151 was so amended (C. L. 1779) as to permit, under the circumstances therein stated, the admission of depositions at the trial. So it is evident that the legislature of 1867 did not intend what is now claimed by counsel for appeal, because by section 167 recognizances of the people's witnesses were required, while the use of their depositions at the trial was not permitted by statute. The intention at the time seems to have been, mainly at least, to insure the presence at the trial of the material witnesses for the prosecution. At the session of 1867 section 167 was amended so as to require the magistrate to take from each material witness *examined before him* a written recognizance to appear and testify at the trial, or that he would forfeit the sum of \$100 might be ordered by the court. The three sections so amended follow, have never been amended, and with those in force, they show to our minds that the legislative intention has always been the same—that is, to secure the attendance of witnesses required to give recognizances, as after 1867, when depositions were admitted in certain cases as before, when the statute did not provide for their admission in any event. We think the legislature of 1867 had one object in amending section 167, which was to require the magistrate to aid in securing the attendance of the defendant's witnesses as well as those for the state, and that it did not intend to make the taking of a recognizance a condition precedent to the admission of the deposition. Section 151 (C. L. 1779) states the circumstances under which depositions may be used by either party at the trial, and we can not change them by adding conditions not stated, or subtracting those specified. We think it would be wrong to hold either party induce a witness not to appear at the trial, or that fact proven would, probably, debar such party from the right to use the deposition, in case the witness is out of the state, or unable to attend, on account of the acts of that party, but we think of no other case where the deposition of a witness can not be used under the circumstances mentioned in section 151. It is the duty of the magistrate to obey the statute, in respect to the taking of recognizances of material witnesses,

and it is the same in respect to other requirements to preliminary examinations. A defendant can, however, always protect himself if he sees fit, by having the depositions of his witnesses taken conditionally, under section 1, and as to the witnesses for the state, he has a right to cross-examine them fully at the preliminary examination.

Finally, it is claimed by appellant's counsel that the court erred in admitting Mercer's deposition because there was no proof that he was "sick, out of the state, dead, or that his personal attendance could not be had in court." We think this objection is well taken. The statute provides that, depositions taken upon preliminary examinations, reduced to writing and authenticated by the magistrate as therein required, "may be used by either party at the trial of the cause, \* \* \* when the witness is sick, out of the state, or when his personal attendance cannot be had in court." (C. L. 1779.)

It admits of no discussion that it was incumbent upon the state to show, by some proof at least, the existence of one of the conditions stated in the statute; for it is only when the witness is sick, etc., that the right to use the deposition is given. It is not shown whether Mercer was a resident of the state or not. So far as we know, he never had resided in the town of Elko, where the case was tried.

The only evidence given as a foundation for the introduction of the deposition in question, is as follows: John Lane, constable, said: "Saw a man in Elko on the evening of the fifth day of November, 1880, who said his name was A. W. Mercer. He went by the name of A. W. Mercer here. I heard him testify before the committing magistrate on the hearing upon this case. He had a ticket for Chicago, said he was going to Kankakee, Illinois. I saw him get on the cars going east on the evening of the sixth of November, 1880; have not seen him since." There was then no proof that the witness was sick, or dead, and we think there was nothing to show that he was out of the state, or that his personal attendance could not have been had in court. The cause was tried November 26, and he left Elko on the cars on the sixth of the same month. He had time enough

## Argument for Appellant.

re, to go to Illinois and return, between the two mentioned. Besides, he may not have gone beyond station east of Elko. He may not have intended, to leave the state. So far as we know, no effort was made to find him or produce him in court. No subpoena was served for him. So we say again, there was absolutely no proof that he was out of the state, or that his personal services could not have been had in court. For the purpose of admitting the deposition without proof of some of the conditions stated in section 151, the judgment is reversed and the cause remanded for a new trial. It is so ordered.

[No. 1,032.]

MANNING, SURVIVING PARTNER OF THE LATE FIRM  
MANNING & DUCK, APPELLANT, v. M. J. SMITH,  
RESPONDENT.

SURVIVING PARTNER ON PROMISSORY NOTE EXECUTED IN FIRM  
AFTER DEATH OF A PARTNER—SUFFICIENCY OF COMPLAINT.—The  
allegations of complaint stated in the opinion and held equivalent to a  
true averment that the note was made and delivered to the plaintiff,  
surviving partner, in the name of the firm, and to be sufficient to ena-  
ble plaintiff to maintain the action.

FILED from the District Court of the Second Judicial  
Washoe County.

facts appear in the opinion.

per & Rankin, for Appellant:

demurrer to plaintiff's amended complaint was im-  
sustained. On the death of one partner the sur-  
viving partner is entitled to all the choses in action and  
debts of debt belonging to the firm. They must be  
in his name. The right of action in relation to all  
partnership demands is transferred to the surviving partner.  
See 100 Pa., sec. 666, note 5; *Murray v. Mumford*, 6  
Md. 485; *Barney v. Smith*, 4 Har. & J. (Md.) 485; *Yale v.*  
*Metc.* 187.) The execution of the note sued on



## Argument for Respondent.

after the death of Duck, in settlement of an account by Smith to the firm of M. & D., was not the making of a new contract, but simply the changing of the form of indebtedness. (Collyer on Part., sec. 546, note; *v. March*, 22 Me. 184; *Rootes v. Wellford*, 4 Mun. Woodford v. Dorwin, 3 Vt. 522.) This does not prevent a surviving partner from suing upon it in his own name, as surviving partner, is the real party in interest. It is not necessary that the payee mentioned in the note be the real payee, if the court can ascertain who the real party in interest is. (1 Daniels on Neg. Inst., secs. 99, 100; and cases cited.)

*W. M. Boardman*, for Respondent:

I. The court did not err in sustaining defendant's demurrer to plaintiff's original complaint. It is not alleged in said complaint that any member of said firm is deceased. (1 Estee's Pl. 259; Collyer on Part., secs. 674, 675, 681, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.) It is not shown that the plaintiff is the surviving partner, and as such, entitled to maintain this action. (*Hubbell v. Skiles*, 16 Ind. 138; *Ledden v. Colby*, 14 Ind. 383.) The complaint discloses on its face that the note was not made or delivered to the plaintiff as surviving partner. (*Keith v. Pratt*, 5 Ark. 661.)

II. The court did not err in sustaining defendant's demurrer to plaintiff's amended complaint. Upon the dissolution of one of the members of said firm, September 19, 1880, the same was then dissolved. The firm of Manning & Boardman, being dissolved, then and thereafter ceased to be a legal entity in law; new contracts or promissory notes could not be taken or made to such firm; the note sued on was not made or delivered to any person or payee in law, and is void. (*Cornthwaite v. Bank of Rockville*, 57 Ind. 268; Collyer on Part., secs. 540, 541; Story on Con., sec. 241; 1 Pars. 201; *Wayman v. Torreyson*, 4 Nev. 124.) The note is not the property of said firm, upon which any right of action exists in favor of plaintiff as surviving partner; but, if a right of action exists in favor of such plaintiff, it is upon the original demand of the firm. (*Daby v. Ericsson*, 45 Me. 786; *Clark v. Howe*, 23 Me. 560.) The right of the surviving partner to sue upon the note is not a right of action.

Opinion of the Court—Hawley, J.

was to continue in possession of the effects of the partnership, and to settle its business, but his right and do not extend further. No obligation to pay money made to the members of a firm when one of its members dead, or to the firm, when the firm itself is dissolved. L. L., p. 173, sec. 200; Coll. on Part., sec. 129, pp. 124, and cases cited; Id. sec. 130, pp. 126, 127; *Gleason v.* 34 Cal. 258.)

The Court, HAWLEY, J.:

This action was brought upon a promissory note executed by the defendant to "Manning & Duck," on the first of January, 1879. The district court sustained a demurrer to the original and amended complaint, and (the plaintiff refusing to further amend) entered judgment in favor of defendant. The original complaint did not contain any averment as to who constituted the firm of Manning & Duck; nor did it allege that any member thereof was dead. It failed to show the essential facts necessary to maintain the plaintiff to maintain the action as "surviving partner of the late firm of Manning & Duck."

The amended complaint alleges: "That prior to the ninth day of September, 1878, A. H. Manning and William Duck constituted a copartnership under the firm name of Manning & Duck; \* \* \* that on the ninth day of September, 1878, said William Duck, leaving as sole surviving partner said A. H. Manning, in such capacity of surviving partner he brings this suit; \* \* \* on the first day of January, A. D. 1879, I, J. Smith, defendant, in settlement of an account with said firm against him, made, executed, and delivered in the name of said defendant, his certain promissory note (a copy of which is set out); "that the note is due and payable to the plaintiff, as surviving partner of the firm of Manning & Duck, is the holder of the note, it being the sole surviving partner of the late firm."

We are of opinion that these averments are sufficient to

Opinion of the Court—Hawley, J.

enable the plaintiff to maintain this action. The allegations are not as clear and specific as they might have been made. They are, however, equivalent to a positive statement that the note was made *and delivered to the plaintiff surviving partner*, in the name of the firm.

From the facts stated, the law will infer that the contract was made with the living party alone. (*Bonne v. R. Ark. 20.*)

The judgment of the district court is reversed and the cause remanded for trial. The district court will grant the defendant a reasonable time within which to appear and answer the amended complaint.



# REPORTS OF CASES

DETERMINED IN THE

## SUPREME COURT

OF THE

STATE OF NEVADA,

APRIL TERM, 1881.

[No. 1,043.]

STATE OF NEVADA, RESPONDENT, v. J. J.  
QUINN, APPELLANT.

~~JURISDICTION OF SUPREME COURT ON APPEAL.~~ Defendant was  
found "guilty of an assault." The judgment imposed a fine of five  
hundred dollars, and taxed the costs against defendant. From this judg-  
ment an appeal was taken. *Held*, that this court had no jurisdiction.  
The appeal was dismissed. *State v. McCormick*, 14 Nev. 347, affirmed. (Bel-  
l, dissenting.)

from the District Court of the Second Judicial  
District, Washoe County.

Facts appear in the opinion.

*Varian*, for Appellant.

*Murphy*, Attorney General, for Respondent.

The Court, HAWLEY, J.:

Appellant was indicted for the crime of an assault with  
intent to kill. He was tried, and found "guilty of an  
assault" and adjudged to pay a fine of five hundred dollars,  
and judgment was also rendered against him for the costs.

Opinion of Belknap, J., dissenting.

(*State ex rel. Quinn v. District Court, ante*, 76.) From judgment an appeal is taken. The Attorney General moves to dismiss the appeal on the ground that this court has no jurisdiction. The principles involved in this case are the same as were presented and decided in the *State v. McCormick*, 14 Nev. 348.

Upon the authority of that case the appeal must be dismissed. It is so ordered.

LEONARD, C. J., concurring:

Every person accused of a crime must be charged with that crime; but an indictment charging an offense of a higher grade, as assault with intent to kill, also charges the commission of every less offense that may be included under the charge of assault with intent to kill. (*People v. Appgar*, 35 Cal. 391.) This conclusion necessarily follows also, from the statute, because the indictment "must be direct and contain \* \* \* the offense charged" (Stats. 1867, 126), and "in all cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment." (Stats. 1861, 479, sec. 412.) It follows, therefore, that a person charged in the indictment with assault with intent to kill, is also charged with simple assault.

If he is convicted of simple assault, he is acquitted of the offenses of a higher grade, and stands charged and convicted of the lower offense alone, which amounts to a misdemeanor only. I adhere, therefore, to the conclusion arrived at in *State v. McCormick*, 14 Nev. 348, and concur in the opinion of Mr. Justice Hawley.

BELKNAP, J., dissenting:

Appellant having been indicted for a felony and convicted of a misdemeanor, the question arises whether this court has jurisdiction of the appeal. Jurisdiction in criminal cases is conferred by the constitution in the following language: "The supreme court shall have appellate jurisdiction \* \* \* in all criminal cases in which the offense charged amounts to felony." (Art. 6, sec. 4.)

In the consideration of this cause effect must be given

Opinion of the Court—Belknap, J.

words used, and these words must be taken in their  
and well-understood sense. The word "charged,"  
used, has a well-understood meaning, and refers to  
a verdict found. It can not refer to the judgment,  
which does not embody the charge, but rather the conviction  
of the defendant. The intention of the constitution,  
to be understood, it, was to give the supreme court jurisdic-  
tion over cases depending upon the importance of the charge  
and the questions involved, rather than upon the result  
of the trial or the extent of the punishment imposed.  
Whatever may have been the intention of the framers  
of the constitution, the clause conferring jurisdiction does  
not admit of judicial construction. It should be taken ac-  
cording to the ordinary signification of the plain language  
of the clause, so taken, I am of opinion that the court has ju-  
risdiction of this case.

For these reasons I dissent from the judgment of the

[No. 1,054.]

**BAUM ET AL., APPELLANTS, v. MOSES MEYER  
ET AL., RESPONDENTS.**

ON APPEAL—WHEN NOT CONSIDERED.—Where it is not shown  
that a statement on appeal was filed with the clerk, or that a copy of  
the record was served, or that it was agreed to, or settled by the judge: *Held*,  
that the appeal did not comply with any of the requirements of the statute and  
therefore cannot be considered.

Appeal from the District Court of the First Judicial  
District of Storey County.

Appeals appear in the opinion.

*Naphtaly, D. Freidenrich, and Wal. J. Tuska*, for

Appellants.

*Wm. Deal*, for Respondents.

COURT, BELKNAP, J.:

It is not shown that the document purporting to be a  
statement on appeal was filed with the clerk of the district

Points decided.

court, or that a copy of it was served upon the party, or that it was agreed to by the parties, or sent to the district judge. For these reasons respondent's statement to its being considered a statement on appeal.

The statute regulating appeals at section 1388 (Comp. St. 1907, § 1388) provides: "A judgment or order in a civil action may be reviewed as prescribed by this title, and no other way." Section 1393 provides: "When the party entitled to the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he must, within twenty days after the entry of such judgment or order, prepare such statement, \* \* \* and shall file the same with the clerk, and serve a copy thereof upon the adverse party." The statement must thereafter be presented to the judge for settlement.

The subsequent section provides: "If the party fails to omit to make a statement within the time limited, he shall be deemed to have waived his right thereto." It is evident that the pretended statement does not comply with the requirements of the statutory requirements, and that by the terms of section 1388 it can not properly be considered. (*Comp. St. 1907, § 1388*; *Job*, 5 Nev. 201; *Irvine v. Samson*, 10 Id. 282.)

Disregarding it, our examination is limited to the statement-roll in which no error appears or is assigned.

Judgment affirmed.

[No. 1,066.]

# THE STATE OF NEVADA, EX REL. J. P. FLANNERY, v. BOARD OF COUNTY COMMISSIONERS OF STOREY COUNTY, RESPONDENT.

SECTION 17 OF SALARY ACT (STAT. 1879, 136) CONSTRUED—SALARY OF JUSTICE OF THE PEACE.—*Held*, that under section 17 of the salary act, which took effect, to salary or fees, should be determined by reference to the number of legal votes cast at the last general election preceding the claim for his salary is preferred.

APPLICATION for writ of mandamus.



facts are stated in the opinion.

s & Deal, for Relator.

n Hiles, District Attorney of Storey county, for Re-  
t.

the Court, HAWLEY, J.:

or was elected justice of the peace for township No. Storey county, at the general election held on the day of November, A. D. 1880, and claims that he is to a salary of three hundred dollars per month the provision of section 17 of the "act fixing the of the various county officers." (Stats. 1879, 136.) tion shows that at the general election held Novem- 1878, there were cast in said precinct one thousand and three votes, and at the general election of e thousand one hundred and fourteen votes.

first section of the act provides that "from and after t Monday in January, 1881, the following-named of the several counties in this state shall receive owing annual salaries, which shall be in full or all and all *ex officio* services required of them."

on 17 reads as follows: "Every justice of the peace, township in this state, wherein the number of legal st at the last general election equals or exceeds the of one thousand five hundred, shall receive as the sum of three thousand six hundred dollars per \* \* \*" Relator claims that the words "last election" refer to the general election held in 1878, was the last general election with reference to the en the act was passed and approved. Respondent s that the words refer to the last general election ng the time when the justice assumed the duties office.

was the intention of the legislature? Looking at le act, its object, scope, and extent, and especially benefits that it was evidently supposed the public receive therefrom, we think it is clear that the leg-

## Argument for Appellant.

islature did not intend to make the votes cast at the election of 1878 a test for determining the right of justice of the peace to the salary provided for in section 17.

We are of opinion that it was the intention of the legislature that the right of every justice of the peace elected after the act took effect should be determined by reference to the number of legal votes cast at the last general election preceding the time when the claim for his salary is preferred. The petition does not state facts sufficient to entitle relator to the salary.

His application for the writ of mandamus is denied.

[No. 1,048.]

M. C. LAKE, APPELLANT, v. J. C. LEWIS, RESPONDENT.

## SPECIFIC PERFORMANCE OF CONTRACT—FAILURE TO MAKE PAYMENT.

WHEN TIME IS NOT OF THE ESSENCE OF THE CONTRACT.—Where time is specified in the contract for the payment of the purchase money, and no penalty is imposed for default of payment, and the purchaser is allowed to enter into the possession and improve the property, and the grantor afterwards accepts the purchase money: Held, that the acceptance of the money was a waiver of any default in payment, and the purchaser was entitled to a deed.

IDEM.—PRESUMPTIONS WHERE FINDINGS ARE SILENT.—Where the findings are silent upon the question of the time of payment, or the effect of delay in payment, or of delays or defaults of the vendee, it will be presumed that time was not of the essence of the contract. In such a case it will not be held that a failure to make payment created a forfeiture of the purchaser's rights.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

R. M. Clarke, for Appellant:

I. Lake having the legal title, the defendant having agreed to pay and having set up both payment and adverse possession, Lake was entitled to recover possession of the premises in this action of ejectment. (Tyler on Eject. 46;

## Opinion of the Court—Belknap, J.

6 Iowa, 153; *Evans v. Lee*, 12 Nev. 393, 399; Eq. Jur., sec. 761; Willard's Eq. Jur. 285.) Lewis' occupancy was not adverse, but was subordinated in privity with Lake. To constitute a bar, Lewis' occupancy should have been both adverse and under claim of right (Tyler on Eject. 859, 860, 861, and cases cited, 8; *Jackson v. Bard*, 4 Johns. 231; *Jackson v. Johnson*, 74.)

## Variation for Respondent:

It may be doubted whether ejectment lies at the suit of a vendor to recover the premises. (1 Sug. Vend. 276; 1 Rem. for Torts, sec. 23; *Arguello v. Edinger*, 10 O. 20.) The remedy by ejectment to enforce payment of purchase price, is always conditional; that is, the judgment rendered is conditional upon the non-payment by the defendant in the action of the money due. If he pays even the purchase price, he satisfies the record, and the plaintiff is entitled to his costs. (*Hamm v. Beaver*, 31 Pa. St. 58; *Clark v. Felt*, 35 Id. 305; *Lauer v. Lee*, 42 Id. 165; *Tayblott*, 41 Id. 352; *Hill v. Oliphant*, Id. 364; *Cadwalader v. Berkheiser*, 32 Id. 43; *Waters v. Waters*, Id. 307.) If the plaintiff can recover the premises, it must be on the theory that he rescinds the contract of sale. A rescinding must put the opposite party *in statu quo*. (*Waters v. Silk*, 5 East, 449; *Richardson v. Kuhn*, 6 Watts, 307; *Willis v. Wozencraft*, 22 Cal. 607.)

## The Court, BELKNAP, J.:

This is an action of ejectment to recover the possession of lots in Reno. The defendant, in his answer, sets among other defenses, that during the month of December, 1863, and when the plaintiff was the owner of the lots in controversy, he sold a portion thereof unto one Lewis, and thereupon let him into possession; that on the terms of the sale the purchaser was not entitled to a deed of conveyance of the premises until the payment of the purchase money, and that this money, amounting to a sum of seventy-five dollars, was paid during the month

of June, 1875. In the mean time, and during the 1871, the defendant purchased from W. C. Lewis that portion of the premises theretofore purchased by him from the plaintiff, and entered into possession thereof. A sale of a similar nature made by plaintiff directly to defendant in the year 1869, of the remaining portion of the lots, is also set forth. It is further alleged that upon entering into possession defendant and his grantor, upon the faith of the sales, made permanent improvements of the aggregate value of three thousand dollars upon all of the lots, and that plaintiff has refused to make a deed of conveyance of the premises to either W. C. Lewis or the defendant. The answer asks that plaintiff be required to make such conveyance to defendant in his own right, and as the successor in interest of W. C. Lewis.

The case was tried before a jury, by whom the facts touching the alleged sales were found substantially as claimed by defendant, save that he had not paid the purchase price of that portion of the premises purchased by himself directly from the plaintiff. Thereupon the court adjudged that defendant pay unto plaintiff, within thirty days, the purchase money found due, to wit, the sum of three hundred and eleven dollars, and that within five days thereafter plaintiff deliver unto defendant a deed of conveyance of the premises. From this judgment and decree plaintiff has appealed.

The point to which our attention is called as ground for reversal of the judgment is, that the legal title being in plaintiff, and defendant having failed to pay the purchase money, and having pleaded payment and adverse possession, plaintiff was entitled to have recovered in this action.

It is well settled that under our system of practice a party may set up in defense to an action at law whatever legal or equitable defenses he may have. The equitable title of defendant as pleaded was sufficient to have defeated a recovery, and to have entitled him to a specific performance of the contract. He failed, however, to establish payment of the purchase money, and it becomes necessary for us to consider the effect of such failure.



is no doubt that in equity time may be made of the contract, either by express stipulation or necessarily follows from the nature and circumstances of the contract. The authorities in this country hold that courts of equity will in no case consider time of the essence of a contract. (1 Storey Eq. Jur., sec. 776; *Scott v. Fields*, 431.) But the facts of each case must determine whether the parties have or have not made time of the essence of the contract.

Looking at the facts of the case under consideration as shown from the findings of the jury (for the evidence is not taken up), it would seem that time was not made of the essence of either of these contracts. We reach this conclusion in reference to the contract entered into with W. because it is not shown that any time was specified for the payment of the purchase money, or that any time was to have been imposed for default in payment. On the contrary, he entered into possession and permanently retained the property with the presumed approbation of the court, and in the year 1875 the plaintiff accepted the purchase money from him. The acceptance of this money constituted itself a waiver by plaintiff of any default in payment.

As to the contract of sale between plaintiff and defendant, the fact that defendant was at the time of the purchase engaged in the business of printing, and that the purchase money was to have been paid either in printing or otherwise, tends to prove that no definite time for payment was made of the essence of the contract.

Without pursuing this subject further, it is sufficient to say that as the findings are silent upon the question of the time of payment, or the effect of failure to make payment, or of delays or defaults of vendor or vendee, we must conclude that time was not of the essence of either contract. We can not hold that a failure to make payment of itself created a forfeiture of defendant's interest under the contract.

In *Shier v. Gratz*, 6 Wheat. 528, the supreme court of the United States, in considering this subject, said: "The  
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## Points decided.

rule that time is not of the essence of a contract has certainly been recognized in courts of equity; and there is no doubt that a failure on the part of a purchaser or vendor to perform his contract on the stipulated day does not itself, deprive him of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his engagement." But if circumstances are so changed that the object of the party can no longer be accomplished, and he can not be placed in the same situation as if the contract had been performed at the time stipulated, a court of equity will leave the parties to their remedy at law.

To the same effect is the case of *Longworth v. Taylor*, 402: "To hold that the failure of the vendor to pay the purchase money for an hour or a day, should authorize the vendor to rescind the contract, would regard the distinction which has heretofore been made between the action of a court at law and chancery. \* If the chancellor finds that the delay of payment has operated injuriously to the vendor; that the condition of the parties is the same as when the payment should have been made; that the value of the property has not materially changed, and that the same justice can be done under the existing circumstances, as if the payment had been made at the stipulated time, chancery will not refuse its aid."

The finding of the jury to the effect that defendant's session had been adverse, need not be considered, because it was disregarded by the court in its judgment and decision.

Judgment affirmed.

[No. 1,075.]

## EX PARTE JOHN R. DARLING.

STATE PRISON ACT (STAT. 1881, 109) CONSTRUED—COMMUTATION OF PRISONER'S SENTENCE—UNCONSTITUTIONAL IN PART.—*Held*, that the act in question, in so far as it attempts to commute any portion of a sentence imposed by the courts prior to the time the act took effect, is inoperative and void, because it interferes with the judiciary.

HABEAS CORPUS, before the supreme court.

the facts are stated in the opinion.

counsel for petitioner.

A. Murphy, Attorney General, for the state.

the Court, HAWLEY, J.:

petitioner is held in confinement in the state prison under a commitment, issued on the sixteenth day of November, 1872, ordering him to be imprisoned for the term of five years. He claims that he is entitled to his discharge under the amended act "for the government of the state" (approved March 1, 1881), which provides that "every convict faithfully performing such labor as may be required of him by the rules and regulations of the prison shall be allowed from his term, instead and in lieu of the commutation heretofore allowed by law, a deduction of two months in each of the first two years, three months in each of the next two years, and four months in each of the remaining years of said term." (Stats. 1881, 109.)

The act is in terms retroactive. It was evidently intended by the legislature to apply to cases before, as well as after, the first day of April, 1881, when the act takes effect. This is made clear by the language of the *proviso*: "That of all prisoners entitled to their discharge *at the date of the passage of this act*, by virtue of the provisions hereof, more than one shall be discharged on any one day." Is this portion of the act constitutional? Does it not interfere with the judiciary? The constitution divides the powers of government of this state into three separate departments: the legislative, executive, and judicial. It declares, in clear and explicit terms, that "no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to any of the others, except in the cases herein expressly provided or permitted." (Const., art. 3.)

The judicial power of this state is vested in the courts. The trial, conviction, and sentence of prisoners who have violated the laws of this state are well-known judicial du-

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ties. Neither the legislative nor the executive department can interfere with the courts in the exercise of these other duties which pertain exclusively to the judicial department.

Section 21 of article 5 of the constitution, creating a board of state prison commissioners, and giving to it "the supervision of all matters connected with the state prison as may be provided by law," does not *direct or permit* the legislature, under the pretense of regulating the discipline of the prison, to wipe out and destroy the previous sentences, or any portion thereof, imposed upon the prisoners by the courts. The legislature can only pass such acts as are authorized by the constitution. It can not infringe upon any of its provisions.

It may be admitted, for the sake of the argument, that the act was framed and beneficially designed to improve the discipline of the prison, and that it would, if allowed to be carried into effect, produce that happy result. If so, the argument might have had some force with the framers of the constitution had it then been presented; but it is not entitled to any weight with us if the constitution is, as we think it is, clear and explicit. We have only to deal with the question of power. We have nothing to do with the wisdom or expediency of the statute. We are of opinion that the act in question, in so far as it attempts to commute any portion of the sentence imposed by the courts prior to the time the act took effect, is inoperative and void because it interferes with the judiciary.

A similar law was declared unconstitutional by the supreme court of Pennsylvania, and for the same reasons. The court, in passing upon this question, said: "The whole judicial power of the commonwealth is vested in courts. Not a fragment of it belongs to the legislature. The trial, conviction, and sentencing of criminals are judicial duties, and the duration or period of the sentence is an essential part of a judicial judgment in a criminal record. Can such a judgment be reversed or modified by a board of prison inspectors acting under legislative authority? If it can, what judicial decree is not exposed to legislative modifications? From

## Points decided.

judicial sentence may not the legislature direct 'decisions' to be made if this act be constitutional? What may do indirectly they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest judicial functions? It is to be observed that these questions have no reference to the power of the legislature to prescribe a general law that shall be inconsistent with a previous judicial decree. Such a rule, when it operates on future cases not retrospectively, is quite legitimate. Their power to legislate in that manner is not to be doubted. But for the act in question, the good conduct of a particular individual, under judicial sentence, is to work out for him payment of a part of his sentence. In respect to one of the relators who was convicted and sentenced before the act was passed, it is considered very clear that it is a legislative impairing of an existing legal judgment." (*Commonwealth v. Johnson*, 42 Pa. St. 448.)

The prisoner is remanded into custody.

MR. KENAP, J.: did not participate in this decision.

[No. 1,044.]

STATE OF NEVADA, RESPONDENT, v. JOHN T. PRITCHARD, APPELLANT.

CHARGE OF JUROR AFTER JURY IS SWORN—IMPANELMENT OF ANOTHER JUROR—FORMER JEOPARDY.—Where the incompetency of a juror was first made known to the court after the juror was sworn and the jury completed: Held, that, upon the facts stated in the opinion, the court was authorized to then discharge the juror, and to impanel another juror in his stead, and that these facts furnished no evidence to support defendant's plea of former jeopardy.

INCOMPETENCY OF JUROR—CONSCIENTIOUS SCRUPLES—CIRCUMSTANTIAL EVIDENCE.—A juror who states that he would not convict a defendant, in a capital case, on circumstantial evidence, is an incompetent juror.

CHARGE OF JUROR, NECESSITY FOR, AFTER JURY IS SWORN.—Courts are fully authorized to discharge a juror or a jury, after the jury has been sworn to try the case, whenever, from any cause, such a necessity exists to make it apparent that the ends of justice would otherwise be defeated.

## Argument for Appellant.

**CHALLENGE TO JUROR—WHEN TAKEN—SECTION 334, CRIMINAL PRACTICE ACT, CONSTRUED.**—Under the provisions of section 334 of the criminal practice act, whenever it appears from the examination of a juror, *in his voir dire*, that he is disqualified, the challenge must be interposed before he is sworn; but these provisions have no application to a challenge where the disqualification or incompetency of the juror is not, within any fault of the challenging party, discovered until after the jury is completed.

**DISCHARGE OF ONE JUROR NO NECESSITY FOR DISCHARGING JURY.**—The discharge of an incompetent juror after the jury is sworn, does not create a necessity for the discharge of the eleven remaining competent jurors.

**INSTRUCTIONS—PROVINCE OF JURY.**—Where all the facts are agreed upon by counsel, and the only question is, whether, upon the agreed facts, the defendant had been in jeopardy: *Held*, that the court did not invade the province of the jury by giving an instruction, that there was no defence to sustain a plea of former jeopardy.

**APPEAL from the District Court of the Second Judicial District, Ormsby County.**

The facts are stated in the opinion.

*N. Söderberg*, for Appellant:

I. The discharge of the juror Dorsey was a bar to a subsequent trial. Jeopardy attaches when the jury is sworn and has been impaneled and sworn to try the case. (Constitution of Nev., art. 1, sec. 8; 1 Comp. L. 1013-1019; 1958, 2020, 2021; 1 Bish. Crim. L. 1013-1019; *State v. State*, 15 Ohio St. 155; *Mounts v. State*, 14 Ohio, 306; *Dobbins v. State*, Oh. St. 493; *Baker v. State*, 12 214; *Ward v. State*, 1 Humph. (Tenn.) 253; *Cooley's Case*, Lim. 327; 3 Ohio St. 238-241; 3 Co. Inst. 110; 7 1 (Ala.) 207; *O'Brien v. Commonwealth*, 9 Bush (Ky.) 333; *People v. Hunkler*, 48 Cal. 331; *McFadden v. Commonwealth*, 23 Pa. St. 12; 1 Whart. Crim. L. sec. 589; *King v. People*, 2 Park. Cr. R. 676, 685; *Queen v. Hepburn*, Cranch, 297; *Commonwealth v. Tuck*, 20 Pick. 365; *People v. Barrett*, 2 Cal. 304; *King v. Sutton*, 8 Barn. & Cress. 4; *People v. Scoggins*, 37 Cal. 676, 680; *Gillespie v. State*, Yerg. (Tenn.) 508; 2 Hawk. P. C. Ch. 47, 51; *State v. Rover*, 10 Nev. 388.)

II. In the absence of a statutory prohibition, such as exists in Nevada, against the withdrawal of a juror, if the jury is complete, the court may, perhaps, in case



## Argument for Appellant.

ty for causes occurring after the jury is sworn, at me before verdict, put an end to the trial by dising a number of the jury. But the inability of the o convict defendant of the crime charged, does not ute such necessity. Independently of the statute, re, the allowance of the challenge of Dorsey for imias, after the completion of the jury, was illegal; and l defendant to an immediate acquittal.

If Dorsey was not a qualified jurymen, it was but f challenge for implied bias, and could have been by te or prisoner, and must have been made before the as sworn. The statute does not authorize either o challenge a juror after the jury is complete. Disg or breaking up a jury contrary to law, against his , without a verdict, is, in the law, an acquittal of ant. (*People v. Scoggins*, 87 Cal. 676, 680; 1 Comp. 7, 1958; *Mima Queen and Child v. Hepburn*, 7 , 290; 2 Com. Dig. 322, title "Challenge—Peremp-letter C.)

Had Dorsey remained on the jury, defendant would ve been entitled to a new trial by reason of Dorsey's ntious scruples, no matter what verdict had been d. (*Jones' case*, 1 Leigh (Va.), 599; *Whitehead v.* 29 Ark. 99; *Woodward v. Dean*, 113 Mass. 297.) Dorsey's unwillingness to find defendant guilty of e in the first degree upon circumstantial evidence was und of challenge. It is not shown that the evidence upon by the prosecution was circumstantial, nor that ant was guilty of murder in the first degree.

There was no adjudication by the court upon the subthe supposed necessity of discharging the juror Dorits judgment should have been expressed in some upon the record. A discharge of a jury, without good hown on the record, operates as an acquittal. (*State cer*, 26 Ind. 846; *Shaffer v. State*, 27 Id. 131; *State v.* n, 17 Iowa, 829; *State v. Vaughan*, 29 Id. 286; *People* , 48 Cal. 323.)

The court erred in overruling defendant's motion to ge the eleven jurors remaining after Dorsey was ex-

## Argument for Respondent.

cused. (1 Whart. Crim. L., sec. 589, and cases cited x; *Reid v. State*, 50 Ga. 556; 1 Bish. Crim. Pr., sec.

VIII. The jury should have been sworn to try defendant's plea of former acquittal. Until so sworn they were not qualified to try said plea. (*Lang v. State*, 58 Ala.

IX. The court erred in charging the jury to find facts against the people upon defendant's second plea, for this was charging the jury upon matters of fact. (Art. 6, sec. 12. C. *State v. Tickel*, 13 Nev. 502; *State v. Frazer*, 14 Id. 20. Comp. L., sec. 931.)

M. A. Murphy, Attorney General, for Respondent:

I. Before a person accused of a felony can claim that he has been placed in jeopardy, he must show to the court that a jury of twelve good and lawful men had been selected and sworn; that they were free from any of the statutory disqualifications, and had been charged with the case.

II. Where a juror entertains such conscientious objections as would preclude him from finding the defendant guilty, where the punishment is death, it is the duty of the court in the due administration of the law, to exclude the juror. (*Walters v. People*, 32 N. Y. 140; *Weller v. State*, 40 Mo. 381; *Gross v. State*, 2 Carter, 329; *Commonwealth v. Carter*, 17 Serg. & R. 155; *Williams v. State*, 3 Kelly, 458; *State v. Smedley*, 9 Smed. & M. 115; *Martin v. State*, 16 Ohio, 141; *O'Brien v. People*, 36 N. Y. 276; *Greeley v. State*, 60 Mo. 141.)

III. A juror, who after he is sworn in chief and has taken his seat, is discovered to be incompetent to serve, may, in the exercise of a sound discretion, be set aside by the court. (18 Wend. 351; *People v. Wilson*, 3 Park. Crim. 199; *State v. Allen*, 46 Conn. 531.)

IV. Though neither party has a right of challenge against a juror is sworn, it is in the discretion of the court to prevent the administration of justice by investigation, at any time of the trial, on objection to the impartiality of a juror, by withdrawing the case from the jury if any juror is found unfit to sit thereon. (*U. S. v. Morris*, 1 Curtis' C. C.

V. An alien will not be permitted to sit on a jury, a



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can be interposed at any time before verdict. *People*, 2 Scam. 326; *Hill v. People*, 16 Mich.

member of the grand jury which found an indictment against the prisoner is not a competent juror, and the party may object to him acting as such at any time before the verdict is rendered. (*Dilworth v. Commonwealth*, 689; *Reg. v. Ward*, 10 Cox Cr. L. C. 573; *Watkins*, 60 Ga. 601.)

A juror who has formed or expressed an opinion is incompetent, and can be challenged off at any time before the verdict is rendered. (*State v. Tuller*, 34 Conn. 280.)

Where, in the course of a trial, the judge was informed that a juror had fraudulently procured himself to be sworn for the purpose of acquitting the prisoner, and the juror was withdrawn; held, there was no jeopardy. (*People v. Bell*, 81 N. C. 591.)

The prohibition in article 1, section 8, of the state constitution, that "no person shall be subject to be twice put in jeopardy for the same offense" means, that no person shall be tried the second time for the same offense after a verdict by a competent and regular jury, upon a good indictment. Whether there be a verdict of acquittal or conviction, no judgment rendered thereon. (*Jones v. The Queen*, 10 Q. B. Mag., Nov. 1880, 766.)

The answers of the juror, Dorsey, were made in response to the questions of the defendant's counsel. This opening of the question of the qualification of the juror at the instance of the defendant, and was a waiver of the objection sworn.

The allowance of a challenge for implied bias is not the subject of an exception. (Crim. Pr. Act, sec. 241; *State v. ...*, 11 Nev. 325; *People v. Murphy*, 45 Cal. 142; *... Atherton*, 51 Id. 495; *People v. Vasquez*, 49 Id. 166; *People v. Cotta*, Id. 166.)

The Court, HAWLEY, J.;

There is a growing conflict of the authorities in the States as to the true meaning of constitutional provisions similar to ours that "no person shall be subject to

against the objection of defendant, to impanel another juror. Before such juror was impaneled defendant moved the court to discharge the remaining eleven jurors, who had been sworn to try said cause, upon the ground "that the withdrawal of said Dorsey operated as a destruction of said jury." The court denied the motion. After the juror Dorsey was discharged, the defendant interposed a special plea of former jeopardy. The court instructed the jury "that there was no evidence to sustain a verdict in favor of defendant upon his said special plea of former jeopardy." The defendant was convicted of murder in the second degree.

If the juror Dorsey had made the same statement before he was sworn as a juror, as he did afterwards, it would have been the duty of the court to have then and there discharged him. The statute, in clear and explicit terms, declares that any juror entertaining such conscientious opinions "shall neither be permitted nor compelled to serve as a juror" (Crim. Pr. Act, sec. 340; 1 Comp. L. 1964.)

If circumstantial evidence was introduced, and it was clearly sufficient to warrant a verdict of guilty, it would have been the duty of the juror to find such a verdict. The court said, in effect, that he could not discharge his duty in that respect; that he would not find a verdict of guilty, where the death penalty might be enforced, in a case of circumstantial evidence, no matter how convincing and clear such testimony might be. He was an incompetent juror. His answers were very similar to those given by a juror in *People v. Ah Chung*. In that case the court said: "It clearly appears from the examination of the juror that he would not convict, in a capital case, on circumstantial evidence, and we think that the challenge was properly sustained. There are many cases in which the evidence on the part of the prosecution is entirely circumstantial, and to hold that such a party is a competent juror who will not convict on such evidence would in many cases defeat the ends of justice" (54 Cal. 402.) In the language of the supreme court of Illinois: "It would be but a mockery of justice to go through

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ms of a trial with such a person upon the jury.”  
v. *People*, 14 Ill. 435.)

brings us to the discussion of the vital question: the court authorized to discharge the juror, against the opinion of the defendant, after the jury was sworn to try the case? In considering this question, it must continually be in mind, that Dorsey was, on account of his convicted opinions, incompetent to serve as a juror; that his incompetency was not made known to the court, or to the jury, until after he was sworn; that his incompetency was such a character that it could not be waived; that it was necessary for the prosecution to interpose and challenge the juror, and that the statute makes it the imperative duty of the court not to *permit* any such person to serve as a juror. It must be remembered that it was not the duty of the prosecution, nor of the court, that the incompetency of the juror was not discovered until after the jury was sworn, and that the knowledge of the juror's incompetency was brought out by the voluntary act of defendant's

*ex parte Maxwell* (11 Nev. 436) it was held, that sections 396 and 397 of the criminal practice act (1 Comp. L. 1021) should be construed with reference to the constitutional restriction in respect to second jeopardy, and under these provisions the trial courts are invested with power, in the exercise of a sound legal discretion, to set aside a jury after the cause has been submitted to them, without the consent of the defendant, and without the disqualification constituting a legal bar to a future trial, in all cases of manifest necessity, whether such necessity arises from a physical cause occurring during the trial or deliberation of the jury, or from the inability of the jury to agree on a verdict; that this power is not one of absolute, uncontrolled discretion, but must be exercised in accordance with established legal rules, and is always subject to review by the appellate court.

*Brien v. The Commonwealth*, the supreme court of Massachusetts, in construing a similar statute, said: “It could not have been intended by the section *supra* (248) that the

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power of the court to discharge a jury in cases of necessity restricted to the causes enumerated in that section; if all other causes arising during the progress of the trial showing a clear and manifest necessity for the discharge the jury must be disregarded. This section of the code, in our opinion, was not intended to define all the causes upon the happening of which this power could be exercised, but was only intended as an adoption of the legal rule, that in case of actual necessity must exist before a jury can be discharged." (9 Bush, 337.)

All the authorities agree "that where the jury has been discharged upon necessity the prisoner may again be put upon trial." (*State v. Nelson*, 26 Ind. 868.) But what shall be considered as constituting such a necessity has to justify the courts in exercising this power is not so well settled. The power is one, as before stated, of judicial discretion to be exercised soundly, not arbitrarily, according to the peculiar facts and circumstances of each particular case.

The most common of the class denominated as physical necessities that have been held to justify the courts in discharging a jury, although it has been sworn, is where the presiding judge becomes so ill as to be unable to proceed with the trial (*Nugent v. State*, 4 Stew. & P. 12); or where a juror is prevented by sickness from attending court during the trial. (*U. S. v. Haskell*, 4 Wash. 402; *Hector v. State*, 2 Mo. 166; *State v. Curtis*, 5 Humph. 601; *Commonwealth v. Fells*, 9 Leigh, 613.)

There is another class of cases where the courts have been justified in discharging a jury upon what is termed a necessity of doing justice, which arises from the duty of the court to prevent the obstruction of justice by guarding the administration against all fraudulent practices, such as tampering with the jurors after they are sworn (*Foster's Oregon Law*, 27; *State v. Wiseman*, 68 N. C. 203); or the fraudulent introduction into the panel of a perjured juror, who at the instance of the defendant has procured himself to be selected on the jury for the purpose of acquitting the prisoner. (*State v. Bell*, 81 N. C. 591.)

From an examination of the numerous authorities, be-

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more or less upon this subject, we think it may safely be announced, as a general rule, that courts are legally authorized to discharge a juror or a jury, after the jury has sworn to try the case, whenever, from any cause, such necessity exists as to make it apparent that the ends of justice would otherwise be defeated.

It is for this reason, as well as upon the ground of physical necessity, that courts have always acted in discharging a jury whenever it clearly appears that they are unable to render a verdict. The general principle is well stated by the supreme court of Ohio in the case of *Dobbins v. Commonwealth*: "It is the right of the state, and one of the most important and responsible of its duties, to punish crime; and the absolute right of any one accused of crime, to demand a speedy public trial by an impartial jury, and a verdict, declaring his guilt or innocence, according to the course of law. The one is indispensably necessary to the safety of the community and the preservation of peace and order, and the other for the protection of the innocent, to prevent the oppression which might otherwise be exercised by those having charge of state prosecutions. The constitution has always been to preserve intact both of these important rights; and the object has been completely accomplished by holding the accused liable to answer until the regular course of judicial proceedings, the tribunal charged with the issue, without molestation or interference, had the fullest and amplest opportunity to pass upon the question of his guilt; and by making every interference on the part of the government by which a verdict is prevented, a reasonable hope remains that one may be rendered, an absolute bar to his further prosecution. If a verdict cannot be obtained upon one trial, another may be lawfully granted, and the unavoidable delay which ensues is the fault of the accused. For the better protection of the accused, the law requires unanimity in the jury before a verdict can be rendered; but to allow, on the one hand, the ignorance, perversion or even honest mistake of a single juror to paralyze the administration of justice, and turn loose upon the community the most dangerous offenders; or, on the other, to

allow the government to trifle with the constitutional guards of the accused, would equally subvert the foundation principles upon which the criminal code is constructed." (14 Ohio St. 501.)

The supreme court of the United States, in discussing this question, said: "We think that in all cases of this kind the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." (*United States v. Perez*, 9 Wheat. 580.) Applying this principle to the case in hand, we think the court was justified in discharging the juror Dorsey.

How can it, consistently, be said that no necessity existed for his discharge? He was, as we have already shown, an incompetent juror. By an inadvertence upon his part he had kept from the court and counsel all knowledge of his incompetency until after the jury was sworn to try the case. This was in effect, although not so intended by the juror, a fraud upon the court, and it was its plain duty, when the facts came to its knowledge, to protect itself from the "honest mistake" of the juror, and not to allow the administration of justice to be defeated by keeping such a juror upon the jury.

Let us suppose for a moment that in answer to the question of defendant's counsel the juror had said: "When I was asked whether I had ever expressed any unqualified opinion as to the guilt or innocence of the defendant, I did not fully understand the question, and hence answered it erroneously. The truth is that I have expressed the opinion that the defendant is guilty of murder, and ought to be hanged. I entertain this opinion now, and it is so fixed in my mind that no evidence will remove it." Can there be any question as to what the court should do in such a case? No. It would be the duty of the court to immediately discharge the juror. Why? Because it would be a mockery of justice, a farce, a mockery of justice, to compel the defendant to be tried by any juror entertaining such an opinion. No

as we had occasion to declare in the *State v. McClear*, certain rights as well as the prisoner. The people protection as well as the defendant who is accused of " (11 Nev. 61.) Hence, it necessarily follows that it clearly appeared, to the satisfaction of the court, the answers given by the juror, that he would not condemn the defendant, however clear and convincing the proofs be, if the same depended upon circumstantial evidence, it was equally the duty of the court, as in the case supposed, to immediately discharge the juror, and for the same reason. The juror had rendered himself incompetent. His mind was not in such a condition as to enable him to "well and truly to try," as his oath required him to do, "a matter in issue" between the state and the defendant, and to render a true verdict therein according to the law and the evidence."

The principle of the statute is, that any person entertaining such an opinion is unfit to be a juror in such a case, because his conscience will not permit him to find the defendant guilty when death will be the consequence of the verdict, however conclusive the evidence may be. Such a juror is unfit; he has prejudiced the question; he has made a verdict without hearing the evidence, and ought to be excluded upon common law principles. "It would be a mockery to go through the forms of a trial with such a juror, or even with one such juror. The prisoner is sure to be acquitted, independent of the question of guilt or innocence. It would be a misnomer to call such a proceeding a trial." (*People v. Damon*, 13 Wend. 354).

We have not overlooked the provisions of section 334 of the criminal practice act, which declares that the challenge of an individual juror "must be taken when the juror appears and before he is sworn, but the court may for good cause permit it to be taken after the juror is sworn, and before the jury is completed." (1 Comp. L. 1958.)

The state, as well as the defendant, is required to interpose challenges before the jury is completed. This provision of the statute must be complied with. Whenever it appears from the examination, upon his *voir dire*, that a

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juror is disqualified by reason of the existence of any fact which is made a ground of challenge, the juror may be challenged as specified in the statute, otherwise the challenge, whether the state or the defendant, will be considered waived, having waived the right of challenge.

But it can not, with any sound reason, be urged that the provision of our statute has any application to a case like the present one, where the disqualification or incompetency of the juror, although a ground of challenge, is not, without any fault of the challenging party, discovered until after the jury is completed.

In *State v. Tuller*, immediately after the jury had retired from the court-room to consider their verdict, and before the verdict was rendered, a member of the bar informed the defendant's counsel that one of the jurors (not naming him) had, prior to the commencement of the trial, expressed to him the opinion that defendant was guilty of the crime charged against him. The attorney did not bring this to the notice of the court until after the rendition of the verdict, when he moved the court to arrest the judgment on the ground of the bias of the juror. This motion was overruled, and the court reserved for the advice of the supreme court.

The supreme court, in deciding this motion, said that if the facts had been brought to the knowledge of the court before verdict, it "would have sent for the jury and discharged the case from them without hesitation," and declared the rule to be that if counsel "knows of an objection to a panel before the verdict is rendered, and in time to present the objection before the verdict, and obtain a rehearing before another jury, he does not avail himself of the opportunity, he must be held to a waiver of the objection. Otherwise he would be permitted to lie by and speculate upon the chances of a reversal of the verdict, and that can not be tolerated." (34 Conn.

In *State v. Allen*, 46 Conn. 531, each of the jurors before being accepted and sworn, was examined in behalf of the state and defendant as to his qualifications. On the second day of the trial, and after witnesses had been examined in behalf of the state, the counsel for the defendant stated to the court that they had been informed and



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that one of the jurors in the case was disqualified, reason that before being sworn as such juror he had expressed the opinion that the accused was guilty of the crime charged in the indictment, and asked the court to disqualify him from the trial and hear such witnesses as they were prepared to offer to prove such disqualification. The court, after hearing the evidence, found as a fact that the juror before he was sworn, expressed an opinion that the defendant was guilty of the crime of murder in the first degree, and thereupon declared that said juror was disqualified as a juror upon the trial of the case. Counsel for the defendant then asked for time in which to consider what they would adopt. The court granted them, until the next day, when they offered to waive the disqualification of the juror and proceed with the trial. The court refused to accept such waiver and discharged the jury. The court held that the offer of defendant's counsel was too late; that "the court could not then be required to re-seat the discharged juror upon the panel," and sustained the action of the court in discharging the jury. *Steward v. The State*, (15 Ohio St. 155), after the jury had been regularly sworn, the opening statement of counsel made, the witness had been sworn and placed upon the stand, and the jurors arose and said that he was one of the jurors which found the indictment against the defendant. Whereupon the plaintiff's attorneys "asked defendant's attorneys what they intended to do. And, in answer, the defendant's attorneys asked the attorneys for the plaintiff what they intended to do. Thereupon the plaintiff inquired of the plaintiff's attorneys what they intended to do. To which they replied that they would like the court suggest what they had better do. The defendant then asked the defendant's attorneys what they intended to do, and defendant's attorneys replied that they intended to stand upon the defendant's rights, and could not, and would not do anything, or take any course to waive the defendant's rights in any respect, whatever." After some legal skirmishing and delay, "the court then asked the defendant's attorneys if they objected to proceeding with

the jury. They replied that they did. The court then charged said jury." The action of the court was sustained upon the ground that the discharge of the jury was a necessary result of sustaining the objection interposed by the defendant himself, and hence did not take place without his consent; but was an act done at his own instance, and would not therefore operate as an acquittal, nor bar a further prosecution.

In this connection we deem it proper to say, as a matter of practice, that we would have justified the court had it refused to allow defendant's counsel to ask the jurors a general question as to their qualifications after the jury was complete. Counsel should not, in our opinion, have been allowed to fish, out of season, for some point upon which to lay a foundation for an exception, without, at least, baiting his hook in a proper manner. He should have been required, in advance, to show to the court, by affidavit or otherwise, that he had reason to believe, and did believe, that one, or more, of the jurors was disqualified or incompetent to try the case upon some ground of which he was not aware at the time of the completion of the jury. It is true that the court hesitated for some time, before writing this opinion, whether it would not be a sufficient reply to the argument of defendant's counsel, upon this branch of the case, to say that the discharge of the juror Dorsey was brought about by a voluntary and irregular act of defendant's counsel in asking a question that ought not, under the circumstances, to have been permitted by the court. But, owing to the earnestness of the arguments of the respective counsel, and well as the interest and importance of the issues presented, we deem it best to dispose of the question upon its merits. Especially, as from each and every legal standpoint upon which could reasonably be taken, the authorities sustain the action of the court in discharging the juror Dorsey.

But the question, in regard to which we at first entertained some doubt, and which is by no means as well settled, is, whether the court was justified in impaneling

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juror in the place of the juror Dorsey, instead of  
ing the jury.

considering the facts of this case, in connection with  
thorities to which our attention has been called, we  
rived at the conclusion that this action of the court  
rect. The remaining eleven jurors were competent.  
ection was urged against them. They had been se-  
agreed upon, and accepted in the mode provided  
. No testimony had been offered. It seems to us  
e discharge of an incompetent juror did not create a  
y for the discharge of the eleven remaining compe-  
rors.

*People v. Damon, supra*, which was a trial for murder,  
the fourth juror had been sworn in chief, and taken  
t, the district attorney inquired of him whether he  
scientious opinions against finding a verdict of guilty  
offense punishable with death. The counsel for the  
r objected that the inquiry was too late; that after  
r was sworn in chief he could not be objected to.  
his branch of the case the supreme court said: "The  
practice is to challenge jurors as they come to the book  
sworn, and before they are sworn; but I apprehend this  
er of practice, and may be departed from in the dis-  
of the court. The object is to give the prisoner a  
al; and if it be made to appear, even after a juror is  
that he is totally incompetent by reason of having  
ged the case, it is not then too late to set him aside  
ll another. \* \* \*

Hawkins intimates there are  
ties the other way; but I apprehend no authority  
necessary to sustain the proposition, that the court  
nd should, in its discretion, set aside all persons  
e incompetent jurors, *at any time before evidence is*

(To the same effect see *Dilworth v. The Common-*  
12 Gratt. 689; *Lewis v. The State*, 9 S. & M. 119.)

*People v. Wilson*, 3 Park. Crim. R. 202, after several of  
rors had been challenged and set aside, and one had  
sworn, a juror named Haight was called, and was  
ged by the prosecution on the ground that he was  
d to capital punishment, and could not conscien-

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tiously convict any one on the charge of murder. The court, after hearing the testimony, decided adversely to the challenge, and Haight was sworn and took his seat. Another juror had been sworn, and several others sworn. Haight addressed the court, and said that he had misunderstood the question previously propounded to him; that he had given a wrong answer; that he desired to correct himself and say "that he could not under any circumstances convict one on a charge for murder." The district attorney moved that the juror should be set aside. This motion was opposed by the prisoner's counsel. The court, in answer upon this question, said: "The position is a novel one, but it does not, I think, present an insurmountable difficulty. It was correctly held in the case of *The People v. Damon* (13 Wend. 351), that a juror who, after he is sworn in chief and has taken his seat, is deemed to be incompetent to serve, may, in the exercise of a sound discretion, be set aside by the court at any time before evidence is given, and that this may be done even in a capital case, and as well for cause existing before as after the juror is sworn. In that case, however, the juror had not been previously challenged; whereas in that now before us, a challenge had been interposed, and a trial has been commenced, and the juror has been found by the court to be competent. So long as that finding stands, the juror can not be set aside. It is charged, and yet it would be a mere mockery of justice to suffer the trial to proceed under such circumstances with such a juror. The maxim that 'what necessitates, it justifies, must, I think, apply in such a novel case. Our decision that the juror was competent must be reversed. The challenge to him must be opened, and the trial must be resumed. This was done; the juror repeated his last statement, and the court pronounced the challenge sustained, and the juror was set aside."

In some of these cases the juror was set aside before the jury was complete, in which respect they differ from the case at bar; but the principles announced tend to support the conclusions we have reached.

In *Stone v. The People*, after the jury was sworn, and

Witnesses had been examined by the prosecution, it was discovered that one of the jurors was an alien. This juror was discharged and another called and impaneled in his place. There is a statute in the state of Illinois authorizing the courts, in case a juror was, for any reasonable cause, discharged, "to cause others, if necessary, to be called and sworn in his or their stead." But the case at hand is different, and the remarks which we quote were made in reference to general principles that are, in our opinion, directly applicable to this case and are correct. The court said: "At common law, undoubtedly is, where a juror is excused by reason of sickness or any other cause, or the death of any one ensues during the trial, the remaining jurors are to me discharged, and the prisoner, if he consents to have the eleven remain, must be tried by a jury of eleven. And why is it so? Because the jury is complete; the whole twelve were competent and qualified. In the cases cited the remaining eleven jurors were not discharged, because one of the competent parts of the jury has been unable to perform its functions, not by the act of the parties, or of the court, but by physical causes beyond the control of both. Not so in the present case. For want of sufficient caution, an error has occurred. Shall it be said the court possessed no power to correct the error without prejudice to either party, but that in doing it another shall be committed? Not so. Why not? For the ends of justice, and where manifest necessity exists for the act, authorized to discharge a juror? And if the whole jury may in such case be discharged, why not discharge a person improperly selected and sworn? No injury has been done; no law has been violated. The rights of the prisoner have not been infringed; the course is amenable to justice, and we can perceive no wrong in the course adopted." (2 Scam. 327.) It necessarily follows from the views we have expressed, that the court did not err in instructing the jury that there was no evidence to sustain a verdict in favor of defendant on the plea of former jeopardy. The instruction did not invade the province of the jury in deciding the facts of the

Points decided.

case. All the facts were agreed upon and stipulated by counsel, and the only question was whether, upon the facts, the defendant had been in jeopardy. The issue was correct.

We do not believe that any of the evil results suggested by appellant's counsel will ever flow from the effect of this decision. We are not unmindful of the rights of persons accused of crime, and have never hesitated, as the decisions of this court will show, to interfere in their behalf whenever any of their substantial rights have been infringed upon; but we are unable to see how this decision can be used to oppress or injure them or the state. We believe that it is in harmony with nearly all of the modern decisions, and that it accords with the letter and spirit of criminal practice in this and other states, which has been expressed by the supreme court of Iowa (*State v. Rice*, Iowa, 336), "sought to prevent persons convicted of crime from escaping deserved punishment on refined subtleties and black-letter precedents where no substantial interest of justice has been prejudiced."

We are of opinion that the record shows "good cause" for the action of the court; that the jurors were properly sworn to try all the issues raised in this case, and that the defendant is not entitled to be discharged or to have a new trial.

The judgment of the district court is affirmed.

[No. 1,060.]

THE STATE OF NEVADA, RESPONDENT, v. B. CARRICK, APPELLANT.

**EMBEZZLEMENT—COUNTY TREASURER—SUFFICIENCY OF INDICTMENT.** In an indictment against a county treasurer for embezzlement, it is sufficient to allege and prove the felonious conversion to his own use of money that came into his possession, or was under his control, while in his office, without specifying with certainty the particular funds embezzled, or the particular time when the money was received.

**CHALLENGE TO JUROR—OPINION UPON FACTS—WHEN NOT DISQUALIFYING.** A juror stated that he had an unqualified opinion that there was a deficiency in the accounts of the defendant, as county treasurer, but

## Argument for Appellant.

as to defendant's guilt or innocence: *Held*, that a challenge to the juror, for implied bias, was properly disallowed.

**WHEN ADMISSIBLE.**—A statement made by defendant to two bondsmen, that he was short in his accounts, at a time when he was not charged with crime, or under arrest, when no proceedings were threatened or any promise made to shield him from a criminal prosecution, *Held*, admissible in evidence.

**WHEN NOT ADMISSIBLE.**—It is only in cases where the confession is extorted by mob violence, or by threats of harm, or promises of favor, or any advantage held out by some person in authority, or standing in intimate relation that the law will presume that his promises or threats will be likely to exercise such an influence over the mind of the accused as to induce him to state things that are not true, that will justify the courts to exclude the confession or admission.

Appeal from the District Court of the First Judicial District, Storey County.

Facts are stated in the opinion.

*Taylor and W. H. Dickson, for Appellant:*

The indictment contains no sufficient description of the keys alleged to have been embezzled. (2 Bish. Crim. Law, sec. 703, 704; 2 Bish. Crim. Law, sec. 374; *Rex v. Russ. & Ry.* 402; *Rex v. Flower*, 5 Barn. & Cress. 345; *People v. Cox*, 40 Cal. 275; *State v. Kroeger*, 530; *State v. Stimson*, 4 Zab. 9.)

The evidence should have established an embezzlement of some sum of money, received by defendant at some time, or which was shown by the evidence to have been under his custody or control at some particular time. A general deficiency simply is not sufficient. (Crim. L., sec. 375 *et seq.*; 2 Bish. Crim. Pro., sec. 166; Russ. Crimes, 167, 168, 181, 182, 183; Archb. Cr., 1353, 1354, 1356, 1357; *Brierly v. Cripps*, 7 P. 709; *Colby v. Hunter*, 3 Id. 7, note a; *Rex v. Morgan*, 8 Id. 49; *Watkins v. Morgan*, 6 Id. 661; 2 Russ. Crimes, 460, note z.)

The juror Coyne having formed an unqualified opinion to the effect that there was a deficiency in the accounts of defendant as treasurer, the challenge by defendant should have been allowed. (Proffatt on Jury Trials, secs. 166,



## Argument for Respondent.

181; *Gray v. People*, 26 Ill. 344; *Arnold v. The State*, 2, No. 5, "The Reporter," 175.)

IV. The confession of defendant made to Smith is admissible. (*Commonwealth v. Elwell*, 1 Gray, 461; *People v. McMahon*, 15 N. Y. 384; *People v. Wentz*, 303; *Teachout v. People*, 41 Id. 7; *State v. Guild*, 5 Id. 163; *Commonwealth v. Knapp*, 9 Pick. 496; *Commonwealth v. Tuckerman*, 10 Gray, 190; *Commonwealth v. Moore*, 11 Gray, 461; *Regina v. Moore*, 2 Heard's L. Crim. Cas. 116; 1 Greenl. Ev., sec. 223; Roscoe's Crim. Ev. 40; *Russ. Crimes*, 837; 5 Car. & P. 318; 1 Archb. Crim. Ev. 389, note 1; 2 Russ. Crimes, 839, note n, 840; *People v. Johnson*, 41 Cal. 452.)

M. A. Murphy, Attorney General, for Respondent.

I. The indictment contains a sufficient description of the moneys alleged to be embezzled. (*Commonwealth v. Telle*, 11 Cush. 142; *Commonwealth v. Duffy*, 11 Cush. 118; *McKane v. State*, 11 Ind. 195; *Commonwealth v. E. B. Bish*, 118 Mass. 443; *Commonwealth v. Butterick*, 100 Id. 118; *Bish. Crim. Pr.*, sec. 705; *Commonwealth v. Crim.*, 11 Gray, 470; *People v. Bogart*, 36 Cal. 245; *Larned v. Commonwealth*, 12 Metc. 245, 246; *Commonwealth v. State*, 8 Gray, 492; *Riley v. State*, 37 Tex. 763; *Bish. Crim. Pr.*, sec. 319; *State v. Smith*, 13 Kan. 274; *State v. Walcott*, 1 Me. 106; *Brown v. State*, 18 Ohio St. 496; *City and County of San Francisco v. Randall*, 54 Cal. 408; *Gravatt v. State*, 25 Ohio St. 162; *People v. De la Guerra*, 31 Cal. 416; *State v. Munch*, 22 Minn. 67; *State v. Flint*, 62 Mo. 393.)

II. The statement of the defendant to the witness was admissible. Considered as a confession, it was within any of the rules excluding confessions. It was made to one in authority. It had no reference to the charge in the indictment. There was no inducement held out to defendant of immunity from punishment for the offense, nor was there any sufficient holding out of temptation or advantage to result to himself. (*State v. Kirby*, 11 Cal. 155-387; 1 Greenl. on Ev., sec. 222, 223; *Cropper v. State*, 11 Cal. 155-387.)



s (Ia.), 259; *Teachout v. People*, 41 N. Y. 7.)  
The juror Coyne was a competent juror. The form-  
l expressing an opinion that a crime has been com-  
is no disqualification. (*State v. Thompson*, 9 Iowa,  
*Stewart v. People*, 23 Mich. 63; *State v. Potter*, 18  
65; *State v. Wilson*, 38 Id. 126; *People v. Hayes*, 1  
82; *State v. Gillick*, 10 Iowa, 98; *People v. Brother-*  
Cal. 388; *People v. King*, 27 Id. 507; *Thomson v.*  
24 Ill. 65.)

ne Court, HAWLEY, J.:

llant was county treasurer of Storey county from the  
ay of January, A. D. 1879, up to and including the  
n day of October, 1880. He was subsequently in-  
tried, and convicted, for the crime of embezzlement,  
awfully, willfully, and feloniously converting to his  
e twenty-one thousand nine hundred and forty dol-  
d ninety-one cents of the public money, intrusted to  
e keeping, transfer, and disbursement, as county  
er, alleged to have been committed on the thirtieth  
October, 1880, and before the finding of the indict-  
One count charges the public money thus converted  
he property of Storey county. The other charges  
e money to be the property of the state of Nevada  
e county of Storey. The money is described as  
y gold and silver coins, lawful money of the United  
and of the aggregate value of twenty-one thousand  
ndred and forty dollars and ninety-one cents, a more  
ar description of which gold and silver coins and  
the grand jury can not give, as they have no means  
ledge."

murrer was interposed to the indictment, upon the  
that it "fails to describe any of the moneys alleged  
embezzled, or to state the denominations or character  
of said moneys."

is claimed that the court erred in overruling this  
er. It is also argued that evidence of a general defi-  
is not sufficient to establish the crime of embezzle-  
that the evidence must show the conversion of some

particular sum or sums of money received by the owner at some one time, or to have been under his custody or control at some particular time.

We are of opinion that the indictment substantially conforms to the provisions of sections 234 and 235 of the criminal practice act (1 Comp. L. 1858, 1859), and that in all respects sufficient. It is unnecessary in an indictment against a county treasurer for embezzlement to specify with certainty the particular kind of funds, whether gold or silver coins or legal tender notes, or to give the denomination of each coin or note, or to specify from whom or when at a particular time the money was received. As against a county officer, it is sufficient to allege and prove the felonious conversion to his own use of any money that came into his possession, or was under his control by virtue of his office. (*State v. Walton*, 62 Me. 109.)

In cases of larceny, or receiving stolen goods, it is usually within the power of the owner to describe the kind and character of money or other property stolen, and in the case of embezzlement by clerks, agents, and servants, and private parties there is but little difficulty in giving a particular description of the money embezzled. The duties of the clerk, agent, or servant are generally performed under the direct supervision or control of the principal, and he therefore, has, or may at any time have, full and complete knowledge of the character of the particular sums, and from whom received, and possesses facilities for tracing the facts while transpiring or recent. But these considerations do not apply to a county treasurer. He is the only person who knows the kinds and character of money in his hands and under his control. The public at large can exercise no constant supervision over his acts, nor can it, like an individual, assume the direct custody of the funds at any moment. The proper authorities may, it is true, require him to account, may count and examine the funds in his possession; but all these funds may be changed long before the act of embezzlement is done or the intent is formed. If the law required the kinds and character of money embezzled, and the particular date of embezzlement

ar piece to be stated in the indictment and proved  
e trial, it would, as a general rule, "be wholly  
icable to trace or identify the particular pieces of  
r bills, or to determine whether the sums embezzled  
the one shape or the other, or both; and it would  
lly impracticable to show that any particular sum-  
ed was the same money or funds received from any  
source or person; for, though the amounts might  
nd, this would by no means establish their identity.  
the kind of funds received by the treasurer in any  
ar instance, whether credited upon the books or  
ld be identified as received from a particular source,  
that this was not found in the treasury at any sub-  
time would not prove that the same money had  
bezzled, as this might have been honestly paid out  
ic creditors, and an equal amount embezzled in  
ecies of funds, or those received from a different

(*The People v. McKinney*, 10 Mich. 91.)

e case from which we have quoted, the defendant,  
ey, was state treasurer. He was indicted for em-  
nt of the public money under his control. The in-  
did not describe the particular kind or character  
y or notes alleged to have been unlawfully con-  
nor did it state that the character and denomina-  
said money were to the grand jurors unknown.  
held to be sufficient. This decision was followed  
roved by the supreme court of Minnesota, in the  
an indictment against the treasurer of that state,  
ezzelement (*State v. Munch*, 22 Minn. 67); and by  
eme court of Kansas in the case of a similar in-  
against a county treasurer. (*State v. Smith*, 13  
4.)

e *State v. Flint*, 62 Mo. 393, the defendant, who was  
and tax collector, was indicted for embezzlement,  
considering certain objections urged against the  
nt, the court said: "We do not think there is any  
jection to the indictment on account of its failure  
from whom defendant received the money, or to  
t what particular money he embezzled, or whether

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had been murdered and that the defendant did it," but that he had no bias for or against the defendant, and believed he could try the case as impartially as if he had heard of the case. He was held to be competent.

The court said: "It is scarcely possible, in a community where an act has been done which startles and attracts public mind, to obtain a juror, who should be informed with so grave a matter as the determination of the question of the guilt or innocence of the accused, whose mind has received no impression with regard to the case. From public rumor or newspaper reports, almost every person competent to serve as a juror, will have learned something in regard to the circumstances attending the commission of the alleged offense. And, as some impression, more or less strong, is almost invariably made by such rumor, the rule which would demand a juror with no opinion respecting the case, would, in cases attracting public attention, and in which intelligence is most needed, practically exclude every intelligent man from the jury." (38 Mich. 54.) Similar views are expressed in *The State v. Brown*, Iowa, 536, and in *Stewart v. The People*, 23 Mich.

In *The State v. Spaulding*, Kansas (reported in *Am. Law Register* for February, 1881, p. 110), where the defendant, a city clerk, was indicted for embezzlement, and testified "that he had an opinion, founded upon rumor, that public money was missing; that he had no opinion as to the guilt or innocence of the defendant, and that he believed defendant was city clerk." This juror, upon substantially the same reasons which we have already expressed, was held to be competent.

It was, perhaps, unnecessary to refer to any other of our own decisions, for it is clear to our minds, from the principles announced in the concluding portion of the opinion in *State v. McClear*, and the views expressed in *State v. Davis*, 14 Nev. 439, that the court did not err in dismissing this challenge.

3. Was the confession of the defendant to the witness Smith admissible? Defendant was a candidate for reelection. There was a rumor on the streets that he

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r. Two of his bondsmen, W. H. Smith and C. having heard these rumors, became anxious, and desirous of ascertaining the truth or falsity of the rumor concerning the condition of the affairs in the treasury. The defendant, when first spoken to by Smith, denied the rumor. The next day, Mr. Smith met him in the court-house, and again stated to him the rumors were afloat; urged him to have the money counted by McDonald; said that if the money was not counted it would injure him in the election. Nothing was said in regard to shielding him from a criminal prosecution. No threats were threatened or spoken of. The remarks of Smith were made, as he testifies, solely "with a view to induce the defendant to allow the money in the treasury to be then counted." Defendant testified that Smith said to him that there was no use putting this thing off any longer. If you do not come out and say so, and *we will try and fix it* thereupon he, Smith, and McDonald went into the treasurer's office, and Derby was sent for; that he understood from Smith's remark "that he (Smith) would assist in making good his accounts, and that the money defendant would be paid into the county treasury before there was any count of the money made by the county commissioners," and that if it had not been for said remark he would not have made any statement. Soon after the parties went into the treasurer's office the defendant said: "I might as well make a clean breast of it. I am not going to deny it." The witness Smith then asked him in what amount. He said about twenty-two thousand dollars. He was asked what he had done with the money. He said he "had spent it in the primaries, and had operated some in stocks." Defendant is of opinion that this statement was admissible.

The evidence excluding confessions is based in a spirit of charity, and rests upon the weakness of human nature, and rests upon the fact that a man when charged with crime and threatened with punishment of the law, or promised immunity therefrom, may be induced, while in an alarmed and excited condition of mind, to make statements that are not true. Vol. XVI.—9.



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true. Such statements, when so made, are, and should be, excluded by the courts.

But the essential elements that would entitle the defendant to this charity of the law are lacking in the facts of this case. At the time the statement was made, the defendant was not charged with any crime. No complaint had been filed. He was not under arrest. No prosecution was pending. There was no promise or representation made to Smith which could reasonably have induced the defendant to state things that were not true. Moreover, Smith was not an officer. He had no authority. He did not stand in any such relation toward the defendant as to exercise undue influence or control over the mind of the defendant, as to make his confession inadmissible. It is true that Smith and Derby were jointly liable upon the official bond of the defendant in the sum of twenty thousand dollars, but that they might have been able to pay the deficiency of the defendant's accounts before the money could have been specially counted by the county commissioners, and it may be that if the accounts had been made good, that no criminal prosecution would have been instituted (although that fact would not have relieved defendant from such prosecution.) Even if these facts, if they had any influence over the defendant, were only calculated to make him tell the truth, in exercising the office he did, it must be presumed, in the absence of any showing to the contrary, that he was a man of ordinary mind and intelligence, and we can not conceive of any reasonable theory which, upon the defendant's statement of the conversation, could have induced him to tell an untruth as to his guilt.

It is only in cases where the confession is obtained by mob violence, or by threats of harm, or promises of worldly advantage held out by some person in authority, or standing in such intimate relation from which the jury will presume that his promises or threats will be likely to exercise such an influence over the mind of the accused as to induce him to state things that are not true, that will authorize the courts to exclude the confession or admission.

## Argument for Appellants.

in its general application to this question, as well as is founded in reason and common sense. Its object is to ascertain the truth, and it is not its purpose to rely upon unreliable and competent means of attaining it. The judgment of the district court is affirmed.

[No. 1,055.]

WALL ET AL., APPELLANTS, v. LOUIS TRAINOR  
ET AL., RESPONDENTS.

**NEWLY DISCOVERED EVIDENCE—MATERIALITY OF—AUTHORITY.**—On the trial plaintiffs testified that they sold a quantity of hay to one Dwelly as the agent of defendants. Defendants testified that the hay was sold to Dwelly as the agent of a corporation. Plaintiffs moved for judgment, and the court granted a new trial upon the ground of newly discovered evidence: *Held*, that admissions made by plaintiffs, and after the trial, that they sold the hay to Dwelly as agent for the corporation, was material, regardless of the question whether Dwelly had authority to make the purchase.

**TESTIMONY IS NOT CUMULATIVE.**—Testimony is only cumulative when it is in addition to, or corroborative of, what was given at the trial. The newly discovered evidence brings to light some new fact upon the main question at issue between the parties, and it is likely to change the result, a new trial should be granted.

The judgment of the District Court of the Second Judicial District of Washoe County.

The following are stated in the opinion.

*Evans and William Cain*, for Appellants:

B. Dwelly pretended to act as the duly authorized agent of the California Fruit and Meat Shipping Company. In the purchase of the hay, the testimony shows without doubt that he was not; and it further appears that this corporation never ratified his acts by acceptance or measurement of the hay, or by paying a single dollar of the purchase money. There was no contract for the sale of this hay between plaintiffs and the corporation. There was no sale ever made by plaintiff to Dwelly by either party; hence there was no contract between those two parties, and so

there was no sale to the corporation nor to Dwelly; title had not passed from plaintiffs, and was in the hands of the defendants under the theory and proposed testimony and proof of the defendants, when they measured and fed the hay to the cattle. (Benjamin on Sales, 406, sec. 443; *Cummins v. Lindsay*, 19 Eng. Rep. 237; 24 E. R. 345; *Harbo v. Booth*, 1 Hurlst. & Colt (Exch.), 803; *Higgins v. Pease*, 26 L. J. (Exch.) 342; *McGoldrick v. Willits*, 52 N. H. 129; *Pease v. Smith*, 61 Id. 477; *Bearce v. Dowker*, 11 Id. 129).

II. Before granting a new trial, the court must be satisfied that the newly discovered evidence is so material that it would probably produce a different verdict if the new evidence were granted. (1 Saw. 291.) The evidence is merely cumulative. (*Gray v. Harrison*, 1 Nev. 502; *Howard v. Webb*, 3 Id. 542.)

III. The action is proper in form, and no objection has been taken thereto in the court below. (*McGoldrick v. Willits*, 52 N. Y. 620; 2 Greenl. Ev., sec. 108; *Wier v. Sickel*, 3 Keys, 122; *Coghill v. Marks*, 29 Cal. 677.

*Webster & Rankin*, for Respondents.

By the Court, LEONARD, C. J.:

Plaintiffs obtained verdict and judgment for one thousand two hundred and fifty dollars, balance alleged to be due for hay claimed to have been sold to defendants. The court granted a new trial on the ground of newly discovered evidence material for the defendants, which they could not with reasonable diligence have discovered and produced at the trial. This appeal is from the order granting a new trial.

It is not disputed that plaintiffs sold the hay to Dwelly, acting as agent either for the defendants or for the California Fruit and Meat Shipping Company, a corporation incorporated in the state of California, doing business in this state. Plaintiffs claimed, and their evidence tended to show, that Dwelly made the purchase as the agent of the defendants, while defendants claimed, and their evidence tended to show, that he was not their agent, but was



said corporation, that is to say, general superintendent that he purchased the hay for the corporation. Principal question agitated at the trial was, "To whom property sold?"

urged by counsel for appellants that the newly discovered evidence is not material, and that it is cumulative. If correct as to either assertion, a new trial should not be granted upon the ground stated by the court. Ground of immateriality is based upon the statement that, Dwelly knew he was not contracting for the corporation, that he had no authority to purchase; \* \* \* that the evidence to help defendants would be to the effect that Dwelly actually had authority, or that the corporation actually purchased it, or had ratified his unauthorized

It makes no difference in this action, whether the corporation purchased the hay or not, except that it may be said if the purchase was made by the corporation it could not have been made by the defendants. The question to be decided is, Did the *defendants* make the purchase? That fact must be established affirmatively by proving that Dwelly was authorized to purchase for the corporation. If the defendants could prove that the sale was actually made to the corporation through Dwelly, its general superintendent, that proof would negative the idea that it was made by the defendants, whether Dwelly was authorized to make the purchase or not. There was, in fact, no testimony that Dwelly had authority; but had ample proof of that fact been established, the plaintiffs ought not to have recovered without satisfying the jury that Dwelly acted as agent for defendants, and that they ratified his purchase after being advised of the facts. So it is not true that the only evidence that will help the plaintiffs is proof of Dwelly's authority. The burden of proof is upon the plaintiffs to show that they sold to defendants. In the absence of such proof, they could not recover in any event; but there was evidence tending to establish that fact, as well as evidence tending to disprove it. The plaintiffs testified, positively, that they sold to Dwelly, and that the corporation was not mentioned;

## Argument for Relator.

but that he could not get his money from that com  
that "Trainor's cattle had eaten the hay and Trainor  
pay for it;" that "he should have his pay from son  
since he could not get it from the Meat Shipping  
pany;" "that he did not expect any trouble ab  
money until the Meat Shipping Company refused t  
the last checks he received from Dwelly." Much  
evidence is not cumulative in the proper sense of tha  
The court did not err in granting a new trial up  
ground stated in its order, and the order is affirmed.

[No. 1,070.]

THE STATE OF NEVADA, EX REL. M. A. MU  
ATTORNEY GENERAL, v. J. B. OVERTON ET AL.  
TEES OF THE NEVADA BENEVOLENT ASSOCIATIO  
SPONDENTS.

LOTTERY—ACT TO AID NEVADA BENEVOLENT ASSOCIATION UN  
TIONAL.—The act to aid the Nevada Benevolent Association in  
means for the care and maintenance of the insane of Nevada (s  
186) provides, that it shall be lawful for the association to g  
entertainments, to sell tickets of admission, to distribute a  
ticket-holders personal property, etc., and to regulate the di  
by raffle or other schemes of like character: *Held*, that the  
enterprise in which the association is engaged is a lottery, and  
act is unconstitutional.

QUO WARRANTO, before the Supreme Court.

The facts appear in the opinion.

M. A. Murphy, Attorney General, for Relator:

I. The Nevada Benevolent Association never has  
corporation under the laws of this state; because  
3389 of the compiled laws does not authorize the for  
of corporations for the purpose of holding or con  
public entertainments or gift enterprises.

II. The privileges and franchises usurped by t  
board of trustees are not legitimate or legal, becau  
have attempted to usurp a franchise without autho

## Argument for Relator.

to do those things which by law they were and are  
d from doing. (Sec. 2494, Comp. L.) The arti-  
incorporation upon their face show that the company  
formed for an illegal purpose, that of giving con-  
gift enterprises where property is to be distributed  
e of chance.

The act of the legislature of March 9, 1881, is un-  
constitutional, because it is in conflict with section 24, arti-  
of the constitution. (The authorities cited by  
are referred to in the opinion.)

The constitution of a state is higher in authority than  
made by any body or any set of officers assuming  
nder it, since such body or officer must exercise a  
authority, and one that must necessarily be sub-  
to the instrument by which the delegation was made.  
case of conflict the fundamental law must govern,  
ct in conflict with it must be treated as of no legal  
(Cooley on Const. Lim. 43, 44; Potter's Dwarria  
and Const. 44.) By the constitution which the  
establish, they not only tie up the hands of their  
gencies, but their own hands as well, and neither  
s of the state nor the whole people, as an aggregate  
at liberty to take action in opposition to this funda-  
law. (Cooley's Const. Lim. 28; Potter's Dwarria  
1.)

The Nevada Benevolent Association scheme is a lot-  
in the ordinary meaning of the word as defined in  
sh dictionaries. "It is a distribution of prizes by  
which is one of the definitions of a lottery by  
and Webster. It is a kind of a game of hazard,  
several lots of merchandise, property, or money  
ited in prizes for the benefit of ticket-holders.  
Encyclopedia, American Cyclopedic, Encyclopedia  
a, title Lotteries; Bouv. L. Dic., title Lottery. Oth-  
ties cited are referred to in the opinion.)

repealing clause in an unconstitutional act does  
the former law. (*State v. McClear*, 11 Nev. 39;  
*State*, 26 Ala. 165; *People v. Tephaine*, 3 Park.  
241; *Shepardson v. M. B. R. R. Co.*, 6 Wisc. 614;

## Argument for Respondents.

*State v. Judge of County Court*, 11 Id. 50; *Sullivan v. Adams*, 3 Gray, 476; *Devoy v. Mayor et al. of N. Barb.* 270; *Campau v. Detroit*, 14 Mich. 276; *Ch. Shower*, 18 Iowa, 261; *Harbeck v. Mayor of New York*, Bosw. 366.)

A. C. Ellis, B. C. Whitman, and W. H. L. Barnes,  
Respondents:

I. No facts are stated in the complaint to warrant forfeiture under any law of this state. Section 389 and the compiled laws govern the case stated, if any, whether deny, but the proceeding here referred to, must be brought by the district attorney. And besides, no facts are stated which under any of these sections, would either warrant forfeiture, or upon which a judgment can be based, deciding that this "Nevada Benevolent Association" never had legal existence.

II. The allegation that these trustees base their rights upon doing the things alleged upon an act of the legislature recently passed, is not an allegation of fact, it is idle; it is speculative, it is abstract; nor is it a threat or an action, it is a statement of a present belief and opinion of the trustees, which may to-morrow be modified or changed. And we maintain that the validity of this act can be called in question in this manner. (*Burling v. Goodrich*, Nev. 314; *Hess v. Pegg*, 7 Id. 23; *Overman S. M. Amer. M. Co.*, Id. 322; *Phillips v. Welch*, 11 Id. 187; 12 Id. 159.)

III. The law in question is constitutional. It is presumed to be so unless it can be clearly made to appear to the contrary. Every intent is in favor of the constitutionality of the law. (*Ash v. Parkinson*, 5 Nev. 15; *Clark v. Irwin*, Id. 111; *Evans v. Job*, 8 Id. 132.) It was the intention of the framers of the constitution to prevent the state as such from engaging in lotteries to raise revenue (Const., art. 4, sec. 24.) This section was taken verbatim from the constitution of California, adopted in 1849 in convention, and was adopted by the convention of Nevada without debate. An examination of the debates of the California convention will show that this idea prev



## Argument for Respondents.

who opposed the section, did so upon the ground the lottery was a desirable and convenient mode of raising revenue, and those who favored the section did so upon the ground that it was desirable that the state should raise its revenue otherwise, and by a different mode of taxation. (Debates in the Convention of Cal., 90, by J. Ross Smith, &c.) Such was the original idea of lotteries. A historical review of this subject may be found in the Encyclopedia Brit., tit. Lottery; New American, tit. Lottery; and others, tit. Lottery.

The language of our constitution, considered by itself, imports the same idea, and is exceedingly inapt to express the ideas claimed for it by the attorney general. "A lottery shall be authorized by this state." This is not a lottery, if it is a lottery (which under the allegations of the complaint we deny); the state exercises no control over it. It is not said that it will be drawn under the auspices of the state, nor managed or controlled by officers or agents of the state, nor at any place designated by the state, nor upon any terms or conditions named by the state. No penalty is denounced in the constitution. If it be a crime or misdemeanor to carry on a lottery, it must be so declared by the legislature or the common law, and punished accordingly, but there is no statute of Nevada defining and punishing a lottery. But it is said the statute of 1861, William III. is in force in this state, which statute declared a lottery to be a public nuisance, and it was so held in *Ex parte Blanchard*, 9 Nev. 101; 43; but this will not aid the relator. If it is a public nuisance, it was either a crime or a misdemeanor, and as such can only be punished by indictment. (220.) But which was it, a crime or a misdemeanor? must be determined in order that it can be punished under our statute.

The statute of William declaring a lottery a public nuisance is not in force in this state; because our legislature has undertaken to declare what shall constitute public nuisances and to prescribe punishments therefor, and has omitted any reference to lotteries; and second,

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the law in question repeals not only the lottery act in terms, but also "all other acts (laws) or parts of conflict with this act." It can not be argued that repeal of this law is unconstitutional. The constitution not forever fasten the statute of William III. upon the legislature surely has the power to repeal any law concerning lotteries.

VII. The act of 1873 to prohibit lotteries is repugnant to the constitution. (*Meshmeier v. State*, 11 Ind. 489; *Rhody Ely v. The State*, 3 A. K. Marsh. 70; *Tims v. State*, 26 Ala. 165; *McCarty v. State*, 3 A. K. Marsh. 70; *Judge Monroe Circuit*, 36 Mich. 275; *Yellow R. Imp. Co. v. State*, 46 Wisc. 227.)

*R. M. Clarke*, also for Respondents:

I. Lotteries are (1) public or (2) private: public lotteries are organized and managed by the government for the benefit of the public and as a means of obtaining revenue; private lotteries are organized and managed by private individuals for private gain. It is matter of common knowledge that all governments, among them Austria, France, Great Britain, and many of the states of the American Union, have resorted to lotteries in order to raise money for the service, and that until recent years, public lotteries were almost universally prevailed. (See *New Am. Cyclop.* vol. 10, 663, 664, 665; *Whart. L. Dic.* 467.)

II. The constitution is not couched in apt or proper words which express the intention to prohibit private lotteries, but any lotteries except public. If it had been intended to prohibit all lotteries or private lotteries, the words "by this state," should have been omitted; but the addition of the words, otherwise unnecessary, can only be accounted for upon the theory that their use was intended to qualify and restrict the sense and application of the section to lotteries "by this state," that is to say, state lotteries, lotteries carried on by the state for the purpose of raising revenue.

By the Court, HAWLEY, J.:

On the nineteenth day of February, A. D. 1881,

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corporation of the "Nevada Benevolent Association" and in the office of the county clerk of Storey county. The object of the corporation being "to establish and carry on business of providing for and giving public entertainments, in the state of Nevada, of a musical and scientific character, to sell tickets of admission to such entertainments and to purchase, hold, and distribute among the holders of such tickets personal property, real estate, things in action, and other valuable things, upon such terms and conditions and in such manner and at such times as may be determined by a board of managers to be selected for that purpose by the board of trustees of this company." It was held that so much of the proceeds of said entertainments as may be deemed proper by the board of trustees, not less than fifty thousand dollars, from each entertainment, are to be placed in the state treasury of the state of Nevada to be used only for such charitable and benevolent purposes as may be determined by the legislature of the state of Nevada."

Act to aid the Nevada Benevolent Association in providing means for the care and maintenance of the poor of Nevada, and for other charitable purposes" (March 9, 1881), declaring that "it shall be lawful for the Nevada Benevolent Association of the state of Nevada to give not exceeding five public entertainments or to sell tickets of admission to the same; to disburse among the holders of such tickets personal property, real estate, things in action, demands or other things, and to regulate the distribution of all such property by raffle or other schemes of like character." (1881, 166, sec. 1.)

Information filed by the attorney general alleges that the defendants, as trustees of said association, are, without authority of law, "advertising, printing, circulating, and selling tickets for public entertainments \* \* \*," and that they have their right to advertise, print, circulate, and sell tickets for the said public exhibitions or entertainments, and to purchase, use, hold, and distribute amongst the holders of such tickets personal property, real estate,

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tion of prizes it is a lottery, without reference to the by which it is called. "He may choose to call his a gift sale," said the court in *Dunn v. People*, *supra*; it is none the less a lottery, and we can not permit evade the penalties of the law by so transparent a device as a mere change of name. If it differs from ordinary lotteries the difference lies chiefly in the fact that it is more artfully contrived to impose upon the ignorant and credulous public, is, therefore, more thoroughly dishonest and injurious to society."

"The name given to the process and the form of the machinery used to accomplish the object are not material, provided the substance of the transaction is a distribution or disposition of property by lot." (*State v. Clarke*, 3 Nev. 100.) Courts will not inquire into the name, but will determine the character of the scheme by the nature of the transaction or business in which the parties are engaged. (*State v. State*, *supra*.) "The character of the scheme is not materially changed by the charitable purposes expressed in its title, nor by calling the drawings 'entertainments and concerts.'" (*Ex parte Blanchard*, *supra*.)

The fact that no plan of distribution has been determined upon does not relieve the scheme of its character as a lottery. (*Thomas v. People*, 59 Ill. 163.) "No material," said the court of appeals in *The American Union case*, "to the question in hand that the prizes were not known and designated when the tickets or chances were subscribed and paid for. The scheme in this respect is more objectionable than a scheme in which the prizes were previously fixed, because it affords less security to subscribers that the chance purchased is worth the money paid for it."

We are of opinion that the facts stated in the articles of incorporation, in the statute, and in the information filed, that the scheme is one whereby the legislature of this state, in consideration of the sum of \$250,000, to be paid from the state treasury, to the credit of the "insane and idiotic fund," attempted to authorize the managers of the "Nevada Benevolent Association" to enrich their



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at the expense of the people of this and other by holding out promises of the great and sudden that might be acquired by the ticket-holders; that prizes would be "the lure to incite the credulous unsuspecting into this scheme."

The light of all the facts that have been presented, it is absurd to say that the managers of this scheme were prompted by deeds of charity and pure benevolence. We think it is fair to presume that some of the purchasers of tickets to the entertainments, to be given by the association, would receive blanks; but even if every ticket drew a prize, the scheme would still be a lottery.

In *Wooden v. Shotwell, supra*, the court said: "The prizes distributed by lot. The fact that the scheme contained no blanks, but that every adventurer was to receive something for his money, only rendered the advice the more successful, and its results consequently the more disastrous, without altering its essential character." In *The People, supra*, the court said: "Neither would the character of the transaction be changed by assuming that every ticket in every envelope really represents some article of merchandise intrinsically worth the dollar which the holder will be obliged to pay. If every ticket in an ordinary lottery represented a prize of some value, yet, if these prizes were of unequal values, the schemes of distribution would still remain a lottery."

In the face and teeth of the decisions which we have reviewed; we can not say that the scheme proposed by the "Benevolent Association" is not a lottery. It has the elements and attributes of a lottery; the prizes are distributed by chance. It is a lottery within the definition given in the dictionaries; it is a lottery according to the ordinary acceptance of that word; it is a lottery within the meaning specified by the legislature of this state in the act prohibiting lotteries (Stat. 1873, 186); it is a lottery within the meaning of that word as used in the constitution. The act approved March 9, 1881, constitutional? The question is as clear and plain to our minds as the one already decided. It will not admit of any reasonable doubt.

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The language of the constitution is susceptible of no meaning. There is no room for construction upon which any real or substantial argument can be based.

"No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed." (Constitution, sec. 24.) The act in question attempts to authorize a lottery, and to allow the sale of lottery tickets in this direct violation of the plain letter and spirit of this provision of the constitution. It would be a perversion of the language of the constitution to say that the act is valid.

Respondents, however, contend that the constitution "does not prohibit private lotteries, and was by its intent intended only to prevent the legislature from involving the state in a system of public lotteries as a means of raising money for the service of the state," or, in other words, that this constitutional provision was only intended as a restriction of power to prevent the state, as a state, from engaging in public lotteries for the purpose of raising money for the general revenue of the state. Hence they claim that the state has the right to authorize private parties to conduct and carry on a lottery of the character specified in the information.

In support of this position they refer to the debates at the constitutional convention in California upon the adoption of a provision in the constitution of that state identical with that in the constitution of Nevada. It is not claimed that these debates have the weight of an official decision, but that it is proper to examine them in order to remove all doubt as to the intention of the framers of the constitution. The remarks of the different members shed but little light upon the real question at issue. They are as much in favor of the position taken by the attorney general as they are in favor of the respondents. The debates show that the constitution of New York was referred to in discussing the provision that was adopted in California. Mr. Halleck was in favor of the adoption of the lottery provision. In the course of his argument, said: "In nearly all the new constitutions you will find this clause. It was not common in the old constitutions, but in most cases, where the constitution has been amended, it has been introduced. In the old

of New York, to which reference has been made in course of debate, no prohibition was inserted. Many men present would remember the famous *case of Yates v. Intyre*, which involved not only individuals of the ruin, but was the occasion of serious embarrassment to state government itself. The result so clearly established the evils of the lottery system that the convention of New York, in 1846, inserted a clause in the very first article of the new constitution (see sec. 10) prohibiting lotteries and lottery tickets. It appeared to him \* \* \* that prohibition was one of the best that could be inserted in the article limiting the powers of the legislature."

The language of the tenth section of article 1 of the constitution of 1846, referred to by Mr. Halleck, is as follows: "No lottery shall be authorized, or any sale of lottery tickets allowed within this state."

In *the Governors of the Almshouse v. American Art Union* it was contended by Charles O'Connor, counsel for the Union, as it is here, that the constitution was only intended to prevent the mischievous practice of raising a revenue by public lotteries, which had been for many years in vigor both in England and in this country, and that the prohibitions of the constitution were only directed against this particular evil. He referred to the fact, as done here, that "from 1709 to 1824 public lotteries were authorized at every session of parliament." He also referred to the debates of the constitutional convention of 1846 for the purpose of showing that "public lotteries for prizes as a means of raising revenue were alone in the contemplation of that body."

The constitution of 1821 is in these words: "No lottery shall hereafter be authorized in this state, and the legislature shall pass laws to prevent the sale of all lottery tickets in this state, except in lotteries already provided for by law." The court of appeals, in referring to this constitution which it declared to be substantially the same as the constitution of 1846, said: "This prohibition is general. It is to be held to embrace all lotteries, unless there be some very clear and satisfactory reason for understanding it



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in a more limited sense. It was urged upon the argument that public lotteries for pecuniary prizes as a means of raising revenue were alone within the contemplation of the framers of the constitution. But lotteries have never been created within this state for the purposes of general revenue, and there is therefore no ground for believing that the prohibition was intended to be limited to lotteries for that object. This would have been restraining a mischief which did not exist, and tolerating that which did. Lotteries have been authorized by the legislature for the benefit of colleges, for the making of roads, for the building of bridges, for the improvement of ferries, for the erection of hospitals, and for various other purposes equally commendable and beneficial. All these were clearly within the prohibition. The prohibition was not aimed at the objects for which lotteries had been authorized, but at that particular mode of accomplishing such objects. It was founded on the principle, that evil should not be done that good might be done, and upon the more cogent practical reason, that the evil consequent on this pernicious kind of gambling greatly overbalanced, in the aggregate, any good likely to be derived from it. The promotion of the fine arts is undoubtedly a commendable object, but the prohibition contains no exception in its favor on that ground. \* \* \* The intention of the framers of the constitution undoubtedly was to prevent the future granting of any such lotteries as had at any time previously been authorized by law, and by requiring the legislature to pass laws to prevent the sale of *all lottery tickets* to put an end to all such distributions of money or prizes by lot or chance as had theretofore been forbidden by statute under the name of private lotteries."

The argument that the words "by this state" were inserted for the purpose of preventing the legislature from authorizing public lotteries as a means of raising revenue, and that the provision was not intended to prevent the legislature from authorizing private lotteries, is wholly untenable. No authority has been produced in its support, and we are satisfied that none can be found.

In construing this provision of the constitution the

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ence is as important as the first. If the framers of the constitution had intended by the use of the words, "No lottery shall be authorized by this state," to only limit the relative power to public lotteries, conducted and managed solely by the state for the purpose of raising revenue, they would not have used the language they did in the concluding sentence: "Nor shall the sale of lottery tickets be allowed." These words clearly show that it was not intended that any lottery should be authorized by this state for any purpose.

The words "by this state," as used in our constitution, are the words "in this state," "or within this state," as used in the constitutions of New York, have virtually the same meaning. "No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed." This language applies to all lotteries, whether public or private. Lotteries conducted by the state; by the church; by private individuals; by benevolent and charitable associations, or by corporations. No lottery of any kind can be authorized by the legislature under the present constitution.

The constitution of Texas is as follows: "No lottery shall be authorized by this state, and the buying and selling of lottery tickets within this state is prohibited." Here the words "no lottery shall be authorized by this state," upon which respondents rely for their construction, are identical with the words in our state constitution. The balance of the provision is substantially the same.

The supreme court of Texas, in construing the constitution of that state, said: "The constitutional provision affords no aid to show what is meant, so far as *the granting of authority by any power in the state to establish a lottery is concerned,*" and declared that "the operation of the Preston Gift Enterprise Association" shows clearly that in its operation and essence, a scheme for the distribution of prizes by chance, or, in other words, is a lottery, in the very letter and spirit of the law, and is a *plain violation of the constitutional inhibition of lotteries.*

The act to regulate taxation, June 3, 1873, 'which imposes an occupation tax upon gift enterprises,' has no force

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or power to legalize this or any of its kindred offerings (*Randle v. State*, 42 Tex. 589.) This decision is approved by the court of appeals, in *Holoman v. State*, 2 Tex. (4 Ap. 612.)

The constitution of Indiana reads as follows: "No lottery shall be authorized, nor shall the sale of lottery tickets be allowed." (Art. 4, sec. 8, Const. 1851.) Under this provision the supreme court declared that no lottery could be authorized by the legislature. (*Whitney v. State*, 10 Ind. 405; *Swain v. Bussell*, 10 Ind. 438.) The constitution of Missouri reads as follows: "The general assembly shall never authorize any lottery, nor shall the sale of lottery tickets be allowed." It was held that this provision prohibits the legislature from authorizing any lottery, and forbids the allowance of the sale of lottery tickets. (*Kilgore v. Greenabaum*, 61 Mo. 114.)

We again repeat what, it seems to us, must be evident to every unbiased and impartial mind, that the language of this constitutional provision is too plain for argument. Under it the legislature can not authorize any lottery in this state, and that the act approved March 9, 1881, is null and void. We are conscious of the fact that it was unnecessary to add anything to the reasoning of this court, in *Ex parte Blanchard*, which is, of itself, absolutely conclusive upon both of the points we have discussed. But it has been attempted, by a desire upon our part, to show that no authority could be found in any of the adjudicated cases of the United States to sustain the position contended for by respondents; and that no argument has been advanced by respondents, upon either of these points, that has heretofore been decided adversely to them by the courts of other states, where the constitutional provisions are substantially the same as our own.

It is proper to add that we have arrived at the conclusion stated without considering the question of the morality or immorality of this particular scheme. It makes no difference whether it was set on foot purely for the purpose of raising revenue for the benefit of the "insane and charitable fund" of this state, or whether it belongs to that

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eries that are made up of pecuniary prizes and min-  
to the love of gain; whose schemes address themselves  
grossest and most revolting form directly to that sor-  
session, and to no other sentiment; where the managers  
a pecuniary profit and enlist "a corps of active se-  
to draw the weak and unwary into the purchase of  
" by extensive advertisements containing brilliant  
of the favorable chance to acquire sudden wealth.  
may be admitted for the purposes of this decision as  
argued by respondents' counsel, that the people of this  
are essentially a gambling people, ready at all times to  
the desperate chances which lotteries afford, and that  
serious effects upon the morals of the people would re-  
this game of chance was allowed to proceed. This  
is one that must be considered as settled by the  
on of the constitutional provision. (*Ex parte Darling*,  
y decided.)

the *Art Union case*, to which we have frequently re-  
it was claimed that the enterprise was really of a  
rious character, and that it differed, in this respect,  
the lotteries where the managers were to receive the  
share of the profits. The court, in answer to this  
ent, said: "If no lotteries had existed, excepting  
is contained in the *Art Union* scheme, it is not  
le that they would have been forbidden by the con-  
n or by law. Its mischiefs are certainly not so ap-  
as if its prizes were to be paid in money, or as it  
be if framed for the purpose of enticing the necessi-  
and improvident into its hazards. But this case can  
decided according to the views we may entertain of  
able good or evil consequent upon the execution of  
eme. *The constitution took away the power of deter-*  
*whether this or any other lottery was of good or evil*  
*ry, and certainly did not intend to confer that power*  
*judicial tribunals.* If it were to be admitted that the  
is entirely harmless in its consequences, it would  
no ground for making it by judicial construction an  
on to the general and absolute constitutional prohibi-



Points decided.

Courts can not make any distinction in this respect the nature of the transaction or the character of engaged in it. It is their bounden duty to declare "The law knows no person; it is not made for the individual man, but for men: As the dew of heaven falls, so alike upon the just and unjust." (*State v. Pierce*, 304.) It smiles and frowns upon all alike. It makes no distinctions. Submission to its authority is incumbent upon all.

3. It is unnecessary to discuss any of the other points suggested by respondents' counsel. We will not pre-judge in advance, that respondents intend to violate the law. From the views already expressed it is apparent that it would make no difference whether respondents have a right to act in the premises under the articles of incorporation or under the provisions of the act of the legislature. In either event their acts would be without warrant.

The judgment of this court is that the respondents have no right, liberty, or franchise by virtue of any law to advertise, print, circulate, or sell any tickets in the scheme or enterprise of the "Nevada Benevolent Association," in this state, or to do any of the acts specified in the act "to aid the Nevada Benevolent Association," approved March 9, 1881 (Stat. 1881, 166); and that the costs of the proceeding be taxed against them.

[No. 1,064.]

# THE STATE OF NEVADA EX REL. W. R. KING v. F. HALLOCK, STATE CONTROLLER, RESPONDENT.

**PRESIDENT PRO TEM. OF THE SENATE NOT ENTITLED TO EXTRA COMPENSATION.**—The legislature passed an act in favor of remuneration of his services as president *pro tem.* of the senate, in addition to his regular pay as a senator: *Held*, that this was in effect an attempt to increase his compensation as a senator, and hence, unconstitutional. (Art. 4, sec. 33.)

**IDEM—OFFICER.**—No money can be drawn from the treasury as compensation to an officer of the legislature, except when the compensation is fixed by a law in force prior to the election of such officer. (Art. 4, sec. 28.)



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ICATION for mandamus.

acts are stated in the opinion.

*Edwards*, for Relator.

*Murphy*, Attorney General, for Respondent.

the Court, BELKNAP, J.:

relator is a state senator, and represented the county, in the senate, during the session of 1881. At the commencement of the session he was elected president *pro* the senate, and acted as such whenever thereunto required by the president of the senate, the lieutenant governor. At the close of the session that year the legislature enacted directing the state controller, the respondent in the proceeding, to issue his warrant for one hundred and fifty dollars in favor of relator for payment of his services as president *pro tem*. The respondent refuses to comply with the commands of the statute for the reason that it exceeds the limitations of the state constitution.

Article of the constitution relied upon reads as follows: "The members of the legislature shall receive for their services a compensation to be fixed by law, and paid out of the public treasury; but no increase of such compensation shall take effect during the term for which the members of either house shall have been elected; *provided*, that an appropriation may be made for the payment of such expenses as members of the legislature may incur for traveling expenses, express charges, newspapers, and stationery, not exceeding the sum of sixty dollars for any general or special session to each member; and, *furthermore provided*, that the speaker of the assembly and lieutenant governor, or the president of the senate, shall each, during the time of their attendance as such presiding officers, receive an allowance of two dollars per diem." (Art. 4

compensation of members of the legislature was fixed

Points decided.

[No. 1,007.]

**I. B. MARSHALL ET AL., APPELLANTS, v. GOLDEN FLEECE G. & S. M. CO. AND T. K. HYMAN ET AL., RESPONDENTS, D. Z. YOST, INTERVENOR.**

**RIGHTS OF INTERVENOR—ANSWER.**—Where the answer to a complaint is treated, upon the trial, as the answer to the petition for intervention, the case will be considered the same as if an answer to the petition had been filed.

**IDEM—RELIEF GRANTED.**—In such a case defendants can not complain if the relief granted exceeded the demand in the petition, which was granted was consistent with the case made, and was within the issue.

**RULES OF COURT MUST BE EMBODIED IN STATEMENT.**—A rule of the court relative to the settlement of a statement on motion for a new trial will not be considered by this court, unless it is embodied in the statement.

**PRESUMPTIONS—REGULARITY OF PROCEEDINGS.**—In the absence of evidence to the contrary, every presumption is in favor of the regularity of the proceedings in the court below.

**STATEMENT ON MOTION FOR NEW TRIAL—SETTLEMENT OF BY JUDGE—PRACTICE.**—In a case tried before a referee, where all the proceedings are reported to the court, the statement on motion for a new trial may be settled by the judge.

**APPEAL—ORDER AMENDING RECORDS—REFUSAL TO DISMISS APPLICATION FOR NEW TRIAL.**—An appeal can be taken from an order of the court amending its records concerning the extension of time in which to file a statement on motion for a new trial and from an order denying an application to dismiss the application for a new trial.

**IDEM—AMENDMENTS DURING TERM.**—A court may amend its orders and judgments concerning the extension of time given to file a statement, so long as they conform to the truth, at any time during the term in which they are made.

**NEW TRIAL—RECORDS OF COURT—STATEMENT—TRIAL AND VERDICT.**—The records of the court may be acted upon in the trial on a motion for a new trial without being inserted in the statement, where there is no statement on appeal, the records of the trial must be designated by the judge as having been read, or referred to on the hearing, or put in the statement, or they will not be considered by the appellate court.

**FINDINGS OF FACT—GENERAL AND SPECIAL VERDICT.**—The findings of fact by a court or referee are like the special verdict of a jury; and the conclusions of law drawn therefrom are similar to a general verdict. In a case wherein the jury have found a general and special verdict, the court may draw therefrom a legal conclusion which is outside of the issues.

**JUDGMENT MUST CONFORM TO THE ISSUES.**—A judgment must accord with the pleadings of the party in whose favor it is rendered, and no court, jury, or referee has any authority to find facts and draw therefrom a legal conclusion which is outside of the issues.

## Argument for Appellants.

## ACTION AGAINST TRUSTEES OF CORPORATION—SUFFICIENCY OF COMPLAINT—

DEMURRER.—Upon a review of the pleadings in an action against the trustees of a corporation for levying unnecessary assessments with intent to defraud the stockholders, and to have the assessments declared null and void, and for other relief: *Held*, that the demurrer to the complaint was properly overruled; that the complaint stated a cause of action against the personal defendants; and that the corporation was a proper party defendant.

## NEW TRIAL—FINDING OR DECISION OF COURT AGAINST LAW—PLEADINGS.—If

the decision or finding of a court or referee is against law, a new trial is the proper remedy; the decision is against law if it is contrary to, or inconsistent with, the case made and embraced within the issue.

## IDEM—FINDINGS NOT SUPPORTED BY THE PLEADINGS—LEVY OF ASSESSMENTS AND SALE OF STOCK AFTER COMPLAINT IS FILED.—When the complaint

was filed, the sale of stock under the thirteenth assessment had not been made and the fourteenth assessment had not been levied. The referee found that these assessments would have been unnecessary if the trustees had faithfully administered the business of the corporation and faithfully used the funds realized by the twelve assessments previously levied, and that since the commencement of the suit the trustees had caused the stock of plaintiffs and intervenor to be sold on the thirteenth and fourteenth assessments. As conclusion of law the referee found that these two assessments were unnecessary; that they were made to defraud the stockholders; that they were fraudulent and void; and that plaintiffs were entitled to have them so declared, and to have the sales made thereunder set aside, etc.: *Held*, that the decision of the referee was not justified by the pleadings, and consequently that it was against law.

## IDEM—SALE OF STOCK—WHEN NOT VOID.—If at the time the thirteenth and

fourteenth assessments were levied the corporation had no funds, and these assessments were needed for legitimate purposes, the sales made thereunder would not be void for the reason that the trustees had previously misappropriated the funds of the corporation.

## IDEM—AMENDMENT OF COMPLAINT AFTER FINDINGS ARE MADE—WHEN NOT

ALLOWABLE.—When it is not affirmatively shown that the defendants had reason to believe that the affairs of the corporation, subsequent to the commencement of the action, would be inquired into with the view of arriving at a judicial settlement of the same, or that the case was tried upon that theory; *Held*, that the court, after the findings were made, properly denied plaintiff's application to amend their complaint so that it should conform to the findings of the referee.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

I. B. Marshall, for Appellants:

I. The court erred in granting a new trial. No affidavit

## Argument for Respondents.

such judgment as equity requires. (*Fusier v. S. Nev.* 120; *Comp. L.* 1400; *Ord v. McKee*, 5 Cal. 51.)

*R. M. Clarke and William Cain*, for Respondents.

I. The court had the undoubted right to amend orders during the term the orders were entered, for record is in the breast of the judge. (*Swain v. N. Cal.* 127; *DeCastro v. Richardson*, 25 Id. 49; *Henckell*, 27 Id. 491; *Clark v. Strouse*, 11 Nev. 76; *Kelly*, 11 Id. 377.)

II. The court did not err in refusing to dismiss plaintiffs' application for a new trial "upon the ground the statement was not filed and served in time. (*Dean*, Oct. term, 1876, Supreme Court of California reported.)

III. The court did not err in refusing to allow to amend their pleadings so as to conform to the first referee. (*Nevada County & S. C. Co. v. Kidd*, 282.)

IV. Plaintiffs are bound by their allegations and for relief, and where the facts alleged in the complaint may constitute two or more different causes of action, authorize different judgments, the prayer becomes immaterial and may determine the nature of the action. (*Nevada County & S. C. Co. v. Kidd*, 37 Cal. 304; *Arlington v. L. Id.* 375; *Story Eq. Pl.*, secs. 40, 41, 42; 1 Van. 8 p. 360; 1 *Comp. L.* 1102; *Bliss on Code Plead.*, s. 1; *Corry v. Gaynor*, 21 Ohio St. 277; *Rome Exch. Eames*, 1 Keyes, 588; *Swan v. Smith*, 13 Nev. 257.)

V. The court did not err in granting a new trial. The complaint failed to allege any specific acts or any particular items plaintiffs intended to recover. (*Castle v. Bader*, 23 Cal. 75; *Semple v. Hagar*, 27 Id. 1; *Kent v. Snyder*, 30 Id. 667; *O. & V. R. R. Co. v. Co.*, 37 Id. 363; *Douglas v. Brooks*, 38 Id. 670; *Mane Solomon*, 39 Id. 125.) And it is only for fraud that a party can be sued. 2 *Hilliard on Torts*, 401-404, and cases; *enburgh v. Wood*, 23 Barb. 370; *Neall v. Hill*, 16 C.

*Peabody v. Flint*, 6 Allen, 52.) And plaintiffs must not be guilty of gross laches in prosecuting their claims. (*Fuller v. Melrose*, 1 Allen, 166; 2 Story Eq. Jur., sec. 1520, note 3.)

By the Court, LEONARD, C. J.:

It is alleged in the complaint, herein, as follows:

The Golden Fleece company, one of the defendants, is, and since January, 1874, has been, a corporation duly incorporated and doing business under the laws of this state, having a capital stock of thirty thousand shares, of the nominal value of ten dollars each. It owns and was incorporated for the purpose of working and developing a certain mine in Washoe county, known as the "Golden Fleece mine."

Since about December 1, 1875, the corporate powers of said corporation have been exercised by a board of trustees, consisting of defendants Gallagher, Hymers, Lippman, Cohn, and D. Lachman, who now own, or claim to own, about twenty thousand shares of its capital stock, and have owned or claimed to own the same since November 16, 1875. Since February —, 1874, the officers of said corporation have been and are defendants Hymers, president; Lippman, secretary, and D. Lachman, treasurer, who have been and are a majority of the board of trustees. Plaintiffs are stockholders and the owners of five thousand shares of capital stock.

On or before November 16, 1874, said corporation, at its assessment sales, became the purchaser of fifteen thousand two hundred shares of its capital stock, by reason of the failure of outside parties to bid in the same and pay the assessment and costs thereon, and the stock so purchased belonged to said corporation, subject to the control of the remaining stockholders, who have never made any legal or equitable disposition thereof.

Between November 10, 1874, and April 10, 1875, the market value of the company's stock was from one dollar to five dollars per share. But notwithstanding its market value, of which the personal defendants had full knowledge, and be-



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Opinion of the Court—Leonard, C. J.

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ing a majority of the trustees, and being the owner having the control of a majority of the shares of the stock, they entered into a fraudulent conspiracy to cancel the remaining stockholders out of said fifteen thousand two hundred shares so purchased by said corporation at assessment sales; and in pursuance of such conspiracy, while acting as a board of trustees of said company, at a meeting of said board, on the sixteenth day of November 1874, did fraudulently and unlawfully appropriate to their own use and benefit thirteen thousand five hundred and fifty out of said fifteen thousand two hundred shares of stock, and did cause the same to be issued to them in their own names, without the permission or consent of the remaining stockholders, and in order to make such issue, did fraudulently and unlawfully cancel thirteen thousand five hundred and fifty of the fifteen thousand two hundred shares so belonging to the stockholders of said company, and ever since have refused, and do still fail and refuse to account to the remaining stockholders for said thirteen thousand five hundred and fifty shares or for the market value thereof at the time of such fraudulent appropriation, issue, and cancellation.

On and before November 16, 1874, plaintiff (Marshall) owned, and had standing upon the books of said corporation three thousand five hundred shares of its stock, and subsequently, but during the same month, became the owner of eight hundred additional shares, and now owns, in his own name, four thousand one hundred shares, besides one thousand five hundred shares in the name of plaintiff V. Between the time plaintiff Marshall became a stockholder and the commencement of this action eight assessments aggregating ninety cents per share, were levied by the trustees, and prior to that time there had been levied assessments, aggregating twenty-two cents per share, in all thirteen assessments, and amounting to one hundred and twelve cents upon each share of the capital stock of said company.

Prior to the commencement of this action (as appears from the company's books) its total receipts from assessments and from the sale of property belonging to it amo

to over thirty-one thousand dollars in gold coin, while its expenditures did not amount to more than twenty-one thousand dollars, leaving a balance of surplus funds belonging to said company of over ten thousand dollars, beyond its present liabilities.

Between May, 1874, and the commencement of this action defendants Gallagher, Hymers, D. Lachman, and Lippman constituted a majority of the board of trustees, but since about December 10, 1875, said board has consisted of said defendants and defendant Cohn, who, during their terms of office up to the commencement of this action, have had the entire management and control of all the business of said company. Although little, if any, labor has been done on the mine since August 10, 1875, still subsequent to that date, four assessments of ten cents per share each have been levied, three of which have been paid in full by plaintiffs, and the fourth, levied October 11, 1877, upon all of plaintiffs' stock, except three hundred and ten shares belonging to plaintiff Donahue, is now delinquent and is advertised to be sold to pay the delinquent assessment thereon and costs, and still be sold on the twenty-seventh day of December, 1877, unless said sale is restrained by order of this court.

The defendants last above named, constituting said board of trustees, and B. Lachman, since November 16, 1874, have had and now have standing in their names upon the books of the company twenty thousand shares of the capital stock thereof, all of which they claim to own and since said date have controlled. Having had control of a majority of the capital stock they have controlled the election of all the trustees, and have thereby fraudulently conspired to levy and collect fraudulent assessments from the remaining stockholders, and have levied and collected the same. They have fraudulently failed, neglected, and refused to pay the assessments due on the stock so held by them, and have levied such assessment for the purpose of obtaining money from the remaining stockholders, which money they have appropriated to their own uses and purposes; and also for the purpose of obtaining the ownership of the stock of the

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remaining stockholders, by purchasing the same at delinquent sale, for the ostensible benefit of the company, and appropriating the same to their own use and benefit.

In pursuance of such unlawful conspiracy, and for such fraudulent purposes, defendants Gallagher, Hymers, Lippman, Cohn, and D. Lachman have levied and caused said last or thirteenth assessment to be levied, for the collection of which, all the stock standing on the books of said company in the names of plaintiffs (except the three hundred and ten shares of the plaintiff Donahue) is advertised to be sold as delinquent on the twenty-seventh day of December, 1877, as aforesaid. During the whole time said Lippman has held the office of secretary, he has failed to keep any cash book showing the receipts and disbursements of said company, with the intent to conceal from the remaining stockholders the fraudulent and unlawful acts hereinbefore set forth; and during the whole time, defendant D. Lachman, with like intent, as treasurer of said company, has failed to keep books of account showing the amount of money received by him from or on behalf of said company; such neglect and failure were in direct violation of the by-laws of the company, and were within the full knowledge of all the members of said board of trustees.

Said board of trustees caused said secretary and treasurer to fail to neglect to keep proper books of account, as aforesaid, for the purpose of concealing from the remaining stockholders the unlawful and wicked conspiracy hereinbefore set forth.

The rights and equities, claims and demands of the plaintiffs and the remaining stockholders, and in favor of said company, herein set forth, can not be enforced by suit brought in the name, and in behalf, of said company, for the reason that the control and management thereof is, and since October, 1874, has been wholly in the hands of defendants Gallagher, Hymers, Lippman, D. and B. Lachman, and Cohn, and plaintiffs are wholly unable to procure the bringing of a suit in the name of said company against the defendants above named.

All the misconduct, willful neglect, conspiracy, and



frauds, hereinbefore set forth, of said defendants, have only come to plaintiffs' knowledge within the last thirty days, and this action is brought by plaintiffs against defendants, on behalf of themselves and all other stockholders of said corporation, who may choose to come in and contribute to the costs and expenses of this action.

The thirteenth assessment levied, and under which the stock of plaintiffs is advertised to be sold, as aforesaid, is wholly unnecessary for the purposes of said company, but was levied by said defendants Gallagher, Hymers, Lippman, D. Lachman, and Cohn, for the sole purpose of obtaining the money to be derived therefrom for themselves and for their own uses and benefit.

Wherefore plaintiffs pray that the said defendants be perpetually restrained and enjoined from selling the said stock of plaintiffs as delinquent under the said assessment levied October 11, 1877; that during the pendency of this action, defendants Gallagher, Hymers, Lippman, D. Lachman, and S. Cohn, be restrained and enjoined from acting as trustees of said corporation; that they and B. Lachman be ordered to account for all receipts and expenditures of said corporation during the time they or either of them have had control of the same; and that a referee be appointed to take such account and report the same when ascertained; that all of said defendants last named be ordered to pay over to the said company any and all assessments upon their stock which may be found to be due and unpaid thereon; that upon the said accounting, if any surplus funds, over and above what are required to meet the existing liabilities and necessities of the company remain, the same may be distributed *pro rata* among the *bona fide* stockholders of said company; that said plaintiffs have judgment against defendants Gallagher, Hymers, Lippman, D. and B. Lachman, and S. Cohn, for the market value of one fifth of said thirteen thousand five hundred shares fraudulently appropriated, as aforesaid, by said defendants, to wit, thirteen thousand five hundred dollars, for costs; and for such other and further relief as to the court may seem just and as equity and the nature of the case may require.

Defendants demurred to the complaint upon two grounds, namely, that there was a misjoinder of parties defendant, and that it did not state facts sufficient to constitute a cause of action. Demurrer was overruled and defendants answered, denying all allegations of fraud; or that they had fraudulently or otherwise appropriated any stock of the company; or levied any assessment or collected or disbursed any money, except for what appeared to them to be for the best interest of the corporation; or that they had not paid their full share of assessments and otherwise borne their proportion of the burdens of the corporation; or that they had taken any advantage of plaintiffs, by reason of owning a majority of the capital stock.

They admit that they are the owners of twenty thousand shares of stock, but deny that on the sixteenth day of November, 1874, the stock of the company had a market value of from one dollar to five dollars per share, or that it then or ever had any regular market value, except such sums as parties desiring to purchase chose to pay for the same.

They deny that on or before November 16, 1874, the corporation had purchased exceeding fourteen thousand six hundred shares, which are admitted to have been sold by orders of the board of trustees, alleged to have been regular and legal, and for a sum alleged to have been a reasonable and fair price therefor.

They admit that the amount of assessments collected before the commencement of this action was thirty-one thousand two hundred and fifty-five dollars, but allege that the expenses of the corporation paid by the board of trustees were thirty-seven thousand nine hundred and ninety-six dollars; that the thirteenth assessment was levied, and the stock advertised to be sold, in order to pay outstanding indebtedness of the company; and that without such sale defendants would suffer great loss and damage.

They also allege that the corporation defendant is, and for a long time has been, engaged in expensive litigation; that it has no other means of raising necessary funds than by levying assessments upon its stock, and if restrained from levying assessments and selling delinquent stock the defend-

ants will be unable to protect the interests of the corporation in said action and be subjected to expensive litigation on behalf of their creditors, and in danger of losing their property.

Subsequently D. Z. Yost filed his petition or complaint as intervenor against the same defendants, claiming to be the owner of fifteen hundred shares of stock, alleging the same facts, substantially, as are stated in plaintiffs' complaint, and praying for the same relief, except as to the amount claimed as his proportion of the market value of the thirteen thousand five hundred shares alleged to have been fraudulently appropriated by the personal defendants. No answer or demurrer to intervenor's petition was filed.

The cause was referred to a referee to take the testimony and report findings and judgment, which was done, and the judgment was entered as the judgment of the court. This appeal is taken from an order granting a new trial; from an order denying plaintiffs' and intervenor's motion to dismiss defendants' motion for new trial; from an order amending the records of the court, and from an order denying plaintiffs' and intervenor's motion to amend their complaints so that they should conform to the findings of the referee. We shall treat the intervenor as one of the plaintiffs, and consider his case the same as though an answer to this petition had been filed. No default was taken by him, and one of defendants' counsel admits in his brief that, the case was tried the same as if an answer had been interposed, and that the answer to the complaint was treated as the answer to the petition of intervention. Such being the case, defendants can not complain because the relief granted exceeded that demanded in the petition, if that which was granted was consistent with the case made and was embraced within the issue.

It is claimed that the court erred in granting a new trial, for many reasons; and first, because there was no statement settled according to law, it having been settled by the judge instead of the referee, who tried the cause. We are referred to no authorities upon this point, and can find none under a statute like ours. If there was a rule of court requiring

the statement to be settled by the referee, as stated by counsel for appellants, we can not know the fact, as the rule is not embodied in the statement. In the absence of evidence to the contrary, every presumption is in favor of the regularity of the proceedings in the court below. (*Allen v. Riley*, 15 Nev. 452; *Rutherford v. Pope*, 15 Md. 581; *Cherry v. Baker*, 17 Id. 77; *Scott v. Scott*, Id. 78.)

In applications for new trials, the statute provides that, after the statement and amendments thereto have been filed, in case the amendments are not accepted, "either party may have the statement settled by the judge or referee, upon two days' notice thereof to the other party;" and that, "when settled by the judge or referee, it shall be accompanied with his certificate that the same has been allowed by him, and is correct." (Comp. L., sec. 1258.)

Section 1393 provides that, the statement and amendments on appeal "shall be presented to the judge or referee *who tried or heard the case*," and it is claimed that, the words, "who tried or heard the case," are clearly implied in section 1258. The sections relating to statements on motion for new trials and those on appeal, are different parts of the same statute; still, they are entirely independent of each other. The subject-matter differs, and both are complete in themselves. The legislature has seen fit to declare, in one case, that the statement *may* be settled by the judge or referee, and in the other, that it *shall* be settled by the judge or referee who tried the case. When, as in this case, all the proceedings are reported to the court by the referee, it may be entirely proper for the court to settle the statement. We can not say the legislature did not intend precisely what the language used imports. To hold otherwise would necessitate an interpolation of words not required to complete the sense apparently intended, and the result would be judicial legislation.

It is also claimed that a new trial ought not to have been granted, because no statement or affidavit was filed within the statutory period; and this claim involves the questions whether or not the court erred in its order amending the records as hereafter stated, and in its order denying plain-

tiffs' motion to dismiss defendants' application for a new trial, from which orders appeals are taken. In considering these questions, the entire statement on appeal is before us, because the orders mentioned are appealable (*Calderwood v. Peyser*, 42 Cal. 114), and, as before stated, appeals are taken therefrom. In fact, the only material matters contained in the statement on appeal, that are not in the statement on motion for new trial, are those appertaining to the amendment of the court's records.

Briefly stated, the facts affecting these questions are these: The judgment was entered April 22, and on the following day plaintiffs filed and served notice of referee's findings and judgment. On the same day defendants filed and served notice of motion for a new trial, and made two motions; and thereupon, as appeared by the clerk's minute book, the court ordered, first, "a stay of execution for five days, for the purpose of allowing defendants to file and serve notice for new trial;" and, second, "that a stay of execution be granted until May 20, 1879, to allow defendants to prepare, file, and serve statement on motion for new trial. On May 12, the court granted until May 30, inclusive, in which to file and serve the statement, and it was file and served on that day. Plaintiffs filed amendments to the statement, reserving the right to object to it on the ground that it was not filed and served in time; and on July 5, 1879, it was settled by the judge. On August 11, following, plaintiffs moved to dismiss the application for new trial, on the ground just stated; and on the twentieth of August, that motion and the motion for new trial were heard together. At the conclusion of the argument, counsel for defendants "moved the court to amend the record concerning the extension of time in which to file and serve statement, so as to conform to the truth, by showing the order made April 23, was, in fact, an order extending the time to prepare and serve statement on motion for new trial." That motion was verbal. Whereupon the motion to amend the record and the motion for new trial were continued for further hearing until August 30. On August 23 plaintiffs' attorneys were served with written notice of

motion to amend record, but it contained no notice of intention to amend the statement. On the thirtieth of August the court heard testimony in relation to the nature of defendant's motion of April 23, and the order made thereon; and referring to its own recollection and conscience in the matter, said: "The application of defendants' counsel, made on the twenty-third day of April, 1879, was for an extension of time until May 20, 1879, in which to prepare, file, and serve statement on motion for new trial, and the order then made was for such extension of time for said purpose." And it was then ordered by the court that "the record be so amended as to read, 'to extend time to prepare, file, and serve statement on motion for new trial.'"

Without deciding whether it is so in fact, we shall consider the order of April 23, as entered by the clerk, and as put in the statement on motion for new trial, as one not extending the time to file statement, and we shall not stop to inquire whether the record could have been amended if the April term had expired; although there is high authority that it might have been done even in that case. (*Spanagel v. Dellinger*, 34 Cal. 481; *Frink v. Frink*, 43 N. H. 514.)

There is no doubt that a court may amend its records during the term in which they are entered. Under the statute (1875, 119) the court had power to adjourn or extend the April term over the time fixed by law for the commencement of another term. If it did so, it had authority to amend the record in question. In the absence of any showing to the contrary, we must presume in favor of the regularity of the proceedings and the correctness of the rulings of the court below. We conclude, therefore, that the April term was extended, and that upon the proofs, which were conflicting, and the knowledge and conscience of the court, the record was amended so as to conform to the truth, and that the court had authority so to do.

Second. Was the refusal to dismiss defendants' application for new trial error?

No other reason has been given against the correctness of the court's ruling than this: It is said, "The motion for new trial rests entirely upon the statement made and settled

before the motion is heard; and the order of April 23, as it appears in that statement, shows that the time for filing it was not extended until more than five days after notice of motion for a new trial had been given, and consequently the right to a new trial was waived."

The action of the court in amending the record before granting a new trial being upheld, it follows that the statement was in fact filed and served in time; and, in law, the amended record, by relation, became the record of the court's order from the time it was made. Such being the case, it must be admitted that any objection to the effect that it was not so filed and served is extremely technical, and ought not to prevail, unless the law, or the well-established rule of practice, justifies that result.

The statute in relation to new trials (Comp. L. 1258) provides that, "On the argument reference may also be made to the pleadings, depositions, and documentary evidence on file, testimony taken and written out by a short-hand reporter \* \* \* and the minutes of the court. The statement thus used, in connection with such pleadings \* \* \* and minutes of the court as are read or referred to on the hearing, shall constitute, without further statement, the papers to be used on appeal from the order granting or refusing a new trial. \* \* \* To identify any depositions \* \* \* or minutes of the court, read or referred to on the hearing, it shall be sufficient that the judge designate them as having been read or referred to, in his certificate to be for that purpose by him made thereon." We quote the above for the purpose of showing that certain things specified, and among them the records of the court, may be acted upon in the trial court on a motion for a new trial, without being inserted in the statement, and that the only reason why a subsequent designation by the judge is required is that this court, on appeal from the order granting or denying a new trial, may know upon what the court below based its order. When there is no statement on appeal, the records of the lower court, etc., must be so designated or put in the statement; or this court can not consider them; but when there is a statement on appeal from an order,

there is another method of bringing here the records and papers used on the hearing in the court below. The statute provides that, "On an appeal from an \* \* \* order the appellant shall furnish the court with a copy of \* \* \* the order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified by the clerk to be correct."

In this case, by a statement on appeal properly settled by the judge and certified by the clerk, appellants present not only a copy of the amended order, but also copies of all the minutes of the proceedings of the court showing upon what the court below acted in making the amendment, thus producing a record in this court concerning the matters in hand, which imports the same verity as a statement on motion for new trial, accompanied with the same records designated by the judge according to the statute. The court had a right to act upon its own records in making its order. But having amended them without amending the statement, so that it should conform thereto, it was necessary that the facts upon which the court acted should be presented to this court, according to the requirements of the statute. That was done by a statement on appeal from the several orders appealed from. (See dissenting opinion of Mr. Justice Sawyer in *Quivey v. Gambert*, 32 Cal. 318-322, and *Spanghel v. Dellinger*, 34 Cal. 476.)

It is next urged that the only method of correcting the errors complained of by respondents, and especially those upon which the court below based its order granting a new trial, was by an appeal from the judgment, and that they could not be reached by a motion for new trial. One of the statutory grounds for a new trial is, "Insufficiency of evidence to justify the *verdict* or other *decision*, or that it is against law." One of the grounds stated by respondents in their notice of motion for new trial is, that "the *decision* and *decree* are against law." It is fair to presume that the word "decision," in notice, was used in the sense in which it is used in the statute. It has been decided by the supreme court of California, and, we think, correctly, that "the terms 'verdict, and decision,' as used in the statute,



are appositional; that what is predicated of one, is, also, of the other. There are two kinds of verdict—general and special. The first finds the law and the facts; the second, the facts alone. The findings of fact by a court or referee are like the special verdict of a jury; and the conclusions of law drawn therefrom are similar to a general verdict in a case wherein the jury have found a general and special verdict. It was decided in *Barnes v. Sabron*, 10 Nev. 248, that upon an application for new trial, under the statutory ground above stated, the court was authorized to decide whether the findings of fact sustained the judgment, and that its action in that regard could be reviewed by this court on appeal from an order overruling plaintiffs' motion for new trial. But the precise question there decided does not necessarily arise here, for in this case, if it be admitted that the findings of fact support the judgment, we are still met with this question: Is the decision of a court or referee against law, if its, or his, findings of fact and conclusions of law are outside of the issues raised, or the facts admitted, by the pleadings, when such findings and conclusions are followed by a judgment consistent with them, but inconsistent with the pleadings? If it is, it is the duty of this court to review the order granting a new trial in this case, as it was the duty of the court below to decide the question there. That a judgment must accord with, and be sustained by, the pleadings of the party in whose favor it is rendered is common learning; and no court, jury, or referee has any authority to find a fact or draw therefrom a legal conclusion which is outside of the issues. The statute is decisive of this question without reference to adjudicated cases. Section 1211 Compiled Laws provides that, "the relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." Mr. Bliss, in his Code Pleading, says: "The pleader should bear in mind the language of the rule, and that he will not be entitled to any relief that the evidence alone shows him entitled to. It is

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the rule in chancery, not affected by the code, that a party must recover according to the case made by the complaint, or not at all; '*secundum allegata* as well as *probata*.' "

In *Simmons v. Hamilton*, vol. 7, No. 23, p. 947, Pacific Coast Law Journal, it is said: "Upon the facts found, whether found by the finding of a court, or the report of a referee, or the special verdict of a jury, the court must decide the law of the facts before ordering judgment; and if its decision is contrary to, or inconsistent with, the pleadings in the case, or is, in any respect, contrary to law, a new trial should be granted." That was an appeal from an order granting a new trial. So, also, was *Martin v. Matfield*, 49 Cal. 44. There the appellants, in their notice of intention, put their motion upon the ground of "insufficiency of evidence to justify the *judgment*, and that it is against law." The court said that neither was a statutory ground. Mr. Justice Rhodes said: "The grounds of the motion should have been directed to the *finding*." \* \* \* "As was stated in passing on the question of the sufficiency of the notice of the motion, this ground is objectionable, because it does not attack the *finding*." And in *Shepard v. McNeil*, 38 Cal. 74, where a new trial was granted "on the ground that the plaintiff has entered a personal judgment against defendants," the court said: "Besides, it is no ground for a new trial of the issues of fact, that the *judgment* is broader than the facts alleged and found would justify. Such an error in no way affected the *findings*. The error occurred in entering the *judgment* subsequent to the *findings*. It did not occur in the course of the trial, but afterward, and it is, therefore, not one of the grounds for a new trial. There is no complaint that the *findings* were incorrect in this particular. The point is not specified in the statement as a ground for new trial. If there was any error in entering the *judgment*, the defendants have their remedy by appeal from the judgment itself on the judgment roll. The order granting a new trial on the ground stated is erroneous."

From the foregoing, as well as upon reason, we conclude that, if the *decision* or *finding* of a court or referee is against law, a new trial is the proper remedy, and that the

decision is against law if it is contrary to, or inconsistent with, the case made and embraced within the issue.

It becomes necessary, then, to examine the complaint in connection with the findings. We agree with counsel for appellants that the demurrer to the complaint was properly overruled. It stated a cause of action against the personal defendants, and under the circumstances alleged, it was proper to make the corporation a party defendant. (*Heath et al. v. Erie R. R. Co.*, 8 Blatch. 393 *et seq.*; *Hodges v. N. E. Screw Co.*, 1 R. L. 340.)

The complaint was ambiguous and uncertain in many respects, but those faults were waived by failing to demur specially. It is not necessary, therefore, to decide whether or not the question as to the sufficiency of the complaint can be considered except on appeal from the judgment. Nor do we think it necessary to decide whether or not the court was correct in holding, from the structure of the complaint and the character of relief sought, that plaintiffs waived the alleged torts, and that the action as to the thirteen thousand five hundred shares of stock was for its value, ratifying the sale to the defendants.

In the complaint it is alleged that in pursuance of an unlawful conspiracy the personal defendants had levied the thirteenth assessment, for the collection of which plaintiffs' stock was advertised to be sold, and would be sold, if the sale was not restrained. When the complaint was filed the sale had not taken place under that assessment, and the fourteenth was not heard of. No amended or supplemental complaint was filed. As to the last assessment and the sales thereunder the pleadings are silent, and there is no allegation or intimation of fraud in relation thereto.

The stock of plaintiffs and intervenor was bought in under these assessments by the corporation.

Under such pleadings the referee found as facts that, "assessments thirteen and fourteen were wholly unnecessary, had the trustees aforesaid faithfully administered the business of the company and faithfully used the funds realized by the twelve assessments previously levied; and that, since the commencement of this suit, the aforesaid

trustees have caused the stock of plaintiffs and intervenor to be sold on aforesaid thirteenth and fourteenth assessments." There is no finding that the thirteenth and fourteenth assessments were unnecessary, in fact, when they were levied—but only that they would not have been necessary if the trustees had been faithful to their trusts.

As conclusions of law the referee found that, "these two assessments were unnecessary; were made to defraud the stockholders and in order to sell their stock or compel them to pay assessments; that they were only needed because the defendants had failed to pay their assessments on the stock held by them, or otherwise had converted the money so collected to their own use; that the two assessments were fraudulent and void; that plaintiffs were entitled to have them so declared, and all sales thereunder set aside and annulled, and all stock held in said company restored to its owners at the time of, and prior to, any sales under said assessments." The decree was entered accordingly.

It is hardly claimed by counsel for appellants that the issues made by the written pleadings justified the action of the referee; but it is said that the respondents introduced evidence in relation to assessments thirteen and fourteen, and thereby submitted an "implied" issue to the referee upon which it was his duty to find; that they defended the case upon the theory that the averments in the complaint were sufficient to authorize an investigation of the affairs of the company up to and including the sale under assessment fourteen, and that having taken the chances of introducing the evidence under the pleadings, they must abide the result. This theory of pleading finds no support in the statute, in adjudicated cases, or in reason. Pleadings are the formal allegations by the parties of their respective claims or defenses, and in the district court must be in writing: "Every pleading shall be *subscribed* by the party, or his attorney." (Comp. L. 1114.) Civil actions are commenced by *filing* a complaint and issuing a summons (Comp. L. 1085); and "the complaint shall contain \* \* \* a statement of the facts constituting the cause of action in ordinary and concise language." (Comp. L. 1102.)

"The court can not, properly, even by consent of parties, pass upon questions not raised by the written allegations of the pleadings." (*Boggs v. Merced M. Co.* 14 Cal. 356; see *Swan v. Smith*, 13 Nev. 260; Bliss on Code Pleading, secs. 135, 138.)

It is undoubtedly the law that defective pleadings are sometimes cured by verdict or other decision. In *McAllister v. Howell* (42 Ind. 26), no replication was filed to an affirmative answer, and it was held that inasmuch as the cause had been tried without a replication, the answer should be deemed to have been *controverted* on the trial in the same manner as if a replication had been filed.

In *Smith v. Burns*, 8 Kan. 201, the court say: "We think the statement in the petition was defective, and should have been held so if it had been attacked at the proper time and in the proper manner. But the objection now comes too late. The petition was not defective because it failed to state some material fact, but it was defective because it stated a material fact in a defective manner. \* \* \* It is a general principle of law that where a material fact is stated in a pleading, but stated defectively, the defect will be cured by a verdict of the jury or a finding of the court."

The general doctrine is well stated in *Dickinson v. Hays*, 4 Blackf. 45: "The doctrine is now settled that if there is a cause of action stated, although it may be ambiguously, inaccurately, and defectively stated, yet a general verdict cures the defects, because it will be presumed that all circumstances, both in form and substance, necessary to complete the cause of action thus defectively stated, were proved at the trial. But where there is no cause of action stated, as in cases of this kind, if the contract or the consideration be entirely omitted, the omission is not cured, for the party could not be allowed to prove that which he had entirely omitted to state, and therefore no presumption in his favor could arise." (See *Barron v. Frink*, 30 Cal. 489.) Here no cause of action was stated, or attempted to be stated in relation to the fourteenth assessment, and as to the thirteenth there were no allegations except as above set forth.

But, aside from the law, it is far from true, judging from the record, that defendants defended the case upon the theory that the complaint was sufficient to authorize an investigation of the affairs of the company up to and including the sale under the fourteenth assessment. On page 110 of the transcript it appears that, "the defendants objected to any examination of the affairs of the company after the filing of complaint December 26, 1877," and thereupon the referee ruled that, "all transactions since filing of complaint will be rejected, except where embodying transactions before suit, and the items afterwards will be considered and treated as surplusage, incidentally connected with matters occurring before suit." No objection was made or exception taken to this ruling, which was undoubtedly correct, under the pleadings. Subsequently (page 379) defendants made the same objection, and a ruling was reserved. Again (page 111), plaintiffs objected to a question for the same reason. Again (page 256), plaintiffs objected to Exhibit L, as incompetent, and that all items in the account subsequent to the commencement of this suit should be disregarded. On page 258 defendants objected to questions upon same ground. It is true that some evidence was admitted concerning matters subsequent to December 26, 1877, but both parties had a right to think it would be considered as stated by the referee at page 111.

From a legal standpoint, what has been said concerning the two assessments, etc., is equally true in relation to the stock alleged to have been fraudulently appropriated. Defendants are charged with appropriating thirteen thousand five hundred shares only, while the referee found that they had appropriated fifteen thousand seven hundred shares, and in addition, had purchased for the company six thousand two hundred and forty shares at delinquent sales, making in all twenty-one thousand nine hundred and forty shares purchased before this suit was brought, while they were only charged with having purchased fifteen thousand two hundred shares. The sale of the entire fifteen thousand seven hundred shares was declared void, and plaintiffs were found entitled to recover the same for the company, except

such shares as had been restored to the company at subsequent delinquent sales. It was found that plaintiffs' and intervenor's title to six thousand five hundred shares was valid; that five hundred shares standing in the names of defendants on the twenty-first of November, 1874, by valid purchase, should be canceled as the source of title to the five thousand shares, and that all sales or transfers of any portion of said twenty-one thousand nine hundred and forty shares were void. In the particulars specified, especially, we think the decision of the referee was not justified by the pleadings, and consequently that it is against law.

In this connection it is proper to say also, that we are of opinion the referee erred in declaring the assessment of stock under the thirteenth and fourteenth assessments and sales thereunder invalid, because the trustees had previously misappropriated the funds, admitting that they did so. It was not disputed that the company had no funds, and that they were needed for legitimate purposes was not denied. Had the trustees become possessed of the stock in pursuance of a fraudulent conspiracy, equity would not permit them to enjoy their ill-gotten gains. But the company bought in the stock, and so far as the record shows, held it at the time of the trial. If the levy and sale were unlawfully made, they might be set aside under proper pleadings, perhaps, but we are unable to see that they were invalid under existing circumstances, because the trustees had previously misappropriated the company's funds, thereby causing the existing necessity. Had the trustees stolen the funds, the company's necessities would have been as urgent as they would have been if others had committed the theft, without the fault of the trustees. If other trustees had been elected immediately before the thirteenth assessment was levied, and finding an empty treasury, had levied the thirteenth and fourteenth assessments, and had sold delinquent stock thereunder to the company, in the absence of other purchasers, it would hardly be claimed that the sales would have been void, for the reason that previous trustees had misappropriated the funds of the company. If the trustees did what they are charged with doing, they

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Points decided.

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are responsible for their malfeasance, but the sales were not void because they supplied funds then required, which would not have been necessary if they had been faithful to their trusts. Finally, did the court err in denying plaintiffs' application to amend their complaint, so that it should conform to the findings of the referee? We are unable to say, and so was the court below, the defendants expected, or had reason to think that, the affairs of the company, subsequent to the commencement of the action, would be inquired into with the view of arriving at a judicial settlement of the same, or that the case was, in fact, tried upon that theory. The contrary plainly appears. Such being the case, it would have been an unwarrantable exercise of power to have permitted the amendment at the time it was asked. For the same reason we can not attempt to settle the rights of the parties from the facts before us, however desirable it may be to do so.

The orders appealed from are affirmed.

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[No. 1,043.]

**S. BUCKLEY, APPELLANT, v. ARMINA BUCKLEY, ADMINISTRATRIX OF THE ESTATE OF HENRY A. BUCKLEY, DECEASED, RESPONDENT.**

**MARRIAGE OF ADMINISTRATRIX OF AN ESTATE—EFFECT OF.**—Defendant, prior to the trial, married J. V. Peers: *Held*, that this marriage extinguished her authority as administratrix of the estate, but did not deprive her of the right to retain possession of the property of the estate until the appointment of her successor, or until otherwise ordered by the court.

**IDEM—POSSESSION OF PERSONAL PROPERTY—PRESUMPTION.**—At the time this action was commenced, defendant, as administratrix, had the right of possession to a band of sheep: *Held*, that her possession having been lawful while her authority as administratrix continued, the presumption is, nothing to the contrary appearing, that it continued lawful after her marriage, especially against a wrong-doer.

**PARTIES TO SUIT—HUSBAND OF ADMINISTRATRIX—UNPREJUDICIAL ERROR.** *Held*, that even if the court technically erred in refusing to make the husband of the administratrix a party defendant, it was an error that did not prejudice the rights of the plaintiff.

**BOOKS OF ACCOUNT—WHEN ADMISSIBLE IN EVIDENCE.**—A memorandum book kept by the deceased, which was shown to be principally in his



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Argument for Appellant.

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handwriting, and the entries made about the time when the transactions occurred, and the book one by which the deceased settled with parties with whom he had business: *Held*, admissible in evidence.

APPEAL from the District Court of the Second Judicial District, Washoe County.

Upon the part of the defendant, among other things, a certain memorandum book was offered in evidence; defendant, who was the only witness as to the time when entries were made, gave testimony tending to show that the entries were made by Henry A. Buckley and witness, and principally in deceased Henry A. Buckley's life-time, and all of them at about the time the respective transactions occurred; that it was the book by which deceased settled with other persons with whom he had business; that witness knows the book and that it is Henry's book of accounts, in which he kept his dealings with other persons in his handwriting and in defendant's; that he was in the habit of making his entries generally when the transactions which they alluded to occurred; that defendant knows when entries were made in relation to the number of sheep received from plaintiff and as to number of sheep returned to him, and that defendant was present at the time such entries were made by Henry A. Buckley, and saw him make them; that entry dated November 12, 1870, was in Henry's handwriting, but defendant could not be sure she was present when this entry was made.

*Lewis & Deal*, for Appellant:

I. The marriage of defendant operated as a revocation of her authority. (1 Comp. L., sec. 536; 14 Mass. 295; 36 N. Y. 622.)

II. The court should have allowed the plaintiff to make defendant's husband a party. (5 Paige, 34.)

III. It was error to admit in evidence the memorandum book of Henry A. Buckley. (1 Greenl. Ev., sec. 119, n.; 4 Watts, 258; 9 Conn. 344, 348; 4 Yates, 341; 2 Bay, 173; 2 McCord, 328; 4 Id. 76.)

IV. The action is brought against Armina Buckley in-

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of the estate which had come into her possession; and for a failure so to do she is liable. From the verdict of the jury the plaintiff had no more right to the possession of this property than any other stranger. His taking and detention were wrongful, although he observed the forms of law in so doing.

At the time this action was commenced, the defendant had the right of possession, by reason of her duty as administratrix to take control of the property of the estate; and at the time of trial, so far as the record shows, she was still entitled to its possession, because of her responsibility to the estate. Her possession having been lawful while her authority as administratrix continued, nothing to the contrary appearing, the presumption is that it was lawful after her marriage, especially as against a wrong-doer. (Wells on Replevin, 69, 71.) Having no rights in the property, plaintiff's duty was to return it to defendant's rightful possession, to be accounted for by her as required by law. This much is true upon the supposition that she had merely a special property in the sheep, by reason of her former official capacity, and her liability to the estate, in case of failure to account for them according to law, while, if she had a general property in them, because of her relation to Henry A. Buckley, that was another reason for awarding the right of possession to her. Besides, if the court erred, technically, in denying the motion to make Peers a party defendant, a question we shall not consider, it was an error that in no sense prejudiced the rights of plaintiff. If he had been made a party, the result, as to him, must have been the same. The jury would still have said that he had no rights in the property in dispute.

We are of opinion, also, that the preliminary proof was sufficient to justify the court in admitting in evidence the several entries contained in Henry A. Buckley's memorandum book. (*Buckley v. Buckley*, 12 Nev. 442.)

Finding no error in the record, the judgment and order appealed from are affirmed.

[No. 1,083.]

## W. C. GASS, APPELLANT, v. J. C. HAMPTON, RESPONDENT.

TRANSFER OF CERTIFICATES OF MINING STOCK—WHEN TRUE OWNER IS ESTOPPED FROM ASSERTING TITLE.—G. deposited with the Bank of Virginia certain certificates of mining stock which were issued, in the usual form, in the name of different parties, and indorsed by them, as trustees, to be held as collateral security for any indebtedness that then existed, or might thereafter be incurred, by reason of any purchase or sale of stock that the bank might make for G. Subsequently the bank, without the knowledge or authority of G., delivered these certificates of stock, with others, to H. as collateral security for the payment of a loan made by him to the bank and for any further advances that might be made. H. had no knowledge that G. was the owner of the stock: *Held*, that G. could not recover the value of these certificates of stock against H., who received the same in good faith, believing them to be the property of the bank.

IDEM—INDICIA OF OWNERSHIP.—A party who places another in a position to enable him to commit a fraud, should suffer the loss rather than an innocent person who deals with him on the faith of the usual indicia of ownership with which the true owner has invested him.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

*F. M. Huffaker* and *M. N. Stone*, for Appellant:

I. The stock in controversy is personal property, and the owner can follow it and recover the possession of it wherever found. (1 Hittell's Code and Stats. Cal., sec. 5324; 2 Comp. L., sec. 3397; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 623; *Weston v. Bear River M. Co.*, 5 Cal. 189; *Hawly v. Brumagin*, 33 Id. 399; *Atkins v. Gamble*, 42 Id. 99; *Brewster v. Levin*, Id. 147; *Boylen v. Huguet*, 8 Nev. 353; *Bercich v. Marye*, 9 Id. 315; *Brookman v. Rothschild*, 6 Eng. Ch. 153; Pars. Cont., note.)

II. The bank held the stock as agent or broker of plaintiff, consequently with no power of disposition of it, except by direction of plaintiff, therefore no authority to pledge it for a debt of its own, and any such pledge conveyed no title to the pledgee as against the owner. (*Dunlap's Paley on Agency*, 213; *Patterson v. Tash*, 2 Stra. 1178; *Daubigny v.*

## Argument for Appellant.

*Duval*, 5 T. R. 604; *De Bouchout v. Goldsmid*, 5 Ves. Jr. 211; *Urquhart v. McIver*, 4 Johns. 103; *Van Amringe v. Peabody*, 1 Mason, 440; *Kinder v. Shaw*, 2 Mass. 398; *Odiorne v. Maxcy*, 13 Id. 181; *Jarvis v. Rogers*, 15 Id. 398; *Newbold v. Wright*, 4 Rawl. (Penn.) 195; *Queiroz v. Truman*, 3 Barn. & Cress. 342; *Stevens v. Wilson*, 6 Hill, 513; *Learoyd v. Robinson*, 12 M. & W. 745; *Rodriguez v. Hefferman*, 5 Johns. Ch. 429; Story on Bailments, secs. 325-6; *Hoffman v. Noble*, 6 Metc. (Mass.) 74; *Warner v. Martin*, 11 How. (U. S.) 209; *Holton v. Smith*, 7 N. H. 446; Story on Agency, sec. 113, note 5; *Beach v. Forsyth*, 14 Barb. 499; *Blackman v. Green*, 24 Vt. 17; *Benny v. Pegram*, 18 Mo. 191; *Fahnestock v. Baily*, 3 Metc. (Ky.) 48; 2 Kent's Com. 625; Edwards on Bailm. 214; *McCombie v. Davies*, 6 East, 538; *Wright v. Solomon*, 19 Cal. 64; *Putnam v. Lamphier*, 36 Id. 158; *Hamilton v. Kennedy*, 59 Tenn. 476; *Everett v. Saltus*, 15 Wend. 474.)

III. The Bank of Virginia having possession of this stock had no authority to dispose of it to another, since possession alone does not confer title to personal property, being no indication of ownership. (*Brewster v. Sime*, 42 Cal. 147; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 329; *Covill v. Hill*, 4 Denio, 323; *Ballard v. Burgett*, 40 N. Y. 314; *Cushman v. Thayer Man. Co.*, 76 Id. 370, *et seq.*; *Weaver v. Barden*, 49 Id. 287.)

IV. Defendant receiving this stock of the manager of the Bank of Virginia, and out of the usual course of the business of the bank, which was to buy and sell stock for its customers in the San Francisco market, acquired no title to it as against the plaintiff, the owner. (*Saltus v. Everett*, 20 Wend. 276; *Dame v. Baldwin*, 8 Mass. 518; *Wheelwright v. Depeyster*, 1 Johns. 479; *Hasach v. Weaver*, 1 Yeates, 478; *Easton v. Worthington*, 5 Serg. & R. 130; *Browning v. Magill*, 2 Har. & J. 308; *McGrew v. Browder*, 7 Mart. (La.) 17; *Roland v. Gundy*, 5 Ohio, 202; *Lance v. Cowan*, 1 Dana (Ky.), 195; *Ventress v. Smith*, 10 Pet. 161; *Hoffman v. Carow*, 22 Wend. 318; *Putnam v. Lamphier*, 36 Cal. 158; *Treadwell v. Davis*, 34 Id. 606; *Lyle v. Baker*, 5 Binn. 457; *Heyden & Smith's case*, 6 Co. 486; *Ingersoll v. Vanbokkelin*, 7 Cow. 670; *Pomeroy v. Smith*, 17 Pick. 85.)

V. The judgment in this action deprives the plaintiff of his property without his consent and without due process of law, and is therefore erroneous. (*Covill v. Hill*, 4 Denio, 327; *Silsbury v. McCoon*, 4 Id. 332; *Wilson v. Little*, 2 Coms. 443.)

VI. The defendant took this property from an agent, out of the usual course of business of said agent, which defendant at the time knew, or was put upon such inquiry as to charge him with notice. (*Berry v. Anderson*, 22 Ind. 36; *Davenport v. Peoria Ins. Co.*, 17 Iowa, 276.)

VII. The principle of estoppel *in pais*, on which the case of *Stone v. Marye* was decided, does not apply to this case, and the plaintiff has done no act by which defendant was induced to act with reference thereto, and on the faith of which he did act, which is absolutely essential to constitute an estoppel, which can never be invoked in favor of one who deals with an agent out of the usual course of business of such agent. (*Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616; *Bigelow on Es.* 345, 437; *People v. Brown*, 67 Ill. 435; *Stevens v. Dennett*, 51 N. H. 324; *Cushman v. Thayer M. Co.*, 76 N. Y. 370.

C. H. Belknap, for Respondent:

The plaintiff having allowed the Bank of Virginia to appear as the true owner of the certificates of stock, is estopped from asserting his title to the same as against defendant, who had no knowledge of his claim. (*Brewster v. Sime*, 42 Cal. 139; *Thompson v. Toland*, 48 Id. 99; *Crocker v. Crocker*, 31 N. Y. 507; *McNeil v. Tenth Nat. Bank*, 46 Id. 325; *Moore v. Metropolitan Nat. Bank*, 55 Id. 46; *Holbrook v. N. J. Zinc Co.*, 57 Id. 616; *Stone v. Marye*, 14 Nev. 362.

By the Court, HAWLEY, J.:

This is an action of claim and delivery for certain mining stocks. The material facts are as follows: On or about the twelfth of August, 1879, Gass deposited with the Bank of Virginia, a corporation engaged in the business of buying and selling mining stocks on commission, certain certificates of stock, of which he was the owner, for safe keeping.

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These certificates of stock were in the usual form, and were issued in the name of different parties, and indorsed by them as "trustees." Within a short time after the deposit was made, Gass became indebted to the bank for money loaned and advanced, and for interest and expenses in the purchase and sale of mining stocks, and requested the bank to hold the certificates as collateral security for the payment of any indebtedness that then existed, or might thereafter accrue to the bank, by reason of any purchase or sale of stock that he might desire to make.

On the fourteenth of August, 1879, the firm of J. C. Hampton and Co., of which defendant is a member, advanced and loaned to the Bank of Virginia, in addition to other money then due from it, the sum of two thousand dollars, and in consideration of said loan the bank, without the knowledge or authority of Gass, within a day or two thereafter, delivered the stock, which belonged to Gass, to J. C. Hampton & Co., as collateral security for the payment of said loan and the other indebtedness then due, or by reason of their business transactions of like character thereafter to become due.

At the time of these transactions it was the custom in Nevada and in California to deal in mining stocks and transfer certificates by indorsement in the manner in which the certificates in question were indorsed.

Neither Hampton nor the firm of which he is a member had any notice or knowledge of the ownership or claim of Gass to said certificates of stock until some time after the failure of the bank, when Gass tendered to Hampton the amount he owed the bank, and demanded the stock, and upon the refusal of Hampton to deliver it this suit was brought for its recovery. At the time the demand was made the certificates were held by J. C. Hampton & Co. as security for the indebtedness of the bank to said firm, which exceeded the value of all stocks held by them, and exceeded the amount that could be realized by a sale of the stocks.

Upon the facts, as found by the court, and sustained by the evidence, we are unable to distinguish this case from

that of *Stone v. Marye*, 14 Nev. 362, in so far as the application of the legal principles therein announced are concerned.

Hampton was a stranger to the business operations of the bank. He made no inquiry, and the law did not, upon the facts presented, require him to make any inquiry, whether it was depositing its customers' stocks or its own. The bank had the right to pledge its own stocks for its individual debt, and a transaction of this kind is not outside of the usual course of business. There was nothing in the mere fact of depositing this stock as collateral security with Hampton & Co. to put them upon inquiry as to the ownership of the stocks. There was nothing upon the face of the certificates to raise a suspicion that they were not the property of the bank. There is nothing in the record to show that Hampton & Co., or Hampton, knew, or ought to have known, that the bank did not own the stock, or that Gass, or any person other than the bank, did own it. The record does, affirmatively, show that Hampton & Co. received the certificates in good faith, without any notice or knowledge of the claim or ownership of Gass.

When Gass deposited his stock he knew, or ought to have known, that it was the custom of brokers to transfer certificates of stock that were indorsed in the manner his were by delivery.

By his own voluntary act he left his certificates of stock with the bank in such a condition as to pass by delivery, with nothing on their face to indicate that he had any interest in them, or that they were not the property of the bank, and thereby enabled it to treat the certificates as its own, and to wrongfully obtain the loan of money thereon from parties innocent of the true state of the title. He clothed the bank with such an apparent ownership as to enable it to mislead the public and to hold itself out to the world as the true owner, and thereby to defraud innocent persons dealing with it in good faith.

Under these circumstances the case comes clearly within the principle, announced in *Toland v. Thompson*, 48 Cal. 112, that "the party who places another in a position to

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enable him to practice the fraud should suffer the loss rather than an innocent person who deals with him on the faith of the usual *indicia* of ownership with which the true owner has invested him."

If Gass had desired to protect his rights against the use which the bank might make of his stock, he should—as he readily could—in some proper method, have placed it out of the bank's power to deal with the stock as its own. It is to be presumed, from his acts, that he selected the bank because he had confidence in its managers, and did not believe they would wrongfully use his property. He reposed his confidence in the bank. To it he must look for redress. He can not now, upon any principle of equity, be allowed to hold an innocent party responsible for the loss which resulted to him from the improper and wrongful act of the party in whom he confided.

Counsel for appellant have cited numerous authorities to show that certificates of mining stock are personal property, and non-negotiable; that no person can transfer any other interest in personal property than he, or his principal for whom he acts, is possessed of; that no person can be divested of his property without his own consent, and that an honest purchaser, under a defective title, can not hold the property against the true owner. As a general proposition these "fundamental principles" are unquestionably correct. The bank had no right to hypothecate the stock without the consent of Gass, and it must be conceded that as a general rule, applicable to personal property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. This principle applies to transfers from one party to another where no other element intervenes. But this rule does not, as was said by the court of appeals in *Mc Neil v. The Tenth National Bank*, 46 N. Y. 329, "interfere with the well-established principle that where the true owner holds out another, or allows him to appear, as the owner thereof, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title



or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." The fact, apparently relied upon by appellant's counsel, that the stock "did not stand on the books of the company in the name of the bank of Virginia, nor had the bank of Virginia title by assignment from Gass, the owner," "nor did the bank have any power of attorney from plaintiff, the owner, to have the same transferred or to dispose of it in any way," or that "Gass did not deposit this stock with the bank of Virginia, to secure an account he owed it, with a blank assignment and power of attorney signed by him," do not distinguish this case in principle, from those cited in *Stone v. Marye*.

The bank had the same absolute power to hypothecate the certificates, indorsed by the respective trustees to whom the same were issued, as it would have had if the stock had been issued in its own name, or to Gass, and by him assigned to the bank. In the condition in which the certificates were left with the bank, it could, at any time, have caused the certificates to be transferred on the books of the respective corporations in its own name, and any purchaser or pledgor could have done the same. By the act of Gass the bank was clothed with the usual *indicia* of the ownership of mining stock, and the real point of inquiry here, as it was in *Stone v. Marye*, is whether the plaintiff did confer upon his brokers such an apparent title to, or power of disposition over, the certificates of stock as to estop him from asserting his own title as against parties who took *bona fide* through the brokers.

The cases of *Brewster v. Sime*, 42 Cal. 139; *Thompson v. Toland*, *supra*, and *McNeil v. The Tenth National Bank*, *supra*, upon the authority of which *Stone v. Marye* was decided, were cases concerning stock transactions that can not, in the application of legal principles, be distinguished from the case at bar.

The same principle was applied in the Pennsylvania Rail-

road Company's appeal by the supreme court of Pennsylvania. The executrix of an estate took certain certificates of stock, with blank power of attorney signed on the back, in the railroad company, and deposited them for safe-keeping with one Creeley, who, at that time, was a lawyer in good standing, and was acting as the legal adviser of the executrix, and had been for several years collecting the dividends of the estate.

Creeley secured a loan for himself from an innocent party, and pledged the certificates of stock as collateral security therefor, without the knowledge or consent of the executrix. The loan was not paid, and the party who held the certificates of stock as collateral security took them to the office of the railroad company and had the stock transferred to himself, and he subsequently disposed of the same. The executrix sought to hold the railroad company liable upon the ground that it was negligent in not making inquiries as to the true ownership of the stock. The court, in deciding the questions raised upon this branch of the case, said:

"But there certainly was negligence on the part of the appellee. As executrix she placed the certificates in the hands of Creeley, as her attorney, with the blank powers indorsed uncanceled. Thus by her act he was enabled to commit this fraud. The equities of the respective parties are not equal. Where one of two parties, who are equally innocent of actual fraud, must lose, it is the suggestion of common sense, as well as of equity, that the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other. As Judge King has well expressed this principle in *The Bank of Kentucky v. Schuykill Bank* (1 Pars. Eq. 248): 'The true doctrine on this subject is that, where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act.' The appellee in this case selected the attorney. She had entire confidence in him. She placed these certificates, with the blank powers, in his hands. He proved unworthy of the trust reposed in him.

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He perpetrated a gross fraud, by which he converted this property to his own use. That he was an attorney-at-law in good standing does not help her case. He added to the crime of which he was guilty that of moral perjury by the violation of his official oath. On what principle of equity can she be allowed to throw off from herself on to the appellants the loss which has resulted from the dishonesty of her own agent? This important element in the case was entirely overlooked by \* \* \* the court below; and we think, applying it to the undisputed facts of the case, the appellee's bill as to the appellants ought to have been dismissed." (86 Penn. St. 83.)

The facts do not show, as appellant claims, that the certificates in controversy were delivered to Hampton & Co. as security for the payment of an antecedent debt due from the bank to them, and the authorities cited upon this point have no application to this case.

The judgment of the district court is affirmed.

BELKNAP, J., having been of counsel at the trial of this cause in the lower court, did not participate in the foregoing decision.

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REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,  
JULY TERM, 1881.

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[No. 1,080.]

JACOB KLEIN, APPELLANT, v. JOHN H. KINKEAD,  
GOVERNOR, ET AL., RESPONDENTS.

**STATUTES TO EMBRACE BUT ONE SUBJECT—SECTION 17 OF ARTICLE IV. OF THE CONSTITUTION CONSTRUED.**—*Held*, that the general purpose of section 17 of article IV. of the constitution, that "each law shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title," is accomplished when a law has but one general object which is fairly indicated by its title.

**IDEM.—STATUTE 1881, 59, CONSTRUED—CARE OF INSANE.**—The "act to provide for the taking care of the insane of Nevada" provides for the construction of an asylum; that the money appropriated for that purpose shall be taken from the state school fund, and in its place there shall be deposited state bonds, bearing interest, etc., and provides for the levy and collection of a tax to meet the payment of said bond: *Held*, that the act embraces but one subject, the care of the insane, which is fairly expressed in its title.

**IDEM.**—The different steps by which the result is to be accomplished are not different subjects, but minor parts of the same general subject.

**BONDED INDEBTEDNESS OF STATE—SECTIONS 2 AND 3 OF ARTICLE IX. OF THE CONSTITUTION CONSTRUED.**—In construing these provisions of the constitution: *Held*, that the object in authorizing a bonded indebtedness was to enable the state to maintain its business upon a cash basis, and that the legislature has the power to direct the issuance of bonds at any time, so long as it does not conflict with the limitation as to the amount.

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Argument for Appellant.

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**IDEM—AMOUNT OF INDEBTEDNESS.**—In construing the various statutes relative to the territorial indebtedness: *Held*, that the act in question does not contemplate an indebtedness in excess of that authorized by the constitution.

**IDEM—SCHOOL FUNDS—SECTION 3, ARTICLE XI, CONSTITUTION.**—Under section 3, article XI., of the constitution, the legislature is commanded to invest certain moneys received for educational purposes in United States bonds or the bonds of this state: *Held*, that the issuance of the bonds provided for in the act in question is not an evasion of the investment directed by the constitution.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

C. S. Varian, for the Appellant:

I. The title of the act does not embrace the subject of sections 11 and 12. The act embraces more than one subject. Neither the purpose to make a state loan and public debt, nor to invest school moneys, is indicated by the title. It may be that members of the legislature who voted for the bill, as well as the people lured into security by its title, although willing to provide for the insane, would have found good and convicting objection to the contracting of a public debt, or the diversion of school moneys by a misnamed investment for such purpose. The ordinary mode of raising money to conduct and maintain the public business is by taxation. The question of contracting a public debt involves grave considerations of necessity and public policy. The rate of interest and time of payment, together with the taxation required to meet the obligation, all present questions of great interest to the people, and upon which they are entitled to be heard. This is also true of the question of investing school moneys. There is a general law on the statute book giving the management and control of school moneys to a state board of education. (2 Comp. L. 3322.) There is no language in the title of the act which is elastic enough to include the purposes and subjects embraced in sections 11 and 12. The courts can not enlarge the scope of the title. The constitution has made the title the conclusive index to the legislative intent as to what shall have

## Argument for Appellant.

operation. (*Mewherter v. Price*, 11 Ind. 199; *State v. Kinsella*, 14 Minn. 524; *Gaskin v. Meek*, 42 N. Y. 186; *People v. Allen*, Id. 404; *People v. Hills*, 35 Id. 449; *People v. O'Brien*, 38 Id. 193; *Ryerson v. Utley*, 16 Mich. 269; *Cutlip v. Sheriff*, 3 W. Va. 588; *People v. Father M. Society*, 41 Mich. 67; *Shepherd v. Helmers*, 23 Kan. 507; *State v. Silver*, 9 Nev. 227.) Three subjects are embraced in the law: 1. Providing for the insane; 2. Providing for a state loan; 3. Providing for the investment of school funds.

II. The loan authorized is not "for the purpose of enabling the state to transact its business upon a cash basis." (Secs. 2, 3, art. IX., Con.; sec. 1, art. XII., Con.) If building an insane asylum is to be considered as a part of the ordinary business of the state, the expense of doing so should be defrayed in the ordinary way out of the annual revenue. No necessity exists for the creation of a public debt to build an asylum. The power to contract such a debt is limited to the purpose "of enabling the state" to do its business. If it already has the power and is able in another and the usual way to carry out its purpose, the constitutional provision does not apply. Eliminating sections eleven and twelve from the law, and there still remains an appropriation to carry it into effect. As an appropriation in anticipation of revenue, it is within the power of the legislature and can be made effective. (Const. Debates, 754-756, 762 *et seq.* 879; *Ash v. Parkinson*, 5 Nev. 15; Const., sec. 2, art. IX.; *State v. School Fund*, 4 Kan. 269.)

III. These sections authorize and direct the creation of a public debt in the sum of eighty thousand dollars, and the public debt of the state now exceeds the sum of three hundred thousand dollars. The territorial debt is wiped out by payment. (Stat. 1871, 81; 1873, 94; 1877, 191; 1879, 15; Const., art. XVII., secs. 7, 24.) The constitution does not say that upon payment of that debt, the state may go on forever, under pretense of revivifying it under different forms and names, and contract debts equal in amount to those paid. What it does say is that the assumption, *i. e.*, the undertaking to pay the old debt, shall not prevent the

## Argument for Respondents.

state from contracting the additional indebtedness. (*People v. Johnson*, 6 Cal. 499; *Nougues v. Douglass*, 7 Id. 65; *Rodman v. Munson*, 13 Barb. 188, 63; *Scott v. Davenport*, 34 Iowa, 208; *State v. School Fund*, 4 Kan. 270.)

IV. These sections direct the diversion and transfer of the moneys pledged to educational purposes to another fund and for other purposes, and are unconstitutional. (Art. XI., sec. 3.) To preserve the fund it is apparent that all investments must be made in securities that some time or other can be made available to repay the money. To invest moneys in bonds means to loan them, so that they will produce returns by way of interest, and upon the expectation of realizing the principal upon the maturing of the bonds. The bonds of a state or of the general government are, within the contemplation of our constitution, always negotiable in open market. When such bonds are once upon the market they are the subject of purchase and sale, *i. e.*, of investment; and it is in this sense only that the moneys belonging to the school fund can be "invested" by the trustees of the fund. It is vain to attempt to fritter away the express provisions of the constitution by contending that the words "investment" and "bonds" have any other meaning than that known to commerce and the business world everywhere. By "state bonds" is meant something of value for purchase, investment, and income; not to the debtor state, but to the creditor capital, which owns it. There is no security in a paper never delivered by a state, and which remains in the vaults of its treasury. The power of the state is limited to an investment in constitutional bonds, already on the market, containing an obligation to pay some one, a sum certain and at a time certain, and secured by a revenue provided by authority. (*State Treasurer v. Horton*, 6 Kan. 354.)

*Lewis & Deal*, for Respondents:

I. The act in question embraces but one subject and matters properly connected therewith, which subject is briefly expressed in the title. (Sec. 17, art. IV., Const., is mandatory; *State v. Silver*, 9 Nev. 231.) In the construction of the provisions of this section in state constitutions the courts

## Argument for Respondents.

have adopted a liberal rule in favor of their validity. (*State v. Ah Sam*, 15 Nev. 27; *Murphy v. Menard*, 11 Tex. 673; *Cooley's Const. Lim.* 146; *Sun Mutual Ins. Co. v. New York*, 4 Seld. 241; *Brewster v. City of Syracuse*, 19 N. Y. 117; *People v. Mahaney*, 13 Mich. 495.) When the title of an act expresses a general purpose or object, all matters fairly and reasonably connected with it, and all necessary measures which will facilitate its accomplishment, are proper to be incorporated in the act, and are germane to its title. (*People v. Briggs*, 50 N. Y. 562; *Sedg. on Stats.* 41; *People v. Banks*, 67 N. Y. 572; *People v. Brinkerhoff*, 68 Id. 265; *Kerrigan v. Force*, Id. 384; *Billings v. The Mayor*, Id. 415; *Groversville v. Howell*, 70 Id. 290; *Worthen v. Badgett*, 32 Ark. 496; *Gibson v. State*, 16 Fla. 291; *Gold v. Chicago*, 82 Ill. 472; *Farmers' Ins. Co. v. Highsmith*, 44 Iowa, 330; *Howland Coal Co. v. Brown*, 13 Bush (Ky.), 681; *New Orleans v. Dunbar*, 28 La. Ann. 722; *People v. Bradley*, 36 Mich. 447; *Perkins v. Du Val*, 31 Ark. 236; *Prescott v. City*, 60 Ill. 122; *People v. Wright*, 70 Id. 388; *People v. Brislin*, 80 Id. 423; *Crescent Gas Light Co. v. New Orleans*, 27 La. Ann. 138; *New Orleans v. New Orleans R. R. Co.*, Id. 414; *Ohio v. Covington*, 29 Ohio St. 102; *Shields v. Bennett*, 8 W. Va. 74; *Woodson v. Murdock*, 22 Wall. 351; *Tallahassee Mfg. Co. v. Glenn*, 50 Ala. 489; *State v. Price*, Id. 568; *Burke v. Munroe Co.*, 77 Ill. 610; *Williams v. State*, 48 Ind. 306; *Harris v. People*, 59 N. Y. 599; *Morton v. Comptroller General*, 4 S. C. 430; *Hingle v. State*, 24 Ind. 32.)

II. The act is not special. It embraces all the insane, it is general in all its provisions, and it operates uniformly throughout the state. (*McGrath v. State*, 46 Md. 634; *Cooley's Const. Lim.* 128, n.; *State v. Commissioners*, 29 Md. 520; *Wheeler v. Philadelphia*, 77 Pa. St. 348.)

III. The erection of buildings for the care of the insane is a part of the business of the state. This duty is enjoined upon the legislature in the most comprehensive terms. (Sec. 1, art. XIII.) At the time the constitution was adopted there was no insane asylum in the state, and it was the intention of the framers of that instrument, that proper laws should be adopted with provision for the support



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Argument for Respondents.

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of the insane. The authority given to provide for the support of the insane carries with it the power to do everything necessary to attain that end.

IV. The tenth and eleventh sections of the act do not authorize the transfers of moneys pledged for educational purposes to another fund for other purposes. (Sec. 3, art. XI. of the Constitution.) The state is prohibited by it from ever using for any purpose any part of the principal of the proceeds from the sources mentioned, but the interest of the principal is permitted to be used for the benefit of the public schools. In order that any benefit can be derived from the moneys in the state school fund, it is necessary that the principal should be invested either in United States bonds or Nevada state bonds. In obedience to this section the legislature has from time to time provided for the investment of the moneys belonging to the state school fund. It is made the duty of the proper state officers to cause the investment of the moneys in the state school fund, whenever there is any to invest, in United States securities, or in bonds of this state. There is no transfer of funds from the state school fund to any other fund authorized by sections 10 and 11 of the act in question within the prohibition of section 3, art. XI., but the authority is given to the state to borrow eighty thousand dollars upon the security of its bonds, as provided in that section. By the deposit of the state bonds in the state school fund, the credit of the state is pledged for the repayment of the money borrowed, and interest thereon. the test of this is whether a debt is created by the transaction in favor of the state school fund. If there is, there is no transfer of moneys from the state school fund to another fund for other uses, but there is a strict compliance with the provisions of section 3, art. XI. of the constitution, and the laws passed to carry that section into effect.

V. The public debt of this state does not exceed three hundred thousand dollars, and it will not exceed it when the whole eighty thousand dollars appropriated by sections 10 and 11 is negotiated. (The various statutes and constitutional provisions bearing upon this subject are discussed at length.)

By the Court, BELKNAP, J.:

By an act passed at the last session of the legislature the respondents herein were, with others, created a board of commissioners for the care of the insane of this state. (Stats. 1881, 59.)

They are required by the act in question to cause to be erected upon land belonging to the state, near the town of Reno, an asylum of sufficient capacity for the care of one hundred and sixty patients. The act directs the time within which the building shall be completed, the material of which it shall be constructed, its maximum cost, and the manner in which contracts for its construction shall be made. It appropriates the sum of eighty thousand dollars for constructing and furnishing the asylum, and in the eleventh section provides as follows: "The money herein appropriated shall be taken from the state school fund, and in its place shall be deposited eighty bonds of one thousand dollars each, bearing interest at the rate of four per cent. per annum; said bonds shall run for twenty years, but shall be redeemable by the state at its pleasure, after two years; said bonds shall be signed by the governor and state controller, countersigned by the state treasurer, and authenticated by the great seal of the state, and shall state in substance that the state of Nevada owes to the state school fund eighty thousand dollars, the interest on which sum, at four per cent. per annum, she agrees to pay during the life of said bonds, for the benefit of the common schools of the state; said bonds shall be lithographed, as is usual in similar cases, and deposited with the treasurer of the state. The interest on said bonds shall be paid semi-annually, on the first days of January and July of each year, on the written order of the state board of education to the state controller, directing him to draw his warrant for the amount of such semi-annual interest on the indigent insane interest and sinking fund herein created. All sums derived from the interest of said bonds shall go into the general school fund, for the support of the common schools of the state, and for the regular and prompt payment of which the faith and credit of the state is hereby pledged."

The twelfth section provides for the levy and collection of a tax, the proceeds of which are appropriated for the payment of the principal and interest of the bonds mentioned in the preceding section. Subsequent sections provide for the care of the insane pending the completion of the building, their management thereafter, and other matters, which are not drawn in question. Appellant claims that so much of the act as is contained in the eleventh and twelfth sections is unconstitutional, and seeks by this action to restrain respondents from issuing the moneys in the state school fund, as they are directed to do by the twelfth section.

The first ground of objection to the validity of the act is that it does not comply with the requirements of section 17 of article IV. of the constitution. This section provides that each law enacted by the legislature shall embrace but one subject and matter properly connected therewith, and that such subject shall be briefly expressed in the title. The title of the act is "an act to provide for the taking care of the insane of the state of Nevada," and it is insisted that the act not only embraces the subject expressed in the title, but two other subjects; that is to say, provision for a state loan and for the investment of moneys of the state school fund.

The restriction upon the legislature contained in section 17 of article 4, was considered by this court in the case of *State v. Silver*, 9 Nev. 231. It was then declared that the design of the constitution in requiring that each enactment should contain but one subject and matter properly connected therewith, was to prevent improper combinations to secure the passage of laws having no necessary or proper relation, and which, as independent measures, could not be carried; and that the object of the other requirement, that the subject of the act should be expressed in the title, was that neither the members of the legislature nor the public should be misled by the title.

"The constitution does not require that the title of an act should be the most exact expression of the subject which could be invented," said the court of appeals of New York

in the matter of the petition of Mayer (50 N. Y. 504). "It is enough if it fairly and reasonably announces the subject of the act."

"The general purpose of these provisions is accomplished," says Judge Cooley in his *Treatise on Constitutional Limitations*, page, 143, "when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible."

It has accordingly been held in Kentucky, under a similar constitutional provision, that an act entitled "An act to amend the charter of the Cincinnati and Covington bridge company," a provision that the bridge company might sell and the city of Covington might subscribe for one hundred thousand dollars of the stock, and sell the bonds of the city and levy a tax to pay them, was valid. The court said: "None of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in the title. \* \* \* The power to sell stock to the city of Covington necessarily requires that a power should be conferred on the latter to subscribe and pay for it; for without such a power the power to sell would be nugatory. The subject is the same, although it relates to a transaction to which two corporations are parties, one of which only is named in the title of the act. If by the act a power had been conferred on the city of Covington to subscribe for the stock of any other corporation but the one named in the title of the act, then the provision would fall within the constitutional prohibition, and be clearly null and void. But as it is restricted in its operation to matters pertaining to the bridge company, and the provisions of the act, so far as they relate to the city of Covington, are apposite to the purpose which was intended to be effected by its passage, and are sufficiently indicated in its title, it is not liable to this constitutional objection. It was certainly not necessary for the legislature to pass two

separate acts to effect the object it had in view—one to enable the company to sell the stock to the city, and another to enable the city to subscribe and pay for it. The constitutional provision must receive a rational construction, and not one that would lead to such an unnecessary and absurd result." (2 Met. (Ky.) 219.)

In *People ex rel. Hayden v. City of Rochester*, 50 N. Y. 525, it was held that, in an act entitled "an act in relation to the erection of public buildings for the use of the city of Rochester," a provision for selecting and procuring a site for the contemplated buildings was valid under a similar constitutional provision, upon the ground that it was a necessary step towards the erection thereof. The court said: "But buildings can no more be erected without sites than without materials or means to defray the expense. All these are details, and no reference thereto in the title is required. The act in all its parts may and will, with the site selected, be fully executed without any violation of the constitution."

So, under a similar clause in the constitution of Illinois, it was held that an act entitled "an act to authorize the town of Ottawa to erect two bridges across the Illinois and Michigan Canal," and containing provisions for raising money to defray the cost of such bridges, did not embrace more than one distinct subject; that the title was properly expressed and the act valid. (*Ottawa v. The People*, 48 Ill. 233. See also *Brewster v. City of Syracuse*, 19 N. Y. 116; *Gordon v. Cornes*, 47 Id. 608; *People ex rel. Rochester v. Briggs*, 50 Id. 555; *People ex rel. Burroughs v. Brinkerhoff*, 68 Id. 259.)

We are unable to find anything in the act under consideration that does not relate to the care of the insane. The general subject of the act includes not only the construction of an asylum but necessarily the means by which the work is to be accomplished, and the proceedings necessary to be adopted for the purpose of defraying the expense to be incurred. Certainly no one interested in the act would fail to comprehend from its title that it contem-

plated the expenditure of money, for the care of the insane necessarily involves such expenditure.

The legislature is the sole judge of the mode by which this money shall be provided, and was equally authorized to raise it by loan or appropriate it from the general revenues. The act has but one subject, and that is the care of the insane. All of its provisions have this common object in view. The different steps by which the result is to be accomplished are not different subjects, but minor parts of the same general subject, and legislation would be impossible if all of these details were required to be provided for by distinct enactments.

The second objection to the validity of the act arises under sections 2 and 3 of article IX. of the constitution. By section 2 the legislature is required to provide for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year, and in case the expense shall in any year exceed the revenue, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of the ensuing year or two years. Section 3, for the purpose of enabling the state to transact its business upon a cash basis, authorizes a bonded debt which shall never, in the aggregate, exceed the sum of three hundred thousand dollars, except in certain enumerated cases. It is contended that the building of an insane asylum is a part of the ordinary business of the state, and in view of the provisions contained in the sections mentioned, the expense of constructing such building should be taken from the revenues arising from taxation.

The authority to create a bonded debt is subject to no restrictions or conditions whatever save that such debt shall not exceed the sum of three hundred thousand dollars, and the law authorizing it shall provide for its payment within twenty years by taxation. The constitution nowhere declares the necessity which shall exist as prerequisite to the issuance of bonds or the making of a loan under this section, nor the use to which money obtained by such loan

shall be applied. From the language employed by the instrument itself, as well as from the debate in the convention upon those portions of the constitution relating to state finances, the object in authorizing a bonded indebtedness was to enable the state to maintain its business upon a cash basis, notwithstanding financial exigencies, without resorting to onerous taxation.

For the first three years subsequent to the adoption of the constitution, the legislature was restricted from levying a tax for state purposes exceeding one per cent. per annum. (Sec. 24, art. XVII.) In the discussion of this restriction in the constitutional convention it was in several instances urged that if this rate of taxation failed to produce the necessary revenue to defray the expenses of the state, relief could be had by the issuance and sale of the bonds of the state to the amount of three hundred thousand dollars, under the provisions of section 3 of article IX. No suggestion was ever made, so far as appears from the debates, of the right of the legislature to seek relief at any time by this means. It has the power to direct the issuance of bonds under this clause at any time so long as it does not conflict with the limitation as to amount.

The next objection is that the act contemplates an indebtedness in excess of that authorized by the constitution. Under section 7 of article XVII. of the constitution, the state was required to assume all debts and liabilities of the territory of Nevada unpaid at the time of the admission of the state into the Union, but it was provided that such assumption should not prevent the state from incurring the three hundred thousand dollars indebtedness as provided in section 3 of article IX. already mentioned. At the session of 1871 the legislature determined the territorial indebtedness to be three hundred and eighty thousand dollars, for which amount a loan, bearing interest at nine and one half per cent. per annum, payable in fifteen years, was by authority of law negotiated. (Stats. 1871, 80.)

Before this loan became due, and for the evident purpose of reducing the rate of interest which the state was paying upon it, the legislature, by acts approved March 8, 1877,

and January 28, 1879, respectively, authorized the purchase and retirement of the bonds issued under the act of 1871, and the issuance of a new bond for three hundred and eighty thousand dollars, bearing interest at the rate of five per cent. per annum. In the purchase of the bonds of 1871 the sum of three hundred and twenty-five thousand dollars belonging to the school fund was used, and the new bond was executed to and became the property of the school fund.

These proceedings it is claimed amounted to a payment of the bonds of 1871, and extinguishment of the territorial indebtedness; that the three hundred and eighty thousand dollars in bonds now outstanding, and in the school fund, exceeds the maximum indebtedness allowed by the constitution, and therefore the legislature has no authority to issue the eighty thousand dollars of bonds provided for by this act. But this position is untenable. The proceedings by which the bonds of 1871 were retired, and the three hundred and eighty thousand dollar bond, now in the school fund, issued, did not extinguish the territorial indebtedness. That indebtedness still exists, but it is evidenced by a different obligation; that is to say, by a bond for three hundred and eighty thousand dollars, bearing five per cent. per annum interest, instead of bonds for the same amount, bearing nine and one half per cent. interest per annum.

Finally, objection is made that the eleventh section of the act directs a transfer of the moneys of the school fund to another fund and for another purpose. Under section 3 of article IX. of the constitution, the proceeds of the sales of public lands donated to the state by the general government, as well as moneys received from other sources, are solemnly pledged for educational purposes, and required to be placed in the school fund, and not be transferred to any other fund or for other use. This fund the legislature is commanded to invest in "United States bonds or the bonds of this state," and the interest only of the capital of the fund shall be used for educational purposes.

In this behalf it is urged that the issuance of the bonds provided for in this act is an evasion of the investment di-



## Points decided.

rected by the constitution; that the constitution contemplates the purchase of bonds existing at the time of the passage of the enactment authorizing the loan. This objection is without force. It is manifest that the bonds provided for by this act are as much the bonds of the state as if they had been outstanding at the time of the passage of the act, and were thereafter to be purchased for the benefit of the school fund. The legislature primarily directs the investment of the moneys in this fund, and so long as it complies with the directions of the constitution, and makes the loan upon the securities required by that instrument, the loan will be valid. A discretionary power is conferred to invest the fund either in the bonds of the state or of the general government, and any attempt on the part of courts to supervise such discretion would be an invasion of the authority of the legislature.

The act being constitutional, the judgment of the district court refusing to restrain respondents from proceeding, should be affirmed, and it is so ordered.

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[No. 1,076.]

THE STATE OF NEVADA, RESPONDENT, v. ROBERT  
ST. CLAIR, APPELLANT.

**INSTRUCTIONS—FORM OF VERDICT—MURDER AND MANSLAUGHTER.**—The court gave a proper definition of murder in the first and second degrees, manslaughter, and justifiable homicide, and instructed the jury to designate the offense, if any, of which the defendants should be found guilty. The court gave a form of verdict for "murder in the first degree," "murder in the second degree," and "not guilty." Held, that the forms were merely given as a guide to the jury, and could not be considered to limit the rights of the jury to a consideration of the defendant's guilt to the two degrees of murder, and that the jury could not have been misled by the omission of the court to give a form of verdict for manslaughter.

**IDEM—DUTY OF COUNSEL TO ASK FOR INSTRUCTIONS.**—If counsel considered it important that a form of verdict for manslaughter should be given, it was their duty to prepare the same or request the court to give it.

**NEW TRIAL—CONFLICTING AFFIDAVITS—MISCONDUCT OF JURORS.**—In the case of a conflict in the affidavits on motion for a new trial on the ground of misconduct of jurors; Held, that it was the duty of the district

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Statement of Facts.

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court to determine the question of veracity, and that its action in this respect will not, upon the showing made, be disturbed.

**PRESUMPTIONS—CONDUCT OF JURORS—VAGUE RUMORS.**—The presumption is that every juror is a man of ordinary intelligence, and that he acts conscientiously in the performance of his sworn duty, and that he would not be improperly influenced by vague rumors.

**MODIFICATION OF INSTRUCTIONS.**—*Held*, upon review of the instructions, stated in the facts of this case, that the modification made by the court could not have misled the jury to the prejudice of the defendant.

**REFUSAL OF INSTRUCTIONS ALREADY GIVEN IN SUBSTANCE—NOT ERROR.**—It is not error to refuse instructions asked by defendant when the court of its own motion gave proper instructions upon the subject-matter embraced therein.

**APPEAL** from the District Court of the Fourth Judicial District, Humboldt County.

On the trial of this cause, three witnesses, Campbell, Weill, and Mohler, testified that at the time of the homicide they were at work in an adjoining field about one hundred and twenty-five rods distant from the bridge where the body of deceased, Patrick Tully, was found; that Campbell and Weill were on an elevation about eight feet, and Mohler about two feet, above the ground; that there was grass growing in a field between witnesses and the bridge, but that no other object obstructed the view; that if a man on the ground at the scene of the homicide or anywhere in the vicinity of the deceased's house or the bridge was standing up, his person from his head down as far as his hips would be easily visible to said Campbell, Weill, and Mohler, but that the bridge was not visible to them at the time the shots were fired; that while they were so at work they heard a shot fired in the direction of and at the house and bridge; that immediately witnesses looked up and saw defendant in the act of firing a pistol in front of the house and right close to the bridge; after witnesses looked up they saw defendant fire three more shots; they heard the shots and saw the smoke from the pistol, and these were fired rapidly; that after the firing of these three shots had ceased defendant walked up a few steps and then squatted down so that witnesses could only see his shoulders, and witnesses could not tell what he was doing while so squat-

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Statement of Facts.

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ted down; that after remaining a few seconds, defendant raised up and ran toward the door of the house and disappeared; that they could not see whether defendant entered the house or not; that defendant was out of sight for two or three minutes, and then reappeared and returned to the place where he had squatted down; that they then heard a shot from a much smaller pistol than the one from which the four first shots had been fired; that then defendant stooped down again, remained so for a few seconds, got up and walked around the place and then walked away up toward the station and met some person on horseback, there halted, and soon turned around and came back to the bridge there halted again for a few minutes, and then started on the road to his own house.

The defendant in his own behalf testified, that he was walking in front of the bridge when the deceased sprang forward, thrust his pistol across defendant's breast and fired a shot from a small pistol; that deceased also fired two other shots from the same pistol, which did not take effect; that defendant then drew the large pistol and deceased started to run toward the bridge, and as he did so defendant fired at him four shots from the large pistol, the first of which was fired just as defendant turned to run and struck deceased in the breast; that the other shots were fired rapidly while deceased was running and defendant was pausing; that deceased fell and expired on the bridge and laid in the position as before described. That when defendant found that deceased was dead, defendant was horrified and excited and started across the fields toward the house of Mr. Marzen, and had passed deceased's house, when he saw Michael coming from the station on horseback, and then defendant went back toward the bridge, and when he arrived there his pistol was accidentally discharged; that defendant then went up the road and met Michael and sent him back to the station for assistance; that defendant's pistol was loaded with conical balls and round balls; that the chambers which contained the round balls contained twice the amount of powder that the chambers did which contained the conical balls; that when they arrived at the

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Statement of Facts.

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bridge they discovered the dead body of deceased lying on the bridge; that the first four shots were in their opinion from the same pistol, and that pistol was a large pistol; that the other shot was from a very small pistol.

The record states "that said witnesses Campbell, Weill, and Mohler did not, and neither of them did, and no witnesses in the case did state in testimony directly and in so many words, that said Campbell, Weill, and Mohler did not see at the time said shots were fired by defendant the deceased standing up; but there was evidence given in the case tending to prove that said Campbell, Weill, and Mohler did not and that neither of them did see Tully, the deceased, standing up at the time defendant fired said shots or either of them."

The defendant presented and asked to be given an instruction in the words following, to wit: "The jurors must not presume that the witnesses Campbell, Weill, and Mohler did not see Tully, the deceased, standing up at the time of receiving the fatal shot, or shots, unless the evidence shows to the contrary."

The court gave said instruction after adding the words following, to wit:

"But this does not mean that you must necessarily presume that said witnesses did see said Tully standing up at said alleged time, merely because there is no testimony herein of one or more witnesses, if such is the case, declaring directly and in so many words that said Campbell, Weill, and Mohler did not at said alleged time so see said Tully: for if the evidence in the case should satisfy your minds beyond a reasonable doubt that said Campbell, Weill, and Mohler did not so see said Tully at said alleged time, you would be perfectly justified in coming to the conclusion that said Campbell, Weill, and Mohler did not so see said Tully at said alleged time, even though no witnesses in the case have testified directly and in so many words that said Campbell, Weill, and Mohler did not so see said Tully at the said alleged time; and merely because said Campbell, Weill, and Mohler did not testify herein, directly and in so many words, that at said alleged time they did not see said Tully standing

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up, it does not follow as a matter of law, either that said Tully was standing up at said alleged time, or that said Campbell, Weill, and Mohler, or either of them, saw said Tully standing up at said alleged time."

*M. S. Bonnifield*, for Appellant:

I. The court erred, in not giving the jury a form of verdict for manslaughter. (Hillyer on New Trials, 258; 22 Iowa, 270; *Garrett v. Gonter*, 42 Pa. St. 143.)

II. The instruction asked for by defendant relative to the testimony of the witnesses was pertinent and proper. The modification by the court was erroneous. Where a presumption is one of fact merely, the court is not warranted in declaring it to the jury as a presumption of law. (Hillyer on New Trials, 284; *King v. Pope*, 28 Ala. 601, and cases cited.)

*M. A. Murphy*, Attorney General, for Respondent:

I. This court will not disturb the decision of the court in overruling the motion for a new trial upon the ground set out in the affidavits. (*Costly v. State*, 19 Ga. 628; *State v. Harris*, 12 Nev. 414; *State v. Jones*, 7 Id. 413; *Carnaghan v. Ward*, 8 Id. 33; *People v. Boggs*, 20 Cal. 434.)

II. The modifications and additions made to the instructions did not injure the defendant. The instruction asked by defendant attempted to instruct the jury upon a question of fact, and was to the effect that the jury must not consider the testimony of the witnesses Campbell, Weill, and Mohler, and without the modifications and additions given by the court, it took from the jury the right to consider and weigh said testimony and draw their own inference therefrom.

III. The judge is not bound to give the instructions asked, in the language in which they are framed; he may modify the charges so as to make them conformable to his own views of the law. (*State v. Turner*, 19 Iowa, 148; *State v. Collins*, 20 Id. 90; *Mask v. State*, 36 Miss. 94; *People v. Dodge*, 30 Cal. 450.)

By the Court, HAWLEY, J.:

Appellant, having been convicted of murder in the second

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degree, appeals to this court, and claims that, upon several grounds, the court erred in refusing to grant him a new trial.

1. Did the court err in failing to give to the jury a form for a verdict of manslaughter? We think not.

The record shows that the jury was properly instructed as to what constituted murder in the first degree, murder in the second degree, manslaughter, and justifiable homicide; that the court also instructed the jury as follows: "Should you find the defendant guilty, you will designate, by your verdict, the offense of which you find the defendant guilty;" that prior to the commencement of the argument of counsel, and at the close thereof, the court asked counsel for defendant "to prepare and hand to the court any forms of verdict defendant might desire to have the jury place their verdict in;" that defendant's counsel prepared the form of a verdict of "not guilty," which the court gave to the jury, that the court of its own motion, gave the form of a verdict for "guilty of murder in the first degree" and "guilty of murder in the second degree." Upon these facts it is clear, to our minds, that the jurors were not misled, as claimed by appellant's counsel, into the belief that if they found defendant guilty they were confined in their deliberations, as to the degree of guilt, to the two degrees of murder. It was their duty, if they believed, from the evidence, that the defendant was guilty of any offense (and they were so instructed), to determine the degree of guilt from the evidence adduced at the trial. The forms were merely given as a guide to the jury in framing their verdict, and were not intended, and could not have been considered, to limit the right of the jury to a consideration of the defendant's guilt to the two degrees of murder. Moreover, if counsel for defendant considered it important that a form of verdict for manslaughter should be given, it was their duty either to prepare the same, or, at least, to request the court to give a form of verdict for each of the lesser degrees of guilt.

2. The court did not err in refusing to grant a new trial upon the grounds presented by the affidavits in the bill of exceptions.

The affidavit of Nagle, a person confined in jail for con-

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tempt of court, and of the defendant, allege that, after the jury retired to deliberate upon a verdict, they heard the jurors discuss the question of the guilt or innocence of the defendant; that they heard three of said jurors vote not guilty; that some of the jurors said that if the jury would agree to a verdict of murder in the second degree they would recommend defendant to the mercy of the court; that they distinctly heard W. H. Woolcock, one of the jurors, say that he did not believe the defendant guilty, but if the jury would recommend the defendant to the mercy of the court he would support the verdict of murder in the second degree; that John Byrnes, one of the jurors, said to the others, in substance, that he knew the defendant went armed and was in the habit of knocking fellows over the head with his pistol; that he did not have any friend in the county and was a dangerous man. These statements are contradicted by the affidavits of the sheriff and the deputy sheriff, to the effect that it is impossible for any one in the jail, where Nagle and the defendant were confined, to distinguish anything that is said in the jury-room.

It was the duty of the court to determine the question of veracity presented by these conflicting affidavits, and its action in this respect will not, upon the showing made, be disturbed.

The attorneys for the defendant state in their affidavit "that the facts set out in the fifth ground of motion for new trial are, each and all, true, substantially as therein set out." The facts stated in this ground are as follows: "E. P. Torrey is, and at all times since said indictment was, professedly a warm friend of defendant; was called regularly as a juror in the case; was examined on his *voir dire* by both parties and passed, and was excused peremptorily by plaintiff. W. H. Woolcock, one of the jurors who tried this case, was, at the time the jury was impaneled, in the employ of said Torrey as foreman in a mine; had been so employed for several months, and ever since said trial has been in said employment. Within one or two days before the final submission of the case to the jury, by the court, the sheriff informed said jurors, and each of them, that it was rumored in

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Opinion of the Court—Hawley, J.

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town that said Torrey had a conversation with said Woolcock at the hotel upon the occasion of said jurors taking supper there. John Byrnes, one of said jurors, informed the court in open court, of said alleged rumors, and asked that the matter might be investigated. The sheriff stated in open court that he had heard such rumors, and so informed the jury."

These affidavits, in so far as they state that the sheriff informed the jurors of the rumor, seem to be denied by the sheriff, who states, in his affidavit, that he "did not, during the trial of said case, speak to said jurors, or either of them, on the subject of said case, nor allowed any other person to speak to said jury, or either of them, on the subject of said case."

But how could the rumor have influenced the jury to the prejudice of the defendant? His counsel argue that the rumor was started for the purpose of intimidating the juror Woolcock, and to compel him to vote for a verdict of guilty through fear that if he voted otherwise people would say that he had been improperly influenced by Torrey. The natural presumption is that every juror is a man of ordinary intelligence, and that he acts conscientiously in the performance of his sworn duty. The affidavits of Nagle and the defendant being disregarded, there is nothing left in the record to show that Woolcock had any hesitation in voting for a verdict of guilty, or that he was in any manner influenced by the rumor of the reported conversation with Torrey.

The rumor was, at most of a very indefinite and uncertain character. It was not reported that Torrey and Woolcock had any conversation about the case. That is left as a matter of inference. It is not even claimed that there was any foundation for the rumor, for there is no attempt to show, as a matter of fact, that any conversation whatever actually occurred between Torrey and Woolcock after the jury was impaneled to try the case. Counsel simply claim that the rumor was started for a sinister purpose, and that it was used as a scarecrow to frighten Woolcock and keep him from voting for a verdict of not guilty.



## Points decided.

record fails to sustain this position. It is utterly  
e. It would be unreasonable for us to presume  
juror was improperly influenced by such a vague

e court did not err in giving the instruction, as  
relative to the presumptions of the jury upon the  
y of the witnesses Campbell, Weill, and Mohler.

modification was unnecessarily lengthy, and contained  
repetition of words; but we are unable to see how  
could have been misled thereby to the prejudice of  
ndant. It was the duty of the jury to determine the  
whether, at the time of the homicide, the deceased  
ding up or lying down, from all the facts and cir-  
ces surrounding the case, and not to draw any pre-  
from the mere fact that the witnesses Campbell,  
d Mohler did not, in so many words, directly state  
y did not see the deceased standing up.

e action of the court in refusing to give the instruc-  
" and "K," asked by defendant's counsel, is sus-  
pon the ground that the court, of its own motion,  
per instructions upon the subject-matter embraced  
(*State v. O'Connor*, 11 Nev. 416; *State v. Rover*,  
3; *State v. Hamilton*, Id. 386.)

ndgment of the district court is affirmed.

[No. 1,077.]

LAKE, RELATOR, v. S. D. KING, RESPONDENT.

COMMENT—DIVORCE—APPEAL.—In an action for divorce, brought  
e Lake against relator, the court, upon special issues of fact found  
ury, ordered that the bonds of matrimony existing between the  
be dissolved, and reserved from its decision the question of the  
a of the common property, and the question of the custody of their  
Held, that the judgment ordered by the court was not a final  
nt in the case, and that no appeal could be taken from the orders  
hereafter for alimony, and for counsel fees.

CATION for mandamus before the Supreme Court.

acts are stated in the opinion.

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Opinion of the Court—Leonard, C. J.

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*R. M. Clarke*, for Relator.

*C. S. Varian*, and *Lindsey & Dickson*, for Respondent.

By the Court, LEONARD, C. J.:

Respondent is the acting and qualified judge of the second judicial district court in this state. At a prior date, Jane Lake commenced an action in said court against the petitioner, M. C. Lake, for a divorce from the bonds of matrimony, for a division of the alleged common property, and for the custody of a child of said Jane and M. C. Lake. Issues of fact were raised by petitioner in his answer, not only as to plaintiff's allegations upon which she claimed a divorce and custody of the child, but also as to the amount and value of the common property. At the trial the plaintiff demanded a jury, which was thereupon impaneled, and it was stipulated by counsel for the respective parties, in open court, that the question of the division or disposition of the alleged common property be withdrawn from the jury and reserved, and thereafter, if necessary, tried by the court, and it was so ordered. Special issues of fact were submitted to, and found by, the jury, and both parties moved for judgment thereon. The court granted plaintiff's motion for judgment, and ordered that the bonds of matrimony then existing between the parties be dissolved, and reserved from its decision the question of division of the common property, to be determined upon testimony thereafter to be taken by the court, and also the question of the custody of the child. Within five days, counsel for defendant filed and served a notice of motion for a new trial, and obtained an extension of time in which to file and serve statement, which motion is now pending. Subsequently sundry orders were made for the payment of alimony and counsel fees for plaintiff. Wishing to appeal from those orders, the defendant in that case and petitioner here, filed and served a statement on appeal therefrom, and applied to the court for a stay of proceedings upon the same, until his statement could be settled. The court refused to order a stay, upon the ground that the

## Points decided.

mentioned were not appealable, and thereafter re-settle and allow said statement for the same reason. When an applicant applies for an alternative writ of mandamus, compelling respondent forthwith to settle said statement, or to show cause to this court why he has not

orders complained of are not included among those from which an appeal may be taken before final judgment. The appeal lies from these orders it is because they are interlocutory orders made after final judgment. Was the judgment in the divorce a final judgment? In *Perkins v. Sierra S.* 10 Nev. 411, this court said: "It is contended by appellant that the judgment was contingent and interlocutory, and not final. What is a final judgment? This question has been frequently decided by the courts. A judgment or order is final that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future action of the court. When no further action of the court is required in order to determine the rights of the parties in the action, it is final; when the cause is retained for further action, it is interlocutory." (See, also, *State v.* 10 Nev. 514.)

In the present case the issues in the divorce suit were only partially settled in part, and the remainder were reserved for further action. The judgment was not final, and respondent did not err in refusing to settle a statement on appeal from the orders mentioned. Writ denied.

[No. 1,084.]

HOOLE, RELATOR, v. JOHN H. KINKEAD,  
RESPONDENT, ET AL., BOARD OF COMMISSIONERS FOR THE  
CARE OF THE INSANE, RESPONDENTS.

RESPONSIBLE BIDDER—STAT. 1881, 59, CONSTRUED.—In providing for the erection of an insane asylum, the statute declared that the board of commissioners might adopt or reject any and all bids not deemed reasonable or satisfactory, but in determining bids for the same work or material the lowest responsible bid shall be taken: Held, that the provision that the lowest responsible bid is mandatory; but in ascertaining whether



or not a bidder was responsible, the board was required to act, and in doing so they exercised judicial function. **IDEM**—PECUNIARY ABILITY AND SKILL OF CONTRACTOR TO BE CONSIDERED. In deciding upon the responsibility of bidders it was the board's duty to consider their pecuniary ability to perform the contract, and to ascertain which ones, in point of skill, ability, and integrity, were most likely to do faithful, conscientious work, and to fulfill the contract.

**MANDAMUS**—JUDICIAL FUNCTIONS.—A subordinate body can be required to act, but not how to act, in a matter as to which it has the right to exercise its judgment; and where it is vested with power to decide upon a question of fact, the duty is judicial, and however erroneous the decision may be, it can not be compelled by mandamus to alter its decision.

#### APPLICATION for mandamus.

The facts are stated in the opinion.

*Thomas E. Haydon*, for Relator:

I. A statute that imposes a duty and gives the authority for performing it is mandatory. (*Veazie v. China*, 50 Ohio, 321; *Boren v. Commissioners*, 21 Ohio, 321 *et seq.*; 108, 109; *People v. Contracting Board*, 256.)

II. Statutory requisitions are deemed directory, when they relate to some immaterial matter, where a contract is a matter of convenience rather than substance, Stat. and Con. Law, 321; *People v. Schermerhorn*, 540; *Steel v. Steel*, 1 Neb. 27; *Corbett v. Bradley*, 7

III. The will of the legislature, clearly ascertained, should control. (*Bartlett v. Morris*, 9 Porter (Ala.) 9; *Thorpe v. Schooling*, 7 Nev. 17; *Odd Fell. Soc. v. Quillen*, 11 Id. 109.)

*M. A. Murphy*, Attorney General, and *W. E. F. Murphy*, Respondent:

I. This court will not issue the writ of mandamus where it appears upon the face of the petition that the contract has been awarded to the contractor. (*Moses on Mandamus*, 32, *et seq.*, sec. 44; *County Court of Warren v. Bibb* (Ky.) 573; *People v. Contracting Board*, 256; 33 Id. 382; *State v. Board of Education*, 24 W.

Opinion of the Court—Leonard, C. J.

One who sues for the writ of mandamus must have a well-defined right to enforce, which is specific, commanded by law, and for which there is no other legal remedy. *Commonwealth v. Mitchell*, 82 Pa. St. 343; *People v. Albee*, 11 Abb. Pr. 289; *People v. Smith*, 12 Id. 133; *People v. Mayt*, 66 N. Y. 606; *State v. Mayor*, 35 N. J. L. 396.)

The Court, LEONARD, C. J.:

Under the statute of this state, passed at the last session of the legislature (Stat. 1881, 59), respondents invited bids for the erection of an insane asylum at Reno, according to plans and specifications previously adopted. Several bids were presented by different parties, and among them the bid of plaintiff, offering to furnish all materials and do the work for the completion of the buildings, for the sum of fifty-two thousand dollars, and of certain citizens offering to furnish the same materials, and do the work, for the sum of sixty thousand dollars. After a public examination, upon the knowledge of the commission and evidence received touching the responsibility of the several bidders and their sureties, the contract was awarded to the citizens of Reno, last named, for the sum of sixty thousand dollars, upon the ground that theirs was the lowest responsible bid. Plaintiff has applied to this court for a writ of mandamus to compel respondents to award the award made as aforesaid, and to award said writ to him as the lowest responsible bidder.

In his answer, respondents deny that plaintiff's bid was the lowest responsible bid, and allege that the bid accepted, the citizens' bid, was such. They deny that plaintiff can furnish the buildings specified in the plans and specifications for the sum of fifty-two thousand dollars, or that he has the credit or means to build the same for less than fifty thousand dollars. They deny that all the sureties offered by the plaintiff can qualify for the bond they propose to become sureties for, on said bond, and that the several exactions of the law respecting property from execution, or over and above all their debts and liabilities. They deny that plaintiff's bid is reasonable

or satisfactory, or that it is entirely or in any way responsible.

They allege that all bids offered were carefully considered with reference to the responsibility of the sureties or guarantors, and as to whether said bids were made in good faith for the purpose of erecting said buildings according to the plans and specifications; that from the testimony of skilled mechanics and experts, they ascertained that they could not be economically erected for less than fifty-eight thousand dollars; that after a laborious examination and inquiry they came to the conclusion that the so-called "citizen's bid" was the lowest responsible bid, and that, therefore, they awarded the contract to the persons named therein. They also allege that, after a careful examination, they considered the bids of Gross & Sons, and William Thompson, lower responsible bids than those of the plaintiffs. They aver that, in awarding said contract, they have strictly complied with the statute under which they were authorized to derive their powers; that they have acted according to their best judgments, for the best interest of the state, and with due regard to the legal rights of the bidders.

It is neither alleged nor claimed that, respondents have not acted in entire good faith. Neither fraud nor collusion is urged against them; nor is it asserted, in any way, that they have been guilty of the exercise of favoritism. It follows that, at most, their fault is an error in judgment in determining that the bid for sixty thousand dollars is the lowest responsible bid.

Section 5 of the statute referred to provides that, "the board may adopt or reject any and all bids not deemed reasonable or satisfactory, but in determining bids for the same work or material, the lowest responsible bid shall be taken."

The provision that they shall take the lowest responsible bid is mandatory, and they had no power or authority to accept any other, but in ascertaining whether or not a bid was responsible, they were required to deliberate and decide, and in doing so, they exercised judicial, not ministerial, functions.

And in deciding upon the responsibility of bidders



it is their duty to consider not only their pecuniary ability  
 from the contract, but it was their right and duty to  
 and ascertain which ones, in point of skill, ability,  
 integrity, would be most likely to do faithful, conscientious  
 work and fulfill the contract promptly, according to its  
 and spirit. In *Commonwealth v. Mitchell*, 82 Pa. St.  
 case similar to this, and under a statute requiring a  
 for stationery, etc., to be given to the "lowest re-  
 bidder," the court thus forcibly expresses itself:  
 scarcely open to doubt, but that the word under con-  
 sideration (responsible), as used in the statute, means some-  
 more than pecuniary ability. In a contract, such as  
 in controversy, the work must be promptly, faith-  
 and well done; it must, or ought to be, conscientious  
 To do such work requires prompt, skillful, and faith-  
 ful. A dishonest contractor may impose work upon  
 the city, in spite of the utmost caution of the superintend-  
 engineer, apparently good, and even capable of bearing  
 for a time, which in the end may prove to be a  
 failure, and worse than useless. Granted, that from  
 contractor pecuniary damages may be recovered by  
 the city at law; that is, at best, but a last resort that often  
 is more vexation than profit—a mere patch upon a  
 hole; an exceedingly meager compensation, at best, for  
 the injury and incalculable damage resulting to a great city  
 by the want of a competent supply of water. The city  
 needs honest work, not lawsuits. Were we to accept  
 the interpretation insisted upon by the relators, the differ-  
 ence of a single dollar, in a bid for the most important con-  
 tract might determine the question in favor of some unskill-  
 ful bidder, as against an upright and skillful mechanic.  
 We know that, as a rule, cheap work and cheap  
 materials are but convertible terms for poor work and poor  
 materials, and if the city, for the mere sake of cheapness,  
 settles up with these, it is indeed in a most unfortunate  
 position. \* \* \*  
 In the present case, then, as we do, with the common pleas, that the  
 proposed upon the respondents was deliberative and  
 advisory, we must also admit the conclusion reached by

## Points decided.

that court, to wit: That the writ of mandamus will not lie. For it is settled beyond controversy that, where the complaint is against a person or body that has a discretionary or deliberative function to exercise, and that person or body has exercised that function, according to the best of his judgment, the writ of mandamus will not be granted to compel the undoing of that which has been done.

A subordinate body can be directed to act, but not to act, in a matter as to which it has the right to exercise its judgment; and where it is vested with power to determine a question of fact, the duty is judicial, and how erroneous its decision may be, it can not be compelled by mandamus to alter its determination. Such has been the uniform decisions of this and other courts. Where no discretion is given to an officer or body, mandamus lies to enforce a performance of the specific act required; but it is otherwise when the duty imposed requires deliberation and decision upon facts presented. It was for the board in this case to determine the lowest *responsible* bidder. They had no right to accept the lowest bid if they were not satisfied with the responsibility of the bidder, according to the definition of the word "responsible" given above. They had the right to reject plaintiff's bid, and such was their duty. If, after examination, it was not, in their best judgment, the lowest responsible bid. The testimony before us is ample to show that, the board acted conscientiously, after faithful examination of all facts within their reach touching the questions here discussed, and their decision can not be disturbed in this proceeding. Mandamus denied, with costs against plaintiff.

[No. 984.]

DUNCAN C. MACKAY, RESPONDENT, v. WESTERN  
UNION TELEGRAPH COMPANY, APPELLANT

TELEGRAPH, MESSAGES—DUTY OF COMPANY.—It is the duty of telegraph companies to transmit messages with reasonable diligence, and in the order of time in which they are received.



## Argument for Appellant.

**DAMAGES FOR DELAY.**—Unless the importance of the message is either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for delay or failure in transmission beyond the price paid for that purpose. Telegraph companies are liable to the extent of the actual damage sustained for delay or failure in transmitting a dispatch, the importance of which is manifest either by its own words or made so by explanation.

From the District Court of the First Judicial Storey County.

acts sufficiently appear in the opinion.

*Hillyer, for Appellant:*

Damages beyond the price paid for sending the telegraph are recoverable. The dispatch was in cipher, and was unintelligible except to the person to whom it was sent. No explanation of its contents, or even of the subject-matter, was made to any of the defendants' agents. Admitting that telegraph companies are, in plain sense, common carriers, and subject to the general rules, as to obligation and liability, governing such carriers, nevertheless there is a very broad distinction to be made in the application of those rules as between them and carriers of articles of value. What the telegraph company carries is intangible, and has no intrinsic value. It is, therefore, not an insurer in any such sense as other carriers.

The liability of the latter, in case of negligence, is determined by the value of the article lost, or the diminution in value of the article damaged. Obviously, there can be no such liability for negligence in transmitting a message which has no value. In case of a breach of contract to send a telegram, the only direct damage is the loss of the price paid for its transmission. All other injury is within the class of what are legally termed consequential damages. In respect to these, the inquiry will be whether they are so related to the transaction as to be a natural or sufficiently probable consequence of the negligence, or are too remote to be recoverable. (*Hayes v. Fargo & Co.*, 23 Cal. 185; *Allen on Tel.* 653; *Sedg.*

on Dam. 439, *et seq.*; *United States Tel. Co. v. Gilder*, 29 Md. 232; *Bank v. Tel. Co.*, 30 Ohio St. 565; *Sand Stuart*, L. R., 1 Com. P. Div. 326; *Lane v. Montreal Co.*, 7 U. C. Com. P. C. 23; *Durgan v. Western Union Co.*, 1 Am. Law Times (N. S.), 409; *Behm v. W. Union Tel. Co.*, 8 Biss. 131; *Hord v. Western Union Co.*, Ohio Rep.; *Schaeffel v. P. & A. Tel. Co.*)

*Lewis & Deal*, for Respondent:

I. It must be admitted that telegraph companies, like companies and individuals, are liable for any damages resulting to another through their negligence or willful conduct. They may make reasonable rules to govern their business and limit their liability, yet they can not make a rule to protect themselves from either willful misconduct or gross negligence. (Allen's Tel. Cas. 196, 212, 261, 578.)

II. Telegraph companies can not, by any rule, limit their liability to the price of the dispatch, nor to any thing less than the actual damage. (Allen's Tel. Cas. 530.)

III. The measure of damages is the exact damage suffered by the sender of the message, that is, as in this case, the difference between the price that could have been obtained for the article ordered to be sold, and the price actually obtained. (Allen's Tel. Cas. 570, 574, 661, n.; *Allen v. Alta California Tel. Co.*, 13 Cal. 422; 2 Ohio Dig. 100; *Leonard v. Tel. Co.*, 41 N. Y. 544; *Rittenhouse v. Western Union Tel. Co.*, Allen's Tel. Cas. 570; *Scott & Jarman on Tel.*, secs. 165, 166, 242-245, 267.)

By the Court, BELKNAP, J.:

The defendant corporation received from the plaintiff, the City of Virginia, in this state, for transmission by telegraph to San Francisco, a message, in words unintelligible by themselves, but which the broker to whom it was addressed could have understood as an order to sell two hundred and fifty shares of Mexican mining stock in his hands belonging to plaintiff. The message was delivered to the defendant at about 1 o'clock P. M. of the fourteenth day

Opinion of the Court—Belknap, J.

1878, but through the negligent delay of defendant was not received at its San Francisco office until 3:36 of that afternoon, and the plaintiff thereby lost the difference between the amount for which the stock could have been sold at the 2 o'clock P. M. informal session of the brokers, and that for which the stock was actually sold on the receipt of the message by the broker. This is the plaintiff claims he is entitled to receive as damages in this action, and under instructions supporting this the jury returned a verdict in favor of plaintiff for \$10,000 and dollars.

The duty of proprietors of telegraph lines to transmit messages with reasonable diligence, and in the order of priority in which they are received. Failure to do so creates liability in favor of the person injured. Defendant's negligence in this respect is conceded for the purposes of this case, and the only question made in the case relates to the amount of damages. Defendant claims that the damages awarded were such as were not fairly within its contemplation as the result of its delinquency, at the time it entered into the contract to transmit the message.

It appears to be no conflict in the decided cases, that the measure of damages for breach of contract for transmission of telegrams is the measure of damages is the same as for breach of contract generally. In general, a party failing to perform his contract may be held to make good the loss caused by his failure, but he can not be held for remote, contingent, and uncertain consequences, or for speculative results, though deducible from the failure. On consideration of this subject the supreme judicial court of Massachusetts, in the case of *Squire v. Western Telegraph Company*, 98 Mass. 237, said: "A rule of law which should embrace within its scope all the consequences which might be shown to have resulted from the failure or omission to perform a stipulated duty or service, would be a serious hindrance to the operations of commerce, and to the transaction of the common business of life. The law should not be to impose a liability wholly disproportionate to the nature of the act or service which a party has bound himself to perform." Vol. XVI.—15.

himself to perform, and to the compensation paid and received therefor. The practical rule, founded on a public policy, and at the same time consistent with good sense and sound equity, is, that a party can be held liable for breach of a contract only for such damages as are the natural, necessary and the immediate and direct results of the breach—such as might properly be deemed to have been in the contemplation of the parties when the contract was entered into—and that all remote, speculative, and uncertain results, as well as possible profits and advantages, and all other like consequences which might have arisen from the breach of the contract, must be excluded as forming no proper or legitimate basis on which to determine the extent of the injury actually caused by a breach."

The case of *Hadley v. Baxendale*, 9 Exch. 341, contains the following authoritative statement of this rule, which is frequently quoted and universally accepted: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as naturally and fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, known and communicated. But, on the other hand, if the special circumstances were wholly unknown to the defendant at the time he was breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from a breach of contract."



Opinion of the Court—Belknap, J.

had the special circumstances been known, the court might have specially provided for the breach of contract on special terms as to the damages in that case, and of course to advantage it would be very unjust to deprive them.” To consider the facts in this case under the rule as laid down: When the plaintiff handed the message to the manager of the defendant corporation no explanation of the subject-matter was made. Its contents were intentionally concealed by the employment of a cipher. It is true the manager testified that the plaintiff in delivering the message to him asked if it would be received in San Francisco at the time for the two o'clock P. M. informal session of the board of brokers, to which inquiry the manager replied that he thought it would. The manager also admitted that a large proportion of the dispatches sent from Virginia City to San Francisco were in cipher, and that he generally received such dispatches related to stocks or mining business. From these facts defendant's manager might have inferred that the message related to mining stocks; but he did not, it contained an order to buy or sell, or revocation of a previous order, or some communication concerning the affairs of any of the many other matters incident to mining transactions, was in no wise suggested. Neither the plaintiff himself nor any communication made to defendant's manager disclosed the special purpose of the plaintiff in sending the message, and because of its total ignorance of the contents defendant could not have contemplated, within the meaning of the act, the probable result of failing to promptly deliver the message, that it would be answerable for the loss in the amount for which the two hundred and fifty shares of Mexican stock were actually sold and that for which they could have been sold at the two o'clock board. The loss sustained can not be “reasonably supposed to have been in contemplation of both parties at the time they made the contract, or the probable result of the breach of contract. It follows that plaintiff is precluded from recovering the amount claimed. The only loss which followed as a natural consequence from defendant's breach of contract was the loss paid by plaintiff for the transmission of the mes-

## Points decided.

sage, and this is the limit of the damages he is entitled to recover under the facts presented.

Although the question herein considered has never before been adjudicated by this court, the decisions of the courts of other states uniformly sustain the principle unless the importance of the message is shown either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for failure or delay in transmission beyond the price paid for that purpose. (*Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530; *Candee v. Western Union Tel. Co.*, 1 Wisc. 480; *Beaupre v. P. and A. Tel. Co.* 21 Minn. 1; *McColl v. Western Union Tel. Co.*, 12 J. & S. N. Y. 4; *Sanders et al. v. Stuart*, 17 Eng. (Moak's Notes, 286; *Edwin v. United States Tel. Co.*, 45 N. Y. 744.)

On the other hand, telegraph companies are liable to the extent of the actual damage sustained for delay or failure in transmitting a dispatch, the importance of which is manifest either by its own words or made so by explanation. (*Leonard v. N. Y. Tel. Co.*, 41 N. Y. 544; *De Ruyter v. N. Y. Tel. Co.*, 30 How. (N. Y.) 405; *Rittenhouse v. Independent Tel. Co.*, 44 N. Y. 265; *Bryant v. Am. Tel. Co.*, 1 Daly, 590; *Sprague v. W. U. Tel. Co.*, 6 Daly, 201; *United Tel. Co. v. Wenger*, 55 Pa. St. 268; *Tel. Co. v. Dryberg*, 1 Id. 300; *True v. International Tel. Co.*, 60 Me. 27; *Squire v. W. U. Tel. Co.*, 98 Mass. 233; *Parks v. Alta Tel. Co.*, 1 Cal. 424; *W. U. Tel. Co. v. Tyler*, 74 Ill. 168; 60 Ill. 4.

Judgment reversed.

[No. 1,031.]

**SAMUEL BROWN, APPELLANT, v. R. W. WARREN  
ET AL., RESPONDENTS.**

**JUDGMENT OF NONSUIT—STATEMENT ON APPEAL—SPECIFICATION OF ERROR.**  
On appeal from a judgment of nonsuit the specification of error consists of these words: "To this decision and judgment of the court the plaintiff by his attorney, then and there duly excepted, and assigns the decision and judgment of nonsuit as error." *Held*, sufficient.

**NONSUIT—WHEN IT SHOULD NOT BE GRANTED.**—If there is any evidence

## Argument for Appellant.

which would authorise a recovery of any portion of the land in controversy a nonsuit should not be granted.

**QUITCLAIM DEED—WHEN IT CONVEYS GRANTOR'S TITLE ACQUIRED BY SUBSEQUENT PATENT—NONSUIT.**—C., after making final payment in a United States land office of the land in controversy, receiving a duplicate receipt therefor, conveyed the same, by quitclaim deed, to B. and R., C. subsequent to this conveyance received from United States government a patent to the land: *Held*, that, by his deed, C. acquired no right or interest in the land in question which he did not possess at the date of his deed to B. and R.; and that, upon the motion for nonsuit, plaintiff's rights should have been considered the same as they would have been if C.'s deed had been a bargain and sale deed, or if it had been executed subsequent to the date of the patent.

**DESCRIPTION IN DEED—PAROL EVIDENCE OF IDENTITY.**—A description in a deed conveying "all the real estate, water rights, and property of every description, real and personal, in the state of Nevada, belonging to the parties of the first, or either of them," is sufficient to convey the same.

Parol evidence is admissible to enable an identification of the property to be made.

**GROUND FOR NONSUIT—GROUNDS OF MUST BE STATED—WAIVER.**—It was held upon appeal that a nonsuit should have been granted, because there was no proof of the due execution of the conveyance to plaintiff. Such ground was stated in the motion for a nonsuit: *Held*, that by failing to specify this ground at the time the motion was made, defendant waived it, and that it could not be considered on appeal.

**CERTIFICATE OF REGISTER OF LAND OFFICE—EVIDENCE OF CONVEYANCE OF LAND.**—A certificate of the register of the land office containing a copy of all the entries, as to preëmption, settlement, payment of purchase money, and issuance of patent, that appeared in the books of the land office, in relation to the lands in question, is competent evidence of the facts intended to be proven thereby.

**TENANT IN COMMON MAY MAINTAIN EJECTMENT AGAINST EVERY ONE OF HIS CO-TENANTS.**—A tenant in common who has an interest in the property which entitles him to the enjoyment of the entire estate, can maintain ejectment against all persons but his co-tenants and parties claiming under them.

Appeal from the Second Judicial District, Washoe County, Nevada.

Facts sufficiently appear in the opinion.

*For Appellant: J. S. Deal and Wm. Webster, for Appellant:*

The court erred in granting a nonsuit. It was shown that Brown was at least a tenant in common with Boyle in the named premises, and as such tenant he had the right to maintain an action for ejectment. (*Sharon v. Davidson*, 4 Nev. 416.)

II. At the time Countryman's deed was executed, tryman had applied for a patent, and had paid the purchase money. That, to all intents and purposes, gave Countryman the legal title, and his deed to Boyle and Ridge conveyed the same to them. For all the purposes of an action of ejectment Boyle and Ridge were by such deed invested with the legal title. (*North Hempstead v. Hempstead*, 2 N. H. 110; *Tyler on Ej.* 74, 75; *Bludworth v. Lake*, 33 Cal. 2d 110; *Green (Iowa)*, 349; 2 *Washburne on Real Prop.* 531; *son v. McCall*, 3 Cow. 80; *Jackson v. Bull*, 1 John. Cas. 34; *Wallbridge v. Ellsworth*, 44 Cal. 353; *Crane v. Salmon*, 15 Id. 63; *Stark v. Barrett*, 15 Id. 366.)

III. The deed operated as an assignment of the duplicate receipt and the right to the patent. (*Green v. Clark*, 15 N. H. 591.)

R. M. Clarke, for Respondents:

I. The quitclaim did not carry to Boyle and Ridge the fee subsequently acquired by patent from the United States. (*Harden v. Cullins*, 8 Nev. 49; *Treadway v. Wilder*, 108.)

II. The descriptive words in the deed are not sufficient to pass the interest, if any of Ridge, which he held in common with Boyle, particularly as that interest, if any, was equitable merely. (7 U. S. Dig. 249, par. 82; *Banks v. Moreno*, 39 Cal. 233, 239, 240; *Higuera v. Wall*, 828; *Power v. Hathaway*, 6 Hill, 453.)

III. This action being for the possession and to recover the title to the land, and also to recover value for use and occupation, Boyle was a necessary party to the suit. (Sec. 14, Civ. Practice Act; *Austin v. Hays*, 10 Johns. 286; *Merrill v. Berkshire*, 11 Pick. 269, 274; *v. Dobyns*, 11 Mo. 105, 106, 107.)

By the Court, LEONARD, C. J.:

This is an action to recover possession of the north-east quarter of the north-east quarter of section 12, township 19 north,



east, Mount Diablo base and meridian—the same being  
1, 2, 3 and 4 of said section—together with mesne  
its, and the appeal is from a judgment of nonsuit.

It is claimed by counsel for respondents that the judgment below should be affirmed, because the statement on appeal does not specifically state the errors or grounds upon which appellant intends to rely on the appeal, as required by section 332 of the civil practice act. The only specification of error is in these words: "To this decision and judgment of the court the plaintiff by his attorney, then there duly excepted, and assigns the decision and judgment of nonsuit as error."

Counsel for appellant insist that the assignment stated sufficiently specific. The law does not require a vain showing. It was incumbent upon the plaintiff, before resting, to make a *prima facie* case entitling him, in the absence of evidence against him, to all or some portion of the relief demanded. If he did not make such showing it was the duty of the court, upon a proper motion, to enter a judgment of nonsuit.

In case of an appeal, the statute requires the appellant to state, specifically, not only the particular errors or grounds upon which he intends to rely on the appeal, but, also, that the statement "shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more." In appealing from a judgment of nonsuit, the plaintiff and appellant must set out in his statement sufficient evidence, upon every material issue, to entitle him to judgment; and if that is shown by a settled statement, he is entitled to reversal; otherwise he must fail. The burden of showing facts establishing a *prima facie* case rests upon him, and he can show them in one way only; that is, by stating so much of the evidence produced by him as is necessary to justify a reversal.

This being so, the appellant can make no more particular specification than was done in this case, except by restating the evidence or the legal conclusions resulting therefrom. He can only say the court erred in granting a nonsuit be-

cause the plaintiff made certain proof, stating it as given, or the substance of it, which entitles him to judgment. Such additional specifications would aid neither court nor counsel upon the opposite side. On an appeal like this, the appellant's theory is, and must be, made out a *prima facie* case in the trial court, and if the appellant can show from the evidence in the statement of facts that he failed in his evidence upon any one material point, his judgment will not be disturbed, if such failure was the ground of the motion, or, it may be, if the omission was such that it could not have been remedied. It matters not what reasons the court may give for granting a new trial, or that the judgment upon those grounds is erroneous. The appellant must show by his evidence that in all respects he was entitled to recover.

We are of the opinion, that in an appeal from a judgment of nonsuit, the plaintiff should not be required to specify more definite specifications of the errors relied on than were done in this case. See *Donahue v. Gallavan*, 43 Cal. 2d 100, and *Moore v. Murdock*, 26 Id. 524, where the specifications were: "First, the court erred in denying defendants' motion for a nonsuit at the close of plaintiff's case; second, the conclusions of law drawn by the court are not warranted by the facts found." The court evidently considered the statement of the first ground of error relied on sufficient. It said: "The only point we can consider is the alleged error of the court below, in overruling the plaintiff's motion for a nonsuit. The other grounds of error stated for new trial were not specified, either as regards insufficiency of the evidence or the errors in law, as required by the statute, and therefore they should be disregarded by the court below, and can not be examined on appeal."

The language of the statute requiring a specification of the errors relied on is substantially the same in appeals for new trials and on appeals from judgments, and the specification that is sufficient in one case is equally so in the other. If we are correct in this, the cases cited sustain the conclusion. The first case was an appeal from a judgment of nonsuit, and in the second, as before stated, one

Opinion of the Court—Leonard, C. J.

s relied on for a new trial, was the court's refusal to grant a nonsuit. There is much greater reason for requiring the appellant on appeal from an order *denying* a nonsuit to specify the particular errors relied on, than in cases of appeal from judgments of nonsuit. Because, in cases of the former character, any one omission may justify the nonsuit, and that may be pointed out; while in the latter the appellant must show himself entitled to recover the whole case, and the error relied on—the granting of the nonsuit—can be shown only by making it manifest, from all the evidence, that he was entitled to recover upon the facts proven by him.

The first point made by counsel for respondents upon the merits, as a reason why nonsuit should have been granted, is stated as follows: "The land in controversy lies between the meander line, and between that line and the center of Truckee river; and if it be said that the meander line must be conclusively taken as the river's edge, or low water mark, it must also be said that the river's edge, or low water mark, and the meander line conform, and that the river never lies between the meander line and the center of the stream is in the river. The river bed in a meandered stream belongs to the government, and in occupying, defendant committed no trespass which plaintiff could redress." It is not necessary, upon the evidence, to decide whether the proprietors of land on a meandering stream own to the low water line, or only to the meander line, as indicated upon the map. The testimony of the two surveyors, and Baker, shows that a portion of the land in question was outside of the meander line from the river, on lot 1, such being the case, even admitting that counsel for respondents is correct in the statement of the law, a nonsuit should not have been granted upon this ground.

It is next said: "Conceding for argument that the facts show that Countryman had completed his cash entry and paid for lots 1, 2, 3, and 4, before quitclaiming to Boyle and Ridge, the quitclaim did not carry to Boyle and Ridge the subsequently acquired by patent from the United States."

The question for our consideration is this: Con- facts to be that on the third day of March, 1864, man filed in the United States land office, at Carson claratory pre-emption statement covering the proper pute; and on the second day of March, 1865, m proof of settlement, improvements, etc., to the sa of the register and receiver; paid the purchase m ceived the usual duplicate receipt; and on the fif February 1869, a patent was issued to him by the ment of the United States. Did the quitclaim c outed by Countryman and wife September 22, 186 quent to making final proof and payment, but befor ing the patent, carry to their grantees, Boyle and the legal title subsequently acquired by the patent, fer to them rights in the property, which would abled them to maintain an action for the possession

It may be admitted that a quitclaim deed only pa interests as the grantor possesses at the time, and has no operation whatever upon subsequently acqu terests. It certainly transfers all existing inter titles. We held in *Treadway v. Wilder*, 12 Nev. 1 the statute of limitations did not commence to run legal title passed from the government; that is to s the issuance of the patent. But we recognized the that, after proof and payment, a preëmtor is the o the land, in fact, and that, thereafter, the gov merely holds the naked legal title in trust for him patent is issued. "To maintain ejectment a right and possession is all that is required." (*Toland v.* 38 Cal. 43; *Dilly v. Sherman*, 2 Nev. 69.)

In *Bhudworth v. Lake* (No. 1), 83 Cal. 262, the co "The purchase was made, the consideration money the purchaser and received by the state, and the authorizing the location delivered. Henceforth, t chaser became the owner of the entire beneficial int that quantity of land. As soon as a valid location warrant was made, the right attached to the speci of land selected, and the legal title at once vested state of California, but for the benefit of the holder



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warrant located. The purchase from the state had already been made and the land paid for. The state simply held the legal title only, without any beneficial interest whatever, with authority in the state officers to execute a patent to the beneficiary, the real party in interest. The state held the legal title in trust, only, for the purchaser, until the patent should issue. When Snelling, in this instance, made a valid location of the warrant \* \* \* he became the owner of the entire beneficial estate, and the state held the legal title in trust for him. Snelling was entitled to a conveyance of the legal title. When he conveyed all his right, title, and interest in the land he not only conveyed the beneficial interest but his right to a conveyance of the legal title. The latter necessarily goes with the former. This is a part of the interest held at the time of his conveyance. The patent was finally issued to give effect to the right before acquired, and Bludworth took the legal title merged with the trust in favor of the grantees of Snelling. When the patent plaintiff acquired no new interest of an adverse character, subsequent to his conveyance to Hall, and in fact that said conveyance was only of his right, title, and interest, instead of a bargain and sale of land, can not affect the question."

In *Byers v. Neal*, 43 Cal. 214, it appears that, in November, 1863, Neal was a settler upon certain public lands, and made proof and payment under the pre-emption laws. The court said: "The patent issued to him on the twentieth of May, 1869, by the authorities of the United States, does not constitute a new title in him in that sense. It is merely a formal assurance of the estate which he had already acquired by the proof and payment in November, 1863." See, also, *Fowler v. Frisbie*, 37 Id. 495; and *Thompson v. Spencer*, 50 Id. 538.)

In *Stark v. Barrett*, 15 Cal. 361, the deed, which was executed by the grantor long anterior to the issuing of the patent, purported to convey the grantor's right, title, and interest in a tract of the land which was included in the patent; and it was held that, "the patent, in recognizing its validity of the grant, necessarily established the validity of

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all properly executed intermediate transfers of the grantor's interest;" and in *McCauley v. Fulton*, 44 Id. 355, the court says, "the effect of that rule is to vest in such grantor a legal estate; and there is no rule in respect to the operation of such patents which is better understood than this."

In *Frink v. Darst*, 14 Ill. 306, it is said: "The case of *Jackson v. Fish*, 10 Johns. 456, was this: A soldier in the service of the United States, entitled to a donation of land for his services, transferred his claim to the same before receiving patent therefor, by a deed of quitclaim or release, and the court held that when the patent issued it vested in the benefit of the releasee. The case was doubtless correctly decided, but it has no analogy to the one at bar. A soldier, at the time he executed the quitclaim deed, transferred his claim to the tract of land from the government, and undoubtedly, when that claim was afterwards perfected by the issuing of a patent, it was for the benefit of the person to whom the claim had been transferred. \* \* \* A deed (quitclaim) will undoubtedly pass the land itself, although the grantor has an estate therein at the time of the conveyance, but it passes no estate which was not then possessed." See also, 3 McLean, 109.

Under the facts admitted for the purposes of this case, our opinion is that, by his patent, Countryman acquired no right or interest in the land in question which he did not possess at the date of his deed to Boyle and Ridge, and that, upon the motion for nonsuit, plaintiff's claim should have been considered the same as they would have been if Countryman's deed had been a bargain and sale deed, or if it had been executed subsequent to the date of the patent.

4. It is next said that the title to the property in question never passed from Boyle and Ridge, or either of them, to the plaintiff; that no conveyance is shown from Boyle and Ridge in the deed from Ridge and the Washoe United Gold and Silver Mining company, limited, the property is not described. The descriptive words in the named deed are as follows: "All the real estate, together with the rights, and property of every description, real and per-

the state of Nevada, belonging to the parties of the first t, or either of them, a particular description of a por- n of which is as follows:" \* \* \*. The property par- ularly described does not include that in question. In *enley v. Green*, 12 Cal. 166, the court used the following uage: "It is undoubtedly essential to the validity of a veysance that the thing conveyed must be described so o be capable of identification, but it is not essential that e conveyance should itself contain such a description as enable the identification to be made without the aid of insic evidence."

pon the question of identity parol evidence is always issible. (*Abbott v. Abbott*, 51 Me. 581; *Waterman v. nson*, 13 Pick. 261.) In the last case, the court said: e parol evidence identifies the subject on which the d operates, and then the estate passes by force of the d. Suppose A. B. grants in these words: 'All the estate y in my occupation in — street.' The very first step o prove where the house occupied by the grantor was ated. But, then, another question arises; the grantee ends that the grantor occupied a dwelling-house and a le adjoining, and the grantor denies it. The question t be determined by parol evidence; but as it is so de- mined, the house alone, or the house and stable, will be dged to have passed by the deed."

n *Jackson v. DeLancey*, 11 Johns. 365, the descriptive ds in the mortgage under consideration were: "All and y those shares, lots, and parcels of land, and all other, lands \* \* \* and estate or estates whatsoever of said am, Earl of Stirling, whereof he is seized in common. eparately and alone, in those several tracts of land called patent of Cheesecocks, in Orange county, Richbell's nt, in the county of West Chester," etc., naming several r patents and their locations. Then followed these ds of general description: "And all other, the lands, ments, and hereditaments belonging to the said William, t of Stirling, within the province of New York." The nises in question passed, if at all, under the general rription; the court held that the general description in

the mortgage was liable to no objection; that a party, ignorant of his rights might sell or mortgage by general description. In *Frey v. Clifford*, 44 Cal. 343, the descriptive words were: "All my right, title, and interest in Sacramento, Upper California, consisting of town lots and buildings thereon." The court held the description sufficient to convey the lots in controversy.

In *Starling v. Blair*, 4 Bibb, 289, it was held that, "the mortgage of 'all the lots the mortgagor then owned in the town of Frankfort, whether he had a legal or equitable title thereto' was not void for generality or uncertainty, but was good for all the lots which could be identified as belonging to the mortgagor at the date of the deed." The court thus rested upon general descriptions: "There may, indeed, be more difficulty in ascertaining the lots intended to be conveyed, where the language used in description is thus general, than if the lots had been designated by their number; but it is in the degree, and not in the nature, of the difficulty, that the two cases differ. It results in neither from ambiguity on the face of the deed, but from extrinsic circumstances, and in both cases resort must be had to the evidence *aliunde* for the purpose of identifying the lots which are the subject of the conveyance." We conclude that this objection is not valid.

5. It is next urged that there was no proof of the due execution of the conveyance introduced in evidence from Nevada Land and Mining company to plaintiff. The defendant on appeal declares that said deed was duly executed and acknowledged. But passing that fact, we do not think respondents can raise the point now under consideration for the purpose of sustaining the judgment of no sale. When the deed was introduced, it is true, the defendant made the same objection. But in their motion for new trial it was not stated or relied on as a ground thereof. The record shows that, after plaintiff rested his case, the defendants moved the court for a judgment of nonsuit, on the grounds, which were stated specifically; and failure to prove due execution of the conveyance under consideration was not mentioned or referred to in general terms.



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sifically. We think it would be unfair to plaintiff, and a justice that ought not to be sanctioned, to permit the introduction of the deed from that company, as a link in plaintiff's chain of title, and then sustain the judgment of suit upon the ground now urged, which was not stated relied on by the moving party. (*Jeffree v. Walsh*, Nev. 146.)

If the deed was not competent to prove a conveyance to the company to plaintiff, it should not have been admitted, and if admitted, although improperly so, it should have been struck out. While it was in evidence, although objected to by defendants, plaintiff had a right to rely upon its proof of conveyance to him. If defendants had again urged the incompetency of that deed upon the motion for nonsuit, and a failure to transmit the title to plaintiff, as a consequence, "due proof of its execution" might have been admitted by the court and made by plaintiff. The only grounds of nonsuit stated, which, it can be claimed, existed in the slightest degree to the objection now urged, are as follows: "There is no proof that the land in controversy, at any time, belonged to Boyle or Ridge, or to both of them; the proof shows the title to the land in question, to be in plaintiff, and not in him. No possession in any one has been shown of this land; the legal title thereto is now in Peter Countryman."

The defendants' claim, on the motion for nonsuit, was not that the conveyance from the Nevada Land and Mining Company did not convey to plaintiff whatever title it had, but that it was, that said company, and Boyle and Ridge, had no title to convey, because the patent to Countryman was issued subsequently to the date of his deed to Boyle and Ridge, and it was upon those grounds that the motion was sustained. If defendants intended to rely upon the ground now urged in their motion for nonsuit, they would have so stated distinctly at the time, and failing to do so, under the circumstances, they waived the point. (*Mateer v. Brown*, 1 Nev. 222; *Baker v. Joseph*, 16 Id. 180; *Kiler v. Kimbal*, 10 Nev. 268.) Besides, as was said in *Sharon v. Minnock*, 6 Nev. 385, the deed, upon its face, purported to be the deed

of the Nevada Land and Mining company, limited, although its due execution was not proved, and its execution was objected to by defendants, still, it having been received in evidence, and not having been taken for consideration of the court upon motion for nonsuit, it could very properly be held to be what it purported to be.

Counsel for respondents says in his brief that "all objections were reserved by the court, and were argued and considered on the motion for nonsuit." The record does not show it if such was the fact. That only shows that several deeds produced in support of plaintiff's case were introduced in evidence. Again, there was some money, admitted without objection after the introduction of the deeds, that the title was in plaintiff. He admitted without objection that, he "claimed to be the owner of the lots in dispute; that on the seventh of December, 1864, he received a conveyance of this land, having purchased it from the Nevada Land and Mining company, limited, and the mortgagees."

6. It is claimed that there was no competent proof of conveyance of the land in dispute by the United States to Countryman; that the duplicate purchase receipt was the best evidence. The proof made and received was a certificate of the register of the land office at Carson, that it was certified that Countryman filed his preliminary declaratory statement March 3, 1864, covering the land in question, and alleged settlement thereof of date December 21, 1863; that on March 2, 1865, Countryman made oath to said proof and paid the purchase money (one hundred and eighty-eight dollars and twenty-eight cents) and received the usual receiver's duplicate receipt, showing said cash entry; that pursuant to said cash entry, a patent was issued by the government of the United States to said Countryman for said land February 5, 1869, and was recorded in Washington, in vol. 1, p. 359, records of the general land office. All of which appeared from the records of the land office.

It was admitted by counsel for the defendants, at trial, that the certificate contained a copy of the

at appeared on the books of the land office, in relation to the lands in question. We think, under the admissions, the certificate was competent evidence of the facts intended to be proven thereby. (Rev. Stats., U. S., 2 ed., secs. 906-907; Copp's Pub. Land Laws, p. 192; sec. 34, and p. 768; Foster's Land Laws, pp. 50, 107, 430; *Kyburg v. Perkins*, 6 Cal. 675; *Gregory v. McPherson*, 13 Id. 572; Greenl. on Ev., vol. 1 (13th ed.), sec. 483 *et seq.*)

7. And lastly, it is urged in support of the nonsuit, that plaintiff has any title or interest in the lands in dispute, and holds the same as tenant in common with Boyle, and that he can not maintain this action without uniting his co-tenant as a party with him. This action, except as to rents and profits, was for the possession only. It can determine only rights but those of present possession. (*Mahoney v. Van Winkle*, 21 Cal. 583.)

We have no doubt, upon reason and authority, that one tenant in common, who is seized *per mi et per tout*, and has an interest in the whole which entitles him to the enjoyment of the entire estate as against every one except his co-tenants, may maintain ejectment, in this state, against all persons but his co-tenants and parties claiming under them. (*Hart v. Robertson*, 21 Cal. 348; *Stark v. Barrett*, 15 Id. 1; *Touchard v. Crow*, 20 Id. 162; *Williams v. Sutton*, 43 Id. 71; *Smith v. Starkweather*, 5 Day, 210.) As to the rents and profits, he can recover, probably, only the proportion corresponding to his interest. (*Clark v. Huber*, 20 Cal. 166.)

Our opinion is, that the court below erred in granting a nonsuit, and the judgment is reversed.

#### PETITION FOR REHEARING.

R. M. Clarke, for Petitioner:

I. Under the pleadings plaintiff did not have such an interest in the land as entitled him to prevail in an action of ejectment.

II. It can not be maintained that the payment of the purchase money by Countryman, and the issuance of the receipt therefor, vested the legal title in Countryman, or took it out of the United States. (*Fenn v. Holmes*, 21 How.

## Argument for Relator.

481; *Witherspoon v. Dymcan*, 4 Wall. 218; *Gibson v. tau*, 13 Id. 99.)

III. No recovery can be had upon an equitable unless it be pleaded. (*Maguire v. Vics*, 20 Mo. 43; *trada v. Murphy*, 19 Cal. 248; *Bhum v. Robertson*, 141; *Brock v. Tucker*, 42 Id. 346.)

## RESPONSE TO PETITION FOR REHEARING.

By the Court, LEONARD, C. J.:

After careful examination of the points urged hearing, the same is denied. (See 89 Cal. 586; 38 Id. 45 Id. 17; 13 Wall. 295; 2 Minn. 171; 2 Saw. 455; 648.)

[No. 1,065.]

THE STATE OF NEVADA, EX REL. G. A. R.  
DISTRICT ATTORNEY OF WASHOE COUNTY v.  
LEETE, RESPONDENT.

STOCKHOLDERS IN CORPORATION.—WHAT CONSTITUTES.—G., sen., own tain shares of stock in a corporation organized for the purpose taining a ditch, etc.; he gave them to his son with the requ new certificates should be issued in his son's name, and transfer the books of the company. This request was complied with. paid nothing for the stock, the transfer being made in order son might be eligible to the office of trustee: *Held*, upon a r the statutes of this state, that such a transaction constituted th stockholder in the corporation, and made him eligible to the trustee. (BELKNAP, J., dissenting.)

INDM.—Under the statutes of this state a person who "holds" sh stock, issued in his name, is recognized as a stockholder as well who "owns" them.

APPLICATION for quo warranto.

The facts are stated in the opinion.

Thomas E. Haydon and G. A. Rankin, for Relator

I. The burden of proof was on defendant to est his right to the office. (Ang. & Ames on Corp. sec. *State v. Haskell*, 14 Nev. 210; High on Rem., sec. 62



The court did not err in striking out Gulling's evidence. The fact that the shares stood in the son's name by consent of his father, entitled him to vote the stock. *Mich v. Marye*, 9 Nev. 316; *State ex rel, Pettinelli*, 10 Nev. 144; *Ang. & Ames on Corp. secs. 131, 132*; *Green's v. Ultra Vires*, 126; *State v. Ferris*, 42 Conn. 560; *Gil v. Manchester Iron Works*, 11 Wend. 627; *Downing v. 3 Zab. 66*; *Union Bank v. Laird*, 2 Wheat. 390; *Shaw v. Mencer*, 100 Mass. 382; *Mechanics' Bank v. N. Y. & N. J. R. Co.*, 13 N. Y. 599; *Ex parte Holmes*, 5 Cow. 426; *Ex parte Wilcocks*, 7 Id. 402; *In re Barker*, 6 Wend. 509; *Merchants' Bank v. Cook*, 4 Pick. 405; *Hoppin v. Buffum*, 1 I. 513.)

Lee, as executor of Larcombe's estate, had a clear right to vote. (2 Comp. L. 3399; *Matter of North Shore Co.*, 63 Barb. 571; *People v. Tibbetts*, 4 Cow. 364; *My v. Hollister*, 26 N. Y. 112; *Middlebrook v. Bank*, 3 N. Y. 135; *Field on Corp.*, secs. 70, 71.

*andsey & Dickson*, for Respondent:

The court erred in ruling that the burden of proof was on the respondent. (*State v. Hunton*, 28 Vt. 594; *People v. State*, 37 N. Y. 192; *State v. Brown*, 34 Miss. 688; *State v. Upferle*, 44 Mo. 154; 1 Comp. L. 394.) Respondent was once lawfully in the office. (14 Nev. 209.) The court erred in withdrawing the testimony of Gulling from the record. (Authorities cited are found in the opinion of the court.)

The court erred in holding that John Lee, as executor of the Larcombe estate, could give a proxy to represent the estate belonging to that estate. (*Sebastian v. Johnston*, 72 N. Y. 282; *Wilson v. Dennison*, 1 Ambl. 86; *Hawkins v. 3 East*, 410; *Heyer v. Deaves*, 2 Johns. Ch. 154; *Myer v. Clark*, 13 Met. 226; *Cole v. Wade*, 16 Ves. jun. 541; *St. Clair v. Jackson*, 8 Cow. 575; *Hawley v. James*, 5 N. Y. 318; *Bulleel v. Abinger*, 6 Jur. 410; *Belote v. White*, 10 Id. 710; *Hunt v. Douglas*, 22 Vt. 130; *Burger v. Duff*, 4 N. Y. Ch. 369.)

The Court, LEONARD, C. J.:

The Orr Water Ditch company is a corporation, duly incorporated under the laws of this state, for the purpose of

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constructing, keeping in repair, maintaining, and  
ing a ditch for the conducting of water from the  
river, in Washoe county, to farming lands therein, for  
gating and domestic purposes. On and prior to Janu-  
8, 1881, respondent was a stockholder in said corporation  
and the duly elected trustees and secretary thereof.  
date just mentioned an election was held by the stock-  
holders of the corporation, for the purpose of electing  
trustees for the period of one year from February 1, 1881.  
There were two hundred and forty-eight votes in the elec-  
poration, and at that election two hundred and thirty-eight  
votes were cast, of which, respondent, Frazer, and Marshall  
received one hundred and nine votes each, and Gulling,  
James Galt, and A. J. Smith one hundred and twenty-five  
each, one hundred and seven of which respondent admits  
were legal, but denies the legality of the eight votes cast  
by Smith for himself, Galt, and Gulling, and the ten votes  
cast for the same persons by Haydon, proxy for the  
executor of the estate of Larcombe, deceased. Respondent  
admits that the one hundred and nine votes cast by him-  
spondent were legal. If the eight votes cast by Smith, Galt,  
the ten votes by Haydon were legal, it follows that respondent  
was not elected, and that Smith, Galt, and Gulling were  
elected. The five persons declared elected directors were  
Haydon, Powell, Galt, Smith, and Gulling. As to the other  
two, there is no contention. After the election the five per-  
sons just named met as trustees, and Gulling was declared  
secretary of the board. He demanded of respondent the  
books, papers, and property belonging to the corporation  
office, but compliance was refused, and this proceeding for  
information in the nature of a *quo warranto* was instituted  
in this court. Plaintiff demands judgment to the effect  
that respondent, is not entitled to the offices of trustee and  
secretary of said corporation; that he be ousted thereof,  
and that Gulling be put in possession thereof, and that the  
books, papers, and property of the corporation appertaining  
to said offices of trustee and secretary, together with the  
his costs. After the filing of respondent's answer, the court  
upon an agreed statement of special issues of fact, the

sent to the second judicial district court in and for  
 hoe county, to be tried by a jury. The jury found for  
 ntiff, and thereupon judgment was entered in this court,  
 rding to the prayer of the complaint. Respondent  
 for a new trial on the ground of several alleged errors  
 ne court below.

is claimed that, in the sense of the statute, Gulling was  
 a stockholder, and, consequently, was not eligible to the  
 e of trustee. The statute provides that, "the corporate  
 ers of the corporation shall be exercised by a board of  
 less than three trustees, *who shall be stockholders in the*  
*pany.*" If Gulling was not a stockholder, he was ineli-  
 , and has no right to the office, or the books, papers,  
 property appertaining thereto, and respondent is en-  
 d to retain the same until his successor, a stockholder in  
 corporation, is elected in his place.

the first question for our consideration, then, is this:  
 n the facts admitted, is Gulling a stockholder in the  
 oration? We have carefully examined the statutes and  
 ions of the different states upon this question, and have  
 e to the conclusion that the answer depends entirely  
 a proper construction of our statute, for the reason that  
 incorporation law, under which this corporation was  
 ed, provides that, "said incorporation, and the mem-  
 thereof, shall be subject to all the conditions and lia-  
 es herein imposed and to none others:" and the stat-  
 of other states, which have been construed by the  
 ts, differ so materially from ours, that the decisions  
 on furnish but little light for our guidance.

ne point of contention under consideration arises upon  
 ception taken by the respondent to the action of the  
 t below in striking out all of Gulling's testimony except  
 which showed that eight shares of the stock of the cor-  
 tion stood in his name upon the books of the company  
 e time of the election. We shall concede that the tes-  
 ny struck out tended to show that Gulling's father  
 d sixteen shares of the stock; that he handed the cer-  
 te to his son, Charles Gulling, and requested the latter  
 ave eight shares put in a new certificate in his name

and transferred to him upon the books of the company for the purpose of making him a stockholder and eligible for the office of trustee, and that he never paid anything for the stock.

Did such an ownership or holding of stock make Gulling a stockholder according to the legislative intent? Counsel for respondent claim that the testimony striven to show that his ownership was only colorable, and that under the statute he must be a stockholder holding the stock in his own right, in order to be eligible for the office of trustee; and that respondent had the right to go behind the book title to ascertain if he was a stockholder in the sense above stated. The court below took a different view, and held that Gulling, who undoubtedly held the muniments of a perfect legal title to the eight shares, and who acted according to his father's wishes, was a stockholder under the statute. We think the court was right. The word "stockholder" is not defined by the statute, nor is it required, in terms, at least, that a person be eligible to the office of director shall be a *bona fide* stockholder, or that he shall own stock absolutely in his own right. He must, however, be "a stockholder in the company."

Counsel for respondent say: "If the mere fact that the stock stands on the books in the name of one person makes him eligible to the office of trustee, irrespective of the question whether or not he has any interest in it, the purpose of the statute is so readily evaded that it becomes a mere letter." It is a part of the history of corporations in this state, that under the statute of 1862, in force at the time the general incorporation law was passed (March 10, 1865), a person was considered and treated as a stockholder by corporations, if he appeared as such upon the books of the company. Except as to the liabilities of stockholders for the proportion of the debts of the corporation, the provisions of the statute is similar to the former one; and as to the qualifications of directors, no change was made. If the legislature intended that a director should own stock absolutely in his own right, it ought, at least under such circumstances



so declared in unmistakable language. But other legislation of the session of 1865 tends to show that the construction contended for by counsel for respondent was intended. In the statute providing for the incorporation of railroad companies, etc., approved March 22, 1865, twelve days after the approval of the general incorporation law (Comp. L. 3425), it is enacted, in section 9, that "no person shall be a director, unless he shall be a stockholder owning stock absolutely in his own right, qualified to vote for directors at the election at which he may be chosen;" and to vote he must own stock ten days before election. To my mind it is significant, that, in the case of a known custom contrary to respondent's theory, the general incorporation law was re-enacted in respect to qualification of directors, while in the railroad law, it was specially declared that every director should be a stockholder owning stock absolutely in his own right. The fact that in the railroad law the legislature, *ex industria*, made absolute ownership the test of eligibility, is strong evidence that in the general law, where that test was excluded, the same rigor was not intended.

But why is it unreasonable to suppose that our legislature intended to recognize as stockholders those persons who should hold certificates of stock in their own names, in whose names the stock should stand upon the books of the company, although, as between themselves and outside parties, there might be private agreements and peculiarities; when state after state, noticeably New York and New Jersey, in terms, enacted the same thing? (See 1 Rev. Stats. N. Y. for 1829, p. 603, sec. 6, and for 1836, p. 605, sec. 6; Nixon's Dig. of Laws, N. J. 1809-1861, p. 153, sec. 6. In the latter state it is enacted that, the books, "shall be the only evidence who are stockholders of such company entitled \* \* \* to vote in person or by proxy, at any election for directors of said company.")

The charter of the Providence and New York steamship company provided that, only stockholders were eligible as directors, and the by-laws provided that, only those stockholders should be entitled to vote at meetings as should

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according to the company's stock ledger, have been held of stock for ten days next preceding such meeting. *Hoppin et al. v. Buffum et al.*, 9 R. I. 517, it appears that certain number of shares in the corporation, owned by Edward P. Taft and Cyrus Taft, were pledged to Earl P. Mason, as security for debts due to himself and others. Neither the ownership nor pledge appeared on the books where the stock had, from the formation of the corporation, stood in the name of "Earl P. Mason, trustee." The certificate was so issued in 1867, and he voted until 1870, without objection.

The court said: "A person who pledges stock has no right to vote upon it, until the title of the pledgee to the stock is perfected. If Taft had appeared on the books as owner, and the books had shown the pledge, Mr. Taft's right to vote could not have been disputed. The object of the stock book and of requiring transfers of stock to be recorded by the corporation, is for the protection of the corporation, to enable it to know who are its members, who are entitled to dividends, and for no purpose is it more important than to enable it to know who are entitled to vote in case of an election. This doctrine is recognized by many authorities directly, and by many impliedly. \* \* \*

If the real owner wishes to have his name, or the true state of facts, appear on the books, he has his remedy in equity to compel a proper transfer, or to compel the pledgee to give a proxy, as was done in the case of *Vawell v. The Bank of Montreal*, 3 Cranch, C. C. 428. \* \* \* In the present case the stock stood in the name of "Earl P. Mason, trustee." The books did not disclose the nature of the trust.

If any other person was the equitable owner of the stock, and entitled to have it transferred to him, he should, if his right was disputed, assert it in season, and take the proper measures to enforce it. But if the trust was of such a nature that the trustee has the control and management of the property, and is to exercise his discretion concerning it, he is the proper person to represent and vote upon it, and the corporation can not be required to examine into the nature of the trust with a view to decide as to the right to vote.

that the intent of the legislature must be gathered from law itself. Let it be remembered that Charles Gulling has the entire legal title to eight shares; the certificate was in his name and the transfer was entered upon the company's books. If he is not a stockholder, it is because such ownership or holding of stock does not satisfy the statute. It is just as true that stockholders and none others can vote as it is that directors must be stockholders. If Gulling was a stockholder he could vote and act as director; otherwise he could do neither.

Section 3393, Comp. L., provides that, "each stockholder, whether in person or by proxy, shall be entitled to as many votes as he or she may 'own,' or represent by proxy, shares of stock;" and it is argued therefrom that an absolute owner in his own right only is a stockholder or can vote. It will be seen that the words "own" and "hold" are used in the statute in the same sense. For instance: Shares of stock "held or owned" by a married woman "may be transferred by her without the signature of her husband;" and all dividends payable upon shares "held" by a married woman may be paid to her in the same manner as if she were unmarried; and any proxy given by a married woman touching shares of stock, "owned" by her shall be valid and binding. (Comp. L. 3397.)

If, after such notice has been given, any stockholder makes default in the payment of the assessment upon shares held by him, so many of such shares may be sold as will be necessary for the payment of the assessment on all the shares held by him, her, or them." (Comp. L. 3398.) "It shall be the duty of the trustees of every company incorporated under this act to keep a book containing the names of all persons, alphabetically arranged, who are, or shall become, stockholders of the corporation, showing the number of shares of stock held by them respectively and the time when they became the owners of such shares." (Id. 3404.)

It is evident, that one who "holds" shares of stock is recognized as a stockholder as well as one who "owns" shares; and in the portion of section 3393, before quoted, the

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word "hold" may be substituted for "own," when it read thus: "Each stockholder, either in person or by shall be entitled to as many votes as he or she may represent by proxy, shares of stock."

It must be admitted that the legislature intended, that all who, as to third parties, "hold" stock in the of the statute—that is, by certificate in their own with proper transfer upon the books—should also absolutely in their own right, in order to be stockholders or that all should be considered such who hold it as stated, notwithstanding there are private agreements and equities between them and others. As before stated, we think the latter view is correct. Section 3397 provides that the capital stock of a corporation, when it is divided into shares, shall be personal estate, and that "such stock may be transferred by indorsement and delivery of the certificate thereof, \* \* \* but such transfer shall be valid, except between the parties thereto, until the same shall have been so entered upon the books of the corporation to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer."

Under that statute, the whole title passes to the transferee so far as the transferrer is concerned, without entry upon the books; but, as to everybody else, the title remains where it was before the transfer. (*Berkley v. Mayre*, 9 Nev. 316; *State v. Pettinelli*, 10 Id. 144; *Wells v. The Bear River and Auburn Water and Mining Company*, 5 Cal. 186). In the absence of other provisions modifying their natural import, those last quoted, in connection with other sections of the statute, and especially 3404 and 3405, show conclusively to my mind that, as to the corporation and other third parties, the legislature intended that the books should show the names of stockholders, and that, as to third parties, persons holding the legal title and exercising control of the stock should be considered stockholders except in cases where the same may have been obtained by fraud or other unfair means.

It will not be denied that delinquent stock can



for assessments without notice to stockholders holding same; yet section 3398 provides that, notice may be given personally or by publication, and if, after notice, any stockholder shall make default in the payment of the assessment upon all the shares held by him, so many of such shares may be sold as will be necessary to pay the whole assessment due. Personal notice is as effective as notice by publication. The secretary has no means of knowing who are stockholders, except by an examination of the books, and he has a right to rely upon them as giving him correct information. If he gives personal notice to a party claiming to own shares upon the books, or if he publishes delinquent stock in the name of such party, and the assessment is not paid, the necessary number of shares may be sold, although they may have been transferred by indorsement and delivery only, before the assessment was made or the notice given. How, then, can it be said that the legislature did not intend to regard as stockholders persons appearing upon the books and holding stock as such? In this case the whole stock is held, probably, by persons residing in Washoe county, and in case of assessment they will all be served personally with notice. Charles Gulling has the legal title to eight shares, and appears, upon the books, to be the absolute owner. Either he or his father has the right to cast eight votes upon them, because one or the other was, as to them, a stockholder.

Those shares may be assessed, regardless of the stockholder, and notice may be given, as before stated, to Charles Gulling; but if counsel for respondent are right in claiming that the father is the stockholder, then, before notice should be served upon him, because "notice should be given to the stockholders, personally or by publication." If it be said in answer that the father would be expected to deny his own voluntary transfer, still, in that case, the intention of the legislature is not less apparent. The case cited by counsel for respondent (*State v. Hunton*, 10 N. T. 595) is not opposed to our interpretation. The general banking law of that state enacted that no stockholder could be *dropped out of the state* should, either personally or by proxy,

vote in the meetings of the corporation; and that a holder of four shares should have four votes; six votes for eight shares; seven votes for ten shares; and one vote for every five shares above ten; *provided*, that no stockholder should be entitled to more than twenty votes. (Stats. of Vermont for 1850, p. 489, sec. 54.)

Prentiss, a citizen of New Hampshire, advanced to the court, and other citizens of Vermont, a large sum of money, which was expended in the purchase of a major part of the stock of the White river bank; and conveyances of the stock were made to citizens of Vermont, and by them put out to other citizens, giving generally, to each, four shares. More than five hundred shares were thus distributed. The court decided, upon ample proof, that Prentiss was the true owner, and that the pretense that it belonged to another person else was altogether colorable; that if the stock had been put in his name he could not have voted upon it; that to permit him to do so would be a fraud upon the law, which should not be outwitted by cunning devices. In other cases it was decided that Prentiss could not do by indirect means, what the law declared should not be done directly. The court said the statute showed a marked intention on the part of the legislature that the banks should be controlled only by citizens of the state. And we say, if our legislature had declared that none should be directors but stockholders holding or owning stock absolutely in their own right, and had used language indicating such intention, upon a consideration of the entire statute, we should have no difficulty in arriving at the conclusion of the Vermont court in *Stewart v. Mahoney M. Co.*, 54 Cal. 149, and the decision of Judge Sullivan upon the application of Dewey in *the People v. the California Bank Company*, in one of the superior courts of San Francisco. *These cases are also cited.* We think neither case is authority to sustain respondent under our statute.

When the first was decided, section 298 of the civil code provided as follows:

"The *owners* of shares in a corporation which has no capital stock are called stockholders. If a corporation

al stock the corporators and their successors are called  
bers." And section 312 provided that "Every person  
g therein (elections), in person or by proxy, or by rep-  
tative, must be a member thereof, or a *bona fide* stock-  
er having stock in his own name on the books of the  
poration at least ten days prior to the election. Any vote  
ection had other than in accordance with the provisions  
his article is voidable at the instance of absent stock-  
ers or members, and may be set aside. \* \* \*

at is to say, under the statute, no person could vote  
was not a *bona fide owner* of shares of stock, or a mem-  
and an election carried by the votes of other persons  
d be set aside. One thousand shares of the stock voted,  
in the name of "H. P. Bush, trustee." They were  
d by three other parties, neither of whom authorized  
to represent them, or, in fact, knew of the meeting.  
stock had been issued in the name of Bush, trustees,  
out the knowledge or authority of the owners. After  
g section 312 of the civil code, the court said: "Bush  
not the proxy or representative of either of the owners of  
stock, nor was he a member of the corporation, nor was  
*bona fide* stockholder; therefore he had no legal right to  
the stock." The court evidently took the view that  
was a statutory prohibition against the voting of any  
*bona fide* owners of stock, and that therefore, Bush's  
were illegal—a conclusion with which we cordially  
e, under the statute, and, especially, under the circum-  
es shown.

the time of Judge Sullivan's decision the statute was  
llows: "At such election the stock of said corporation  
be voted by the *bona fide* owners thereof, as shown by  
books of said corporation, unless the certificate of  
, duly indorsed, be produced at such election, in  
a case said certificates shall be deemed the highest evi-  
e of ownership, and the holder thereof shall be en-  
to vote the same." (Cal. Stat. 1880, 132, sec. 3.) It  
claimed that the books of the company were the high-  
nd only evidence of ownership. Judge Sullivan held  
proof of ownership could be made outside of the

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books under the last statute as well as the first. The case being appealable, it would be in bad taste for us to comment upon the decision, and we refrain from so doing.

The conclusion arrived at in relation to the *status* of Gulling, renders it unnecessary to consider at length the alleged erroneous rulings of the court concerning the validity of the votes cast by Haydon, proxy for Lee, executor of the estate of Larcombe. As to the corporation and other third parties, Lee held the legal title to ten shares, and the stock issued in his name was held by him, although it belonged in fact to the estate of which he was executor. He was a stockholder, and being such, had the right to vote in person or by proxy. The errors complained of touching the validity of Smith's votes need not, therefore, be considered. As to the alleged error in ruling that the burden of proof was upon respondent, it is sufficient to say that, if it was erroneous, it was, under the admissions, without injury.

We have considered this case upon the facts presented, and intimate no opinion as to what the result would have been if Gulling, the father, had demanded the right to vote the eight shares held by, and in the name of, his son.

New trial denied.

BELKNAP, J., dissenting:

In order to have been eligible to the directorship, Gulling must have been a stockholder, and this fact should have been determined by the same rules of evidence as in general govern courts in the determination of controverted questions of fact. The rule of evidence upon this subject has been changed in some states by express provision of statute or authorized by-law making the entries in the transfer books conclusive evidence of the right of a person to vote the shares standing therein in his name (as was the case in *Hoppin v. Buffum*, referred to in the opinion of the court), but when this express authorization does not exist no case has gone farther than to hold the entries in the transfer books *prima facie* evidence of ownership.

Nor do I think the statute of this state was intended to



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ge the general rule of evidence upon the subject. Sec-  
5 of the corporation act contains a provision that the  
ees of the corporation shall be "stockholders in the  
pany." The same section provides that "each stock-  
er \* \* \* shall be entitled to as many votes as he  
e may own \* \* \* shares of stock," etc., and sec-  
12 provides that the pledger of stock may nevertheless  
esent and vote his stock at all corporate meetings.  
e provisions indicate an intention on the part of the  
ature to intrust the owners of the stock of the corpor-  
n with the control of its elections and its general man-  
ent, in accordance with a principle which has the sanc-  
of long continued usage, and which is so firmly en-  
ed into the law of corporations that it may be said  
a part of their common law.

the absence of an intention on the part of the legisla-  
to alter or define the meaning of the word "stock-  
er," as used in the statute, it should be assumed to have  
used in its universally accepted sense, and to mean  
owner of the shares. If, therefore, Gulling did not own  
shares, he was ineligible to the directorship.

the question whether one in whose name stock stood upon  
books of the corporation was from that fact to be treated  
stockholder for the purpose of voting at corporate elec-  
tions, arose in Vermont, under a statute which, among other  
provisions, provided that "each stockholder shall be entitled  
to a number of votes proportional to the number of shares  
which may have been held by such stockholder at least three  
months before the time of voting," etc., and which further  
provided that no stockholder residing out of the state should  
be entitled to vote at corporate meetings. The facts were  
that a citizen of another state, in order to obtain the con-  
trol of the directory of a banking corporation of the state of  
Vermont, caused certificates of stock of which himself was  
the true owner, to be placed in the names of citizens of the  
other state, friendly to his plan, and who voted the stock so  
transferred to them in accordance with his wishes. The  
court held that the votes so cast should have been rejected,  
because the citizens of the state of Vermont were not in fact

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the owners of the stock, the transfer to them having been made simply for the purpose of enabling them to vote upon it. (*State v. Hunton*, 28 Vt. 594.)

The analogy between this case and the one under consideration appears to be very close. In both cases it was claimed that the transfer was simply colorable and for the purpose of conferring an apparent eligibility to the positions of stockholder and director. If importance is to be attached to the word "held" as against the word "owned," the Vermont statute authorized the stockholder to vote the shares *held* by him, whilst the statute of this state entitles him to vote the shares *owned* by him.

In Ohio, when the charter of a banking corporation provided that stockholders only should be elected directors, it was held that the transfer of shares of persons for the purpose of making them eligible to the directorship, who had no interest in the stock, neither made them eligible for directors nor qualified stockholders. (*Bartholomew v. Bentley*, 1 Ohio St. 37). The same principle was decided in the case of *Vowell v. Thompson*, 3 Cranch's C. C. 428, where it was held that the mortgagor of stock in an insurance company, who had transferred his stock to another as collateral security for a debt, was entitled to vote upon the stock at an election of directors, he being considered the owner thereof, and the court compelled the mortgagee to give the mortgagor a proxy for this purpose. To the same effect is *Merchants' Bank v. Cook*, 4 Pick. 405.

In New York, under a statute providing "in all cases where the right of voting upon any share or shares of the stock of any incorporated company of this state, shall be questioned, it shall be the duty of the inspectors of the election to require the transfer books of said company, as evidence of stock held in said company, and all such shares as may appear standing thereon in the name of any person or persons, shall be voted on by such person or persons, directly by themselves, or by proxy," courts have allowed parties to go behind the entries in the transfer books for the purpose of determining the ownership of share for the purpose of voting. This was the ruling in *Ex parte*

mes, 5 Cow. 428, and also in the *Matter of the Long and Railroad Company*, 19 Wend. 37. In the latter case Lord was the owner of a large number of shares of stock of the company by assignment from individuals, in whose name the shares stood upon the transfer books. He applied to the company to have the stock transferred to himself, but was refused for the reason that the stock, under the by-law of the company, had been declared forfeited for non-payment of calls. At the election he offered to vote for the shares and was refused. If his vote had been received it would have changed the result of the election. The court, being of opinion that the by-law was invalid and that Lord's vote was improperly rejected, ordered a new election. And in a late case the supreme court of New York held that the provision of the statute of that state above set forth was intended to be conclusive only upon the inspection of election, and that courts had the power, and it was their duty, to go back of the entries in the transfer book and inquire into the rights of holders of disputed shares to be put upon them. In that case the shares stood upon the transfer books in the name of one to whom they had been assigned. The judge who held the special term considered that this fact precluded all inquiry as to whether the transfer was an absolute sale or a mere pledge, but the general term reversed the judgment, saying: "We are of opinion that the special term erred in holding that it had not power to determine the question whether the transfer of the shares was a sale or a pledge, and whether the appellant had the right to vote upon them, notwithstanding they stood upon the transfer book in the name of the respondent" (*Strong v. Smith*, 15 Hun, 222.) The judgment of the general term was subsequently affirmed by the court of appeals. (80 N. Y. 637.)

The corporation act of this state was adopted from the act of California, and before its adoption had received a judicial construction from the supreme court of that state. When a statute has received a judicial construction, and is afterwards adopted by another state, the construction as given as the terms of the statute will be deemed adopted. In

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such cases it is presumed that the legislature intended to adopt the received construction; different language would have been employed had the intention been to exclude it.

In *Allen v. Hill*, 16 Cal. 114, certificates of stock owned by the firm of Hill & Devane, stood in the name of Devane. After Devane's death, the question arose whether the surviving partner or the administrator had the right to vote the shares. The estate being unsettled, the surviving partner had the right to continue in possession of effects of the partnership under the statute of that state regulating the settlement of the estates of deceased persons, but the question was whether his right to vote the stock was affected by the fact that it stood in the name of Devane alone. Upon this point the court said: "We think that no consequence is to be attached to the circumstance that a portion of the stock represented by Hill stood upon the books of the corporation in the name of Devane alone. This was *prima facie* evidence that it belonged to the separate estate of Devane, but it was competent for the defendants to show that it was in fact the property of the partnership. The cases cited from New York proceed entirely upon a statute of that state, and the reasoning in some of these cases indicates very clearly that in the absence of the statute the conclusion would have been different. \* \* \* It would seem, upon principle, that the real owner of stock should be entitled to represent it at the meetings of the corporation, and that the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege of doing so."

In the subsequent case of *Brewster v. Hartley*, 37 Cal. 15, the court allowed the plaintiffs to go behind the entries in the certificate book for the purpose of ascertaining the ownership to certain shares, and upon determining that the corporation itself was the real owner of the shares which had been voted by a trustee in whose name they stood, ordered the election set aside.

Section 3397, touching transfers of stock and providing that no transfer shall be valid, except between the parties thereto, until the same shall have been entered upon the

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of the corporation, does not affect the question presented by this case. A similar provision is contained in the corporation statutes of other states, and is intended for the protection of the corporation in the enforcement of its claims for assessments or other debts. Under it no transfer, unless entered upon the company's books, can affect its rights.

The legislature did not intend by this clause that all transfers, except as between transferrer and transferee, should be invalid unless entered upon the books of the company, but that such transfers should be valid as against the whole world except the corporation or subsequent purchaser in good faith without notice. (*Parrott v. Byers*, 40 Cal. 614; *Com. Bank of Buffalo v. Kortright*, 22 Wend. 362; *Bank of Utica v. Smalley*, 2 Cow. 778; *Gilbert v. Manchester Iron Co.*, 11 Wend. 628.)

The requirement of sec. 3404, that the trustees shall keep a transfer book containing the names of the stockholders, which shall be accessible to stockholders and creditors, was contained in the original corporation act of 1862, under which the present law is amendatory. Under that law a personal liability was imposed upon stockholders, and this provision appears to have been intended for the protection of the creditors of the corporation as well as the stockholders, who were liable to become creditors in the event of corporate insolvency. This section now contains only an express requirement relative to the keeping of the transfer book, and whatever other purpose it may perform bears no relation to the question of the evidence that should be received to establish the fact whether one is or is not a stockholder.

I am of opinion that the parol evidence touching Gull's ownership of the shares should not have been withdrawn from the consideration of the jury, and, therefore, the verdict from the judgment of the court.

REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,  
OCTOBER TERM, 1881.

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[No. 987.]

L. B. ABERNATHIE, APPELLANT, *v.* CON. VIRGINIA  
M. CO., RESPONDENT.

**COMPROMISE OF INTEREST IN MINING GROUND—AUTHORITY TO MAKE—ACQUIESCENCE IN.**—Where a compromise is made between several persons as to the respective interests which each shall have in certain mining ground, W., one of said parties, being represented by G., and where all the parties to the compromise, including W., for a period of fifteen years, abided by its terms and acted upon it, and conveyed their interests in the ground in accordance therewith, and received the proceeds thereof: *Held*, that these circumstances, in connection with the fact that the defendant at the trial maintained the validity of the compromise which it alone, as the successor of W., could have attacked, rendered the question of G.'s authority to act for W. immaterial to the plaintiff's case.

**ITEM—HOW INTERESTS OF PARTIES MAY BE DETERMINED—INSTRUCTION.**—The court instructed the jury. "To support the statement of any of the witnesses, you can consider the probability of his evidence and the facts to which he testifies, and any facts or circumstances detailed which might tend to corroborate or sustain the statement of any witness; and you may also take into consideration any description or calls in the deeds introduced in evidence, and the manner, conduct, and action of the original owners in relation to the ground, in determining the question whether or not the plaintiff and his associates each owned more than one hundred feet in the Sides claim," etc.: *Held*, upon the facts of this case, to be correct.

*Argument for Appellant.*

**DEED—ASSESSMENT BOOK ADMISSIBLE IN EVIDENCE.**—The Sides company was an unincorporated association. It had officers, kept a record of its meetings, and an assessment book which contained a list of all the owners of the Sides claim, with each of whom was kept an account showing the amount of assessment levied and the payments made. This book was, at all times, open to inspection, and no objection had ever been made thereto. The court instructed the jury that if they believed plaintiff had actual knowledge of its contents they could then consider the entries mentioned as admissions of the extent of his ownership: *Held*, that the instruction was correct.

**STATUTE OF LIMITATIONS—POSSESSION OF TENANT IN COMMON—WHEN ADVERSE—NOTICE.**—To make the possession of one tenant in common adverse as against the others, it is not necessary that notice should be given of the adverse intent; but the intent must be manifested by outward acts of an unequivocal kind.

**DEED—PLAINTIFF NOT TENANT IN COMMON.**—The Sides company did not enter as tenant in common with plaintiff; but as owner of the entire claim. It never acknowledged plaintiff's title, but held under an avowed claim to the whole and in exclusion of plaintiff: *Held*, that its possession was adverse to plaintiff from its inception.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion.

*A. C. Ellis*, for Appellant:

I. There never was any compromise agreed upon between plaintiff or Sides, and Gregory acting for Winters. Gregory was never authorized to make any compromise whatever, by which Winters was to alienate or acquire any mining ground on the Comstock. Gregory should have been authorized in writing to alienate this property, or if he acted without authority in writing, his acts should have been ratified by Winters, either directly, or in some way acquiescing, accepting the fruits of the transaction, or doing something which, as matter of law, would operate as a ratification. Of all this, there is a total absence of testimony.

II. The instruction of the court relative to the deeds and the recitals therein, was error, and misled the jury. The testimony was inadmissible, and incompetent for the purposes for which it was admitted. As a contemporaneous assertion of the assumed fact, that a compromise was made



## Argument for Appellant

with Gregory, and for Winters, it was as inadmissible as if it had been made by a stranger to the ground and to the common source of title.

III. The books of the company organized to develop the ground, were inadmissible in evidence. They are in no respect a declaration or admission by plaintiff or Sides, that they each had so many or such a number of feet as, added to what they had deeded to others, would make a hundred feet. The instruction touching this subject was clearly error. No estoppel is set up. It can not be shown that any grantor of defendants would have been deprived of any feet by any recognition plaintiff or Sides made of title in Winters; it has not been shown that any one ever acted on any such recognition. No estoppel can arise against a party not fully advised or acting under mistake.

IV. The statute of limitation does not apply to this case. The possession of one tenant in common is the possession of all. Actual ouster at a time more than five years before the commencement of the action, was not shown. The possession of the defendants and grantors has been a mere silent possession. No acts of defendant or its grantors were shown, other than mere quiet occupancy of portions of the claim. There is no proof that officers or even stockholders of the Sides corporation ever declared to anybody, much less plaintiff or Sides, that such corporation claimed and occupied adversely to plaintiff or Sides. The charge of the court on this point was error, and the verdict may have been on limitation alone. (*Miller v. Myer*, 46 Cal. 535; *Coleman v. Clements*, 23 Id. 245; *Owen v. Morton*, 24 Id. 373; *McClung v. Ross*, 5 Wheat. 116; *Clymer v. Dawkins*, 3 How. 674; *Abercrombie v. Baldwin*, 15 Ala. 363; *Blackeney v. Ferguson*, 20 Ark. 547; *Colburn v. Mason*, 25 Me. 434; *Jackson v. Tibbetts*, 9 Cow. 241; *Clapp v. Bromagham*, Id. 530; *Gray v. Givens*, Riley (S. C.), 41; *Bayley v. Trammell*, 27 Tex. 317; *Buckmaster v. Meedham*, 22 Vt. 617; *Holley v. Hawley*, 39 Id. 525; *Buckman v. Buckman*, 30 Me. 494; *Warfield v. Lindell*, 30 Mo. 272; *Chandler v. Ricker*, 49 Vt. 128; *Squires v. Clarke*, 17 Kan. 84; *Ball v. Palmer*, 81 Ill. 376; *Linker v. Benson*, 67 N. C. 150; *Brooks v. Fowle*, 14



## Argument for Respondent.

H. 248; *Wilson v. Watkins*, 3 Pet. 51; *Manchester v. Edridge*, 3 Ind. 360; *Ruffners v. Lewis*, 7 Leigh (Va.), ; *Roberts v. Morgan*, 30 Vt. 319.)

J. Hillyer, for Respondent:

The court did not err in instructing the jury relative to the deeds offered in evidence. The instruction permitted the jury to consider only the descriptions and calls, and not the recitals in the deeds. The calls and descriptions, and in fact the recitals of their deeds, were unquestionably competent evidence to contradict the testimony of Sides and Belcher. All the deeds of the co-locators of plaintiff, in their calls and descriptions, were admissible as part of the *res gestæ*. The calls and descriptions were evidence, not of declarations, but of acts. The controverted point was, whether the compromise had been made, and whether the parties held under that compromise or otherwise. Upon this point the actions and conduct of the parties in respect to the claim were not only competent, but the best evidence. The making of a deed with certain calls and definitions was as much an act as work upon the claim or the payment of an assessment. We were as clearly entitled to prove, and the jury to consider, the former as the latter.

I. The assessment book of the Sides association was admissible in evidence. Abernathie was a member of the company; the secretary who kept the books was his agent. He was chargeable with knowledge of the contents of the books, whether he had actual knowledge of them or not. (*Greenl. Ev.*, sec. 493; *Allen v. Coit*, 6 Hill, 318.) At the trial the defendant expressly disclaimed any intention to prove the estoppel upon an estoppel. The purpose of the testimony was to establish the main fact that the compromise had been made, and ownership in accordance therewith. It was not to the existence and extent of the plaintiff's title, and in the least to his right to assert any title which he in fact had.

II. The instructions relative to the statute of limitations were correct. If the occupation of the Sides company was exclusive, then the intention to hold adversely might be in-

licated by acts sufficiently significant and notorious to charge the plaintiff with notice and set the statute in motion, whether he had actual notice or no. (See authorities in opinion.)

IV. But there is another view which disposes of this subject. There was nothing in the relation which existed between the Sides company and the plaintiff and his grantor in respect to the interest in controversy, which required any different character of evidence to establish an adverse possession that is required between strangers. It is only where a person derives title to an undivided portion of the premises, or in some similar manner admits the ownership of others as co-tenants with him, that the rule distinguishing the character of acts necessary to constitute adverse possession has any operation. But the reason, and with it the rule, ceases where one enters and takes exclusive possession under a conveyance to him of a title to the entire premises. Under these circumstances he sustains no fiduciary relation to others claiming adversely to him either the whole or some undivided interest. The Sides company was the purchaser of the entire claim of five hundred feet. It derived its title from persons who, at the time of its purchase, professed to own and possess the whole five hundred feet. The conveyances from its grantors were, at the time of its purchase, placed on record. These recorded conveyances were of themselves notice to the plaintiff and his associates that the entry and possession of the corporation were adverse to any title which they then had or claimed. (See authorities in opinion.)

By the Court, BELKNAP, J.:

The plaintiff having filed his protest in the United States Land Office against the issuance of a patent by the government to the defendant for the mining ground described in the complaint, thereafter brought this action to determine the right of possession thereto, in compliance with the requirements of the mining laws of congress. A trial in the district court resulted in a verdict for the defendant, and from the judgment thereupon entered and an order denying

otion for a new trial plaintiff has appealed. The errors assigned will be considered in the order in which they have been presented.

Appellant, in the first place, insists that the evidence is sufficient to justify the verdict. To reach an understanding of this point it is necessary that some of the facts depicted at the trial should be stated.

The action involves the right of possession to an undivided fifty feet of the south five hundred feet of the consolidated Virginia mine on the Comstock lode. This fifty hundred feet was located by Sides, Baldwin, Belcher, plaintiff in the month of June, 1859, and was known as the Sides ground or claim. Plaintiff's theory is, that this claim originally embraced eight hundred feet; that after its location a fear existed among its owners that at a threatened closing of the miners of the district its length would be reduced to five hundred feet, and in order to frustrate such action and prevent the excess over five hundred feet from becoming subject to occupation by strangers, they conveyed some of their friends, and the claim thus segregated was hereafter known as the Best and Belcher claim; that the interests of plaintiff and of his co-locators thereby became reduced to one hundred and twenty-five feet each, and that the several interests have been reduced by conveyances to twenty-five feet each, which amount of ground they now occupy, excepting Sides, who sold his twenty-five feet to plaintiff grantor shortly before the commencement of this ac-

The defendant contends that during the month of June, 1859, John D. Winters claimed to own three hundred feet of the ground embraced in the Sides location, and that during such adverse claim Winters sold an undivided half of his interest to one James O. Gregory. Thereupon Gregory proceeded to the premises for the purpose of representing his own and Winters' interest. Shortly afterwards the conflicting claims were compromised by plaintiff and his associates agreeing with Gregory, for himself and Winters, that the ground should be divided into five interests, of one hundred feet each; that plaintiff and his associates should

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each be entitled to an undivided one hundred feet, and that the remaining undivided one hundred feet should be owned by Gregory and Winters. Defendant concedes the fact of the segregation of the Best and Belcher ground, as claimed by plaintiff.

The particulars in which the evidence is alleged to be insufficient is, that it nowhere appears that Gregory had authority from Winters to adjust the differences mentioned. If this compromise was made; and from the verdict we must assume that it was, it matters not to plaintiff whether Gregory was or was not authorized to make it. From the year 1859 until the year 1875, the locators of the Sides ground abided by the terms of the settlement made; under it the plaintiff and Sides, as well as Baldwin and Belcher, received without molestation the one hundred feet to which each was entitled, and severally made conveyances down to March, 1863, by which each of them alienated, in the aggregate, the significant interest of one hundred feet, to which he was entitled under the compromise.

Upwards of fifteen years has elapsed since each received the proceeds of such sales, and no one of them has ever been interrupted in the enjoyment thereof. Neither they nor their grantees have ever been molested in the possession of the respective interests received under the terms of the compromise, and in the year 1865 Winters conveyed to plaintiff's grantee whatever interest he then had in the Sides ground. These circumstances, connected with the further fact that the defendant at the trial maintained the validity of the compromise which it alone, as the successor in interest of Winters, could have attacked, rendered the question of Gregory's authority immaterial to the plaintiff's case.

The second assignment of error consists in giving of an instruction to the jury containing in part the following language: "To support the statement of any of the witnesses you can consider the probability of his evidence and the facts to which he testifies, and any facts or circumstances detailed which might tend to corroborate or sustain the statement of any witness; and you may also take into consideration any description or calls in the deeds intro-

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ed in evidence, and the manner, conduct, and action of original owners in relation to the ground, in determining the question whether or not the plaintiff and his associates each owned more than one hundred feet in the Sides claim," etc.

At the trial the defendant introduced in evidence the conveyances of the property made by the locators. These deeds showed that Belcher, after having conveyed fifty feet to Gregory, made a further conveyance of fifty feet to Belknap, in which he recited the fact that the ground conveyed embraced his entire interest in the Sides claim. A similar recital is contained in the deed of Sides to A. E. Belknap for one hundred feet. The objection is to the effect that neither these recitals nor any deeds, save those made by the plaintiff or Sides, could have affected plaintiff's interest, and should not, therefore, have been considered by the jury. These deeds were not offered in evidence for the purpose of estopping the plaintiff in the assertion of his claim; but for the purpose of establishing defendant's theory of the location and the interests taken by each of the locators under it. With this character of evidence defendant proved that each of the locators conveyed one hundred feet and no more of the Sides ground. This certainly was competent evidence of the extent of the ownership of the several locators, and tended to disprove plaintiff's theory that they severally owned one hundred and twenty-five feet.

In this view the attention of the jury was properly directed to the quoted instruction to the calls and descriptions, and not to the recitals in the deeds. These recitals were, however, admissible for the purpose of rebutting the testimony of Sides and Belcher, each of whom had sworn that their original interests of the location was one hundred and twenty-five feet, and not one hundred feet, as claimed by defendant; and, although no estoppel was claimed, the recital in Sides' deed was conclusive against plaintiff's claim to the twenty-five feet obtained through him.

The third exception consists in the admission in evidence of the books of the Sides company. The Sides com-

pany was an unincorporated association, composed of the owners of the claim, and organized for the purpose of providing means for its development. It had officers, kept a record of its meetings, and a book called the assessment book. This book has not been made a part of the record, but is said by counsel to have contained "a list of all the owners of the Sides claim, with each of whom was kept, upon a separate page, an account showing the amount per foot of each assessment levied, the number of feet assessed to such owner, the total amount of the assessments, and the payments made by him." It was shown that the persons claiming to be the owners of the Sides ground paid their respective assessments under this system. That there never was any controversy concerning the proportionate amount which each member of the association was required to pay, and that assessments were collected on five hundred feet, the full number of feet in the claim. That plaintiff and those to whom he had conveyed, paid on one hundred feet and no more; that those deriving title from Sides paid on one hundred feet, and no more, and that Belcher and Baldwin, and those representing each of their interest, paid on a like number of feet, and that Gregory and Winters and their grantees did the same. In this manner the claim was worked for two years, and between forty thousand dollars and sixty thousand dollars expended without a suggestion of any inaccuracy or error in the assessment book.

It was also proven that this book was at all times open to the inspection of the members of the company at its office. In submitting the book to the consideration of the jury they were instructed that if they believed plaintiff had actual knowledge of its contents they could then consider the entries mentioned as admissions of the extent of his ownership. The objection was directed to the point that plaintiff could not be bound by the entries, unless he had actual knowledge of them at the time. This objection is disposed of by the terms of the instructions.

The remaining objection arises upon instructions touching the application of the statute of imitations to the facts



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is case. In the year 1863 an incorporation was created under the laws of this state, called the Sides Silver Mining company. In the month of April of that year this incorporation entered into the exclusive possession of the Sides land, claiming to be the owner of the entire claim under and from those who professed to own it, and continued possession and claim openly and notoriously until some time in the month of May, 1868, when it conveyed the property to the defendant. This adverse possession of the Sides silver mining company, as well as that of its predecessors in interest, is pleaded in bar of plaintiff's recovery.

From the fact that both parties claim title from a common source, plaintiff contends that the evidence of ouster is insufficient to set the statute in motion, in this, that no notice of an intention to hold adversely was given him. In cases where the relation of tenancy in common exists, the exclusive possession of one tenant in common is not necessarily inconsistent with the continuance of this relation, and the commencement of an adverse possession must be unequivocally manifested. It is not necessary, however, in order to set the statute in motion in favor of one tenant in common against his co-tenant, that actual notice of an intention to hold adversely should be given. "To make a possession of tenant in common adverse as against the other," says Angell in his treatise on the limitation of actions, "it is not necessary that notice should be given of adverse intent; but the intent must be manifested by outward acts of an unequivocal kind." (Sec. 429; *Hume v. Trinity Church*, 24 Wend. 587; *Lodge v. Patterson*, 3 Cal. 74; *Owen v. Morton*, 24 Cal. 373; *Weisinger v. Murphree*, 2 Head (Tenn.), 674; *Culler v. Motzer*, 13 S. & R. 44; *Bradstreet v. Huntington*, 5 Pet. 440; 2 Greenl. on sec. 557.)

The uncontradicted testimony in this case, however, shows that the Sides corporation did not enter as tenant in common with the plaintiff, but as owner of the entire mineral claim. It at no time acknowledged plaintiff's title, but maintained under an avowed claim to the whole, and especially the exclusion of him and those under whom he claims, claim-

ing the identical ground in controversy through conveyance from Winters and Gregory. Not claiming an undivided portion of the premises, nor admitting ownership in any wise in plaintiff or Sides, it can not be maintained that such possession was in support of the title claimed by plaintiff. Under the circumstances it was adverse from its inception. This principle was enforced under analogous facts by Judge Story in the case of *Prescott v. Nevers*, 4 Mason, 326. In that case the defendant claiming the whole estate entered under a deed purporting to convey all of it to him, although his title was good only to an undivided fourth interest in common with others. It was then said: "But he (defendant) made an actual entry into the whole, claiming the entirety, in fee and of right. His acts of ownership were such as amounted to a disseisin of the co-tenants; for he entered as sole owner; his possession was openly and notoriously adverse to them; and his acts went to a waste of the estate, and their utter disseisin. I take the principle of law to be clear, that where a person enters into land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title; and that he is deemed to have a seisin of the land co-extensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land so described, in any other person."

The doctrine is discussed in *Parker v. Proprietors etc.*, 3 Met. (Mass.) 100. In that case defendants acquired title through one Tyler, whose title was valid to an undivided portion of the estate only. The court said: "It does not appear that Tyler had notice or knowledge of the defect in his title. But whether he had such knowledge or not, it is very clear that he was in possession, claiming the entire title, and this undoubtedly was an adverse possession, which, being open and notorious, amounts to a disseisin. To constitute a disseisin, it is not necessary, at the present day, to prove the forcible expulsion of the owner, nor is it necessary for a tenant in common to prove an actual ouster of the co-tenant. If he enters, claiming the whole estate, the entry is adverse to the other tenants. The intention so



## Points decided.

old the estate must be manifest, as it is in the present and the open and notorious possession of Tyler was constructive notice of a claim adverse to those heirs of Tyler, who had not conveyed their title. If they had not by the deeds to Hale, and by him to Tyler (which were recorded), they must have known that the latter never entered as tenant in common, but that he entered as purchaser of the entire estate."

The same principle was announced in *Bogardus v. Trinity Church*, 4 Paige Ch. 178, as is thus epitomized by the reporter: "Where one of several tenants in common conveys the entire premises held in common, and the grantee enters into possession under the conveyances, claiming title to the entire premises, such possession is adverse to the co-tenants of the grantor, and at the expiration of the period of limitation, their right will be barred. See also *Clymer's Lessee v. Hawkins*, 3 How. 674; *Jackson v. Smith*, 13 Johns. 407; *Frombois v. Jackson*, 8 Cow. 589; *Kittredge v. Locks and Sons*, 17 Pick. 246.

The judgment and order are affirmed.

[No. 1,050.]

LOXKEY & SMITH, RESPONDENTS, v. S. O. WELLS,  
APPELLANT.

**MECHANIC'S LIEN—ITEMS OF ACCOUNT.**—It is not essential to the validity of a mechanic's lien to specify the items of the account. It is sufficient to set forth a statement of the demand showing its nature and character and the amount due or owing thereon.

**STATEMENT OF TERMS.**—If there are no special terms, time, or conditions given in the contract, none need be stated in the lien.

**OBJECTION FOR NON-JOINDER OF PARTIES, ETC.—HOW WAIVED.**—A party interposing a demurrer and relying upon any defects in the complaint as to non-joinder of parties, or uncertainty, must let final judgment be entered upon his demurrer. If he answers after his demurrer is overruled, he waives his right to rely upon his demurrer.

**PRESUMPTIONS—WHERE RECORD DOES NOT CONTAIN ALL THE EVIDENCE.**—Where the record on appeal does not purport to contain all of the evidence, this court will presume that there was evidence sufficient to sustain the conclusions and judgment of the court.

Opinion of the Court—Hawley, J.

MECHANIC'S LIEN—WHEN MUST BE FILED.—A contractor must within sixty days after his contract is completed. Every claimant to a lien must file it within thirty days after the completion of the building.

IDEM—NOTICE TO LIEN CLAIMANTS.—The court proceeded to terminate the case without proof that notice had been given to claimants as provided by statute: *Held*, that, as there was no evidence made that there were any other lien claimants, the defendants have been prejudiced, and is not entitled to a new trial.

\*APPEAL from the District Court of the Sixth District, Eureka County.

The facts are stated in the opinion.

C. J. Lansing, for Appellant:

The plaintiffs had no lien upon the premises in the complaint. The lien did not specify the amount of the account. (*Heston v. Martin*, 11 Cal. 41.) It did not contain a statement of the terms, time given, and date of the contract. The act requires this to be done in order to comply with this requirement invalidates the lien. (Phil. Mech. Liens, sec. 18; *Associates of Jersey v. Son*, 5 Dutch. 415; *Ayres v. Revere*, 1 Id. 474; *Anthony*, 4 Gray, 289; *Greenough v. Nichols*, 30 Pa. 187; *Noll v. Swineford*, 6 Pa. St. 187; *Con. Pres. v. Staples*, 23 Conn. 544; *Bottomly v. Grace Church*, 8 Nev. 219; *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219; *Strelitz*, 54 Cal. 640; *Hunter v. Truckee Lodge*, 14 Cal. 637.)

Lewis & Deal, for Respondents.

By the Court, HAWLEY, J.:

Section 5 of the "Act to secure liens to mechanics and others" (Stat. 1875, 122), reads as follows:

"Every original contractor, within sixty days after the completion of his contract, and every person, saving original contractor, claiming the benefit of this chapter, within thirty days after the completion of any contract, shall file for record with the county recorder a claim containing a statement of his demand,

ing all just credits and offsets, with the name of the  
er \* \* \* and also the name of the person by whom  
as employed or to whom he furnished the material, with  
statement of the terms, time given, and conditions of his  
contract, and also a description of the property to be charged  
the lien, sufficient for identification, which claim  
be verified by the oath of himself or of some other  
on."

It is claimed by appellant that the plaintiffs' pretended  
does not conform to the provisions of this section, and  
therefore, invalid.

the portion of the lien to which the objections are urged  
as follows:

That it is our desire to avail ourselves of the benefits  
the act, \* \* \* and that it is our intention to claim  
upon the premises aforesaid and hereinafter described,  
to claim and to hold such lien, not only on said build-  
or superstructure so erected, but also upon the land  
which the same is erected; \* \* \* that G. K.  
Hollister is the person by whom we were employed to  
ship the said materials for the construction of said build-  
and to whom, at his special instance and request, we  
furnish said material, the said G. K. Hollister being  
engaged as contractor to construct said building for the said  
Wells, who was and is the owner thereof, and also  
land and premises whereon the same is situated; that  
following is a correct and true statement of our demand  
which we claim said lien, viz., material, to wit: lumber,  
sash, blinds, moldings, casings, and mill work, for  
building, to the amount and value of five hundred and  
seventy-six dollars and twenty-seven cents; after deducting all  
debts and credits, which said lumber and material was  
furnished by us to said G. K. Hollister, to be used, and was,  
in fact, used in the construction of the said building here-  
before described; that no part of said account has been  
paid, and the said sum of five hundred and thirty dollars  
and twenty-seven cents is now wholly due and unpaid; that  
said lumber and material was commenced by us to be  
furnished upon the twenty-eighth day of October, 1879,





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ns of lien." But if there are no special terms, time, or conditions given none can be stated, and in the absence of such specification, or proofs to the contrary, the law would presume that none existed, and that the materials were to be paid for on delivery. The several objections to the validity of the lien are untenable.

It follows from the views already expressed that the complaint states facts sufficient to constitute a cause of action, and that the demurrer interposed upon that ground is properly overruled.

The questions whether the court erred in overruling the defendant's demurrer upon the ground of non-joinder of parties, or of ambiguity and uncertainty as to the time when the building was completed, can not be considered upon this appeal, for the reason that the defendant does not rest upon his demurrer and allow judgment to be rendered against him thereon. After his demurrer was overruled he filed an answer raising issues of fact, and thereby waived his right to reply upon his demurrer upon issues of fact. The general rule seems to be well settled, as stated by Mr. Bliss in his work on code pleading, that "if the demurrer wishes to take advantage of any supposed error in overruling the demurrer, he must let final judgment be entered upon it; for, if he shall answer, after such ruling, he waives his objection to it, except for the two radical defects. (Sec. 100.)

(*De Boom v. Priestly*, 1 Cal. 206; *Pierce v. Minturn*, 10 Cal. 70; *Brooks v. Minturn*, Id. 481; *Pickering v. Mississippi N. T. Co.*, 47 Mo. 459, 460; *Township Board of Education v. Hackman*, 48 Id. 246; *Saline Co. v. Sappington*, Id. 457; *Mitchell v. McCabe*, 10 Ohio, 409; *Peck v. Denio*, 1 Denio, 222; *Jones v. Thompson*, 6 Hill, 621; *Forbes v. Forbes*, 11 Barb. 589; *Fisher v. Scholte*, 30 Iowa, 100; *Coit v. Waples*, 1 Minn. 140; *Hill v. Wright*, 23 Ark. 100.)

The question whether the evidence is sufficient to show that the lien was filed within thirty days after the completion of the building must be considered as settled by the decision of the court to that effect, because the record does not purport to contain all the evidence. But it is argued that the additional findings show the facts upon which the



## Points decided.

of the court to determine, and inasmuch as the record does not contain all the evidence, we must presume it was sufficient to sustain the conclusions and judgment of the court.

This brings us to a consideration of the last question presented by this appeal. Did the court err in hearing and deciding this case without proof that notice had been given to other lien claimants, as provided in section 15? If there had been any showing that there were other lien claimants, we think it would have been the duty of the court to have compelled the plaintiffs to give the notice required by law before proceeding to hear the case. The law contemplates that all the lien claimants shall be brought in, and their claims, as well as those of the plaintiffs and defendant, shall be heard and determined in one action. (*Elliott v. Ivers*, 6 Cal. 290.) But in the present case there is no showing that there were any other liens, and we must presume there were none. If so, the defendant could not have been prejudiced and is not entitled to a new trial. The judgment of the district court is affirmed.

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[No. 1,041.]

J. BUNTING AND M. HARRISON, RESPONDENTS, v.  
THE CENTRAL PACIFIC RAILROAD COMPANY,  
APPELLANT.

NEGLECT OF RAILROAD COMPANY—NEGATIVE AND POSITIVE TESTIMONY—CONFLICT OF EVIDENCE.—Upon the question whether defendant rung its bell or blew its whistle there were several witnesses, upon the part of plaintiffs, who testified that they were in a position where they could have heard the signals had they been given, and that the signals were not given: *Held*, that this negative testimony raised a conflict of evidence against the affirmative testimony of defendant's witnesses, that the bell was rung and the whistle blown.

REBUTORY NEGLIGENCE—INSTRUCTION.—The court instructed the jury that if they believed from the evidence "that the engineer who was driving the express train on the morning of June 12, 1877, had an opportunity to see Bunting's team on the main track, and could have stopped his train with safety to the same, and to the passengers and railroad employees on same in his then situation, and could prudently have avoided

## Argument for Appellant.

collision with his team, his failure so to stop amounts to negligence renders the defendant liable for damages, and such liability attaches though the plaintiffs contributed to the injury by their own carelessness or negligence." *Held*, that, although this instruction is carelessly the principle of law embodied therein is not erroneous. (BELKNAP, dissenting.)

**IDEM—APPLICABILITY OF INSTRUCTION—JURY NOT MISLED.**—Upon a review of the testimony and of the several instructions given by the court upon the question of negligence: *Held*, that there was some evidence upon which the instruction might apply, and that the jury could not have been misled, by the giving of this instruction, to the prejudice of the defendant, as to the law of the case. (BELKNAP, J., dissenting.)

**CONFLICT OF EVIDENCE—WHETHER PLAINTIFFS COULD HAVE SEEN THE TRAIN.**—Upon a review of the testimony, in response to petition for a new trial: *Held*, that there was a conflict of testimony as to whether the plaintiffs might have seen the train of the defendant had they been on the track, and might have heard the train of the defendant had they listened.

**IDEM—REASONABLE CARE.**—The question for the jury and court to decide was not "whether the plaintiffs might have seen the train of the defendant had they looked" at some particular point, but whether, under the facts and circumstances testified to in this case, they made reasonable efforts to see and hear the approaching train, and, in this respect, exercised the due care and caution which the law requires.

**REASONABLE CARE—DUTY OF RAILROAD COMPANY TO STOP ITS TRAIN IN CASE OF GREAT PERIL.**—Railroad companies, as well as travelers, are required to exercise reasonable care and caution, and in the present case, although the plaintiffs may not have been entirely free from fault, if the engine of the defendant's train saw the plaintiffs' team, as it was coming upon the track, in a position of great peril and danger, and he could, by the exercise of reasonable care, have lessened the speed of his train, or stopped it, with safety, in time to have avoided the collision, it was his duty to do so.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts sufficiently appear in the opinion.

W. H. L. Barnes, for Appellant:

I. The evidence is insufficient to justify the verdict in these cases; because the whole evidence shows that the appellant was guilty of no negligence, and that the respondents were. (Testimony reviewed at length.)

II. The whole case showed that the plaintiffs were guilty of contributory negligence; and demonstrated that they could have seen and heard the train by the ordinary



of the faculties of seeing and hearing; and could have seen of the approach of the train in sufficient time to avoid any injury from it. (Testimony reviewed.)

I. The first instruction given by the court to the jury at the request of the plaintiffs was erroneous. It was wholly unjustified by the evidence. No instruction should ever be given unless there is some evidence before the jury to which it is applicable upon some rational theory of the case legally deducible from such evidence. The instruction was upon an abstract proposition not before the jury, and calculated to mislead them. For this error a new trial should be granted. (*Slaughter v. Fowler*, 44 Cal. 195; *Melsohn v. Anaheim L. Co.*, 40 Id. 657.) But if it can be said that the instruction was possibly pertinent, it was contradictory to and inconsistent with instruction No. 4, given by the court of its own motion, and for this reason a new trial should be granted. (*Brown v. McAllister*, 39 Cal. 577; *McCreery v. Everding*, 44 Id. 251.)

Upon petition for rehearing the following authorities were cited: *Railroad Co. v. Houston*, 95 U. S. 697; *Harper v. Railroad Co.*, 32 N. J. L. 88; *Chicago & N. R. R. Co. v. Smith*, 96 Ill. 42; *Schofield v. Chicago & M. & S. R. R. Co.*, The Reporter, November 2, 1881; *Gothard v. Alameda S. R. R. Co.*, The Reporter, July 20, 1881.

Thomas E. Haydon, for Respondents.

There is abundant evidence that no signals by bell or whistle or otherwise were given. This is proven by plain and numerous witnesses, that they did not hear them. Respondent's witnesses testified that they did hear them. This makes a case of conflict of evidence. (1 Thomp. on Ev. 432.)

There is not any absolute or irreconcilable repugnancy between the instructions. The first instruction is lawful. (art. on Neg., sec. 888.)

The Court, HAWLEY, J.:

This is the second appeal taken in these cases. The first was an appeal by plaintiffs from a judgment of nonsuit (14

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Nev. 351.) The second is taken by defendant from the judgment in favor of plaintiffs and from an order of the court refusing to grant a new trial. It was assumed in the argument, by appellant's counsel, that the result of these cases is settled by the previous decision of *Cohen v. The Eureka and Palisade Railroad Co.*, Nev. 370. It was also properly admitted that the money offered on behalf of the plaintiffs upon the new trial was substantially identical with that offered upon the first.

Appellant, upon this appeal, admits that in the former decision, the plaintiffs' testimony made a *prima facie* case against the defendant; but it is contended that, upon the whole case, the evidence is so overwhelmingly in favor of the defendant that the verdict in favor of the plaintiffs ought to be set aside. The rule, so often applied by this and other courts, that an appellate court will not set aside a verdict upon the ground of the insufficiency of the evidence, or review the weight of testimony where there is a substantial conflict of evidence, was recognized and applied without the entire argument. In this connection it is contended that the plaintiffs, by great energy, and an ingenious selection of portions of the testimony of several witnesses, sought to be shown to be true, and the testimony submitted on the part of the plaintiffs to be slight, negative, and indefinite, and the testimony of the defendant so strong, positive, and clear, that it was not to be said that there is any conflict in the evidence.

In view of this argument we have carefully reconsidered all of the testimony submitted by the parties, and our conclusion is that upon all the questions there is a substantial conflict in the testimony. In determining the question whether the bell was blown by the whistle we agree with the appellant, that the statement "I did not hear it" is entitled to but little weight, if any, in the presence of affirmative evidence that these statements were given. But that is not, in our opinion, a fair statement of the facts of this case. The evidence amounts to more than the statement "I did not hear it." Several of the witnesses upon the part of the plaintiffs were in a position where they

to have heard the signals had they been given. Some were looking and listening for the train, and state that they could have heard the usual signals if they had been given. Both of the plaintiffs swear positively that the signals were not given. Quinn was positive that the bell was rung or whistle sounded. McClelland was positive that the bell was not ringing. Buncell, Holliday, and others testified that they could have heard the bell if it had been ringing, and that they did not hear it. This, in our opinion, raises a conflict of evidence against the affirmative testimony of defendant's witnesses.

The question whether negative testimony can, in any case, have the force and effect of positive testimony was decided by this court in *Cohen v. Eureka and Palisade Railroad Company*, 14 Nev. 386, and it was there declared that where the witnesses were in a position to hear, their testimony that the bell was not rung "was just as positive as any testimony can ever be."

In *Benwick v. New York C. R. R. Co.*, 36 N. Y. 132, the court, in passing upon this question, said: "As some of the plaintiffs' witnesses were in a condition to hear it (the bell) if it had been rung, and were giving their attention to the fact that they did not hear it is evidence conducive to prove that it was not rung. \* \* \* The conflict of testimony is a question of fact, which the plaintiff had the right to have determined by the jury." To the same effect see *New York C. & H. R. R. Co.*, 14 Hun, 322; *Dublin & R. R. Co. v. Slattery*, 3 Appeal Cases (L. R.), 1155.

In the case last cited there were ten witnesses who testified that the whistling occurred at the proper time and in the proper way, and only three witnesses testified that, being in a position in which, if it so occurred, the sound should have reached their cars, they did not hear it. Lord O'Hagan, in giving his views upon this state of facts, said: "It is not possible not to be struck by the apparent weight of the defendant's proof. But, as was observed in the Irish court in the non pleas, the jury saw the witnesses, and the judge did not condemn the verdict. And whether it was right or not, the jurors alone were competent, legally and con-

stitutionally, decide between the ten who testified on one side and the three who testified on the other, urged, and the authority of an eminent judge was to sustain the suggestion, that proof of the want of was no material proof at all. But this seems to be able. Assuming that a man stands in a certain position has possession of his faculties, the fact that he can hear what would ordinarily reach the ears of a person placed, and with such opportunities, seems to me to be legal evidence, which may vary in its value and importance, which may in some instances be of small account, in others be the strongest and the only evidence that can be offered; but at all events can not be withheld from the jury; and if this be so, *there was here a conflict of evidence* on which the jurymen, and they alone, were competent to pronounce."

In *Kansas Pacific Railroad Co. v. Richardson* many respects was similar to the case in hand, and in delivering the opinion of the court, said: "The weight of this evidence on the part of the plaintiff below was of negative character, and the company gave positive evidence of a greater number of witnesses to contradict it. Come it, still there was a sufficient conflict of evidence to raise a question of fact, which the trial court was competent in submitting to the jury. The evidence against the company of the signals was more, when carefully considered, than the mere 'I did not hear.' Some of these witnesses had their attention directed to the train as it came in; they were looking at the train, and were in a position to give evidence of the presence or absence of the signals. The evidence was produced to prove that the signals were not properly given; at least it was some evidence in that direction. The failure to give signals must be proved by witnesses who testified they did not hear them. When others testify that they did hear them and others testify that they did not hear them, it is evidence on both sides to be considered. The evidence before the court being sufficient to be submitted to the jury, and to be considered by them, it was sufficient to sustain the finding that proper signals of warning of the ap-



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to the crossing were not given." (The Reporter, L., No. 16, 493.) We are of opinion that the vital question whether plaintiffs were guilty of contributory negligence, whether they exercised ordinary care and caution, was properly left to the jury for decision, and that, inasmuch as there is a substantial conflict in the testimony of the respective parties, the verdict of the jury ought not to be disturbed upon the ground of the insufficiency of the evidence.

The next argument was that the court erred in giving the first instruction asked by plaintiffs. This instruction reads as follows: "The jury are instructed that it is as much the duty of a railroad engineer to exercise prudence and caution in running his train, so as to avoid injury to persons crossing, as it is the duty of such persons to avoid contact with the train. Therefore, if they believe from the evidence that the engineer who was driving the express train on the morning of June 12, 1877, had an opportunity to see Bunting on the main track, and could have stopped his train with safety to the same, and to the passengers and employees on same in his then situation, and could have avoided collision with the team, his failure to do so amounts to negligence, and renders the defendant liable for damages, and such liability attaches even if the plaintiffs contributed to the injury by their own negligence or negligence." The first portion of this instruction is not objected to. The latter portion is carelessly stated, and it is not as clear as it might have been made; the principle of law embodied therein is not erroneous, and the questions ordinarily applicable to cases like this are, whether the damages were occasioned entirely by the negligence of the defendant, or second, whether the plaintiffs contributed to the injury by their negligence or lack of ordinary care and reasonable diligence, that, but for the negligence or want of ordinary care and caution on the part of the defendant, the accident would not have happened. In the present case, if the question was answered in the affirmative, the plaintiffs would be entitled to recover, in the second place, if the question was answered in the affirmative, they could not; as but for their own fault the accident

would not have happened. But it does not necessarily follow that the damages must have been occasioned by the negligence of the defendant, for if the plaintiff was to a remote degree negligent, but their negligence was the proximate cause of the injury, and they exercised ordinary care to avoid the injury, they would still be entitled to recover; and although the plaintiffs may not have been free from fault, they would, nevertheless, be entitled to recover if the defendant, in the exercise of ordinary care and caution, could have prevented the injury.

This last qualification is applied in a great number of cases, the most frequent of which, as found in the authorities, is where cattle are injured upon the track of a train, and where the engineer of the train could, by the exercise of ordinary care upon his part, have avoided the injury; but it is proper to be given in cases where there is any testimony tending to show that the defendant was guilty of gross or willful negligence.

The views we have expressed upon this point are sustained by abundant authority. (*Butterfield v. Folsom*, 10 East, 60; *Bridge v. The Grand Junction R. R. Co.*, 10 W. (Exch.), 244; *Davies v. Mann*, 10 M. & W. 545; *Tuff v. Warman*, 94 Eng. Com. Law, 584; *London & N. W. R. R. Co.*, 1 Law Rep. (appeal) 106; *Solen v. V. T. R. R. Co.*, 13 Nev. 106; *Kansas R. Co. v. Pointer*, 14 Kan. 37; *Morrison v. T. & N. Ferry Company*, 43 Mo. 383; *Brown v. The Hannibal & St. Joseph R. R. Co.*, 50 Mo. 465; *Kerwhaker v. C. & O. R. R. Co.*, 3 Ohio St. 172; *Northern Central R. Co. v. Price*, 29 Md. 487; *Baltimore & Ohio R. R. Co. v. Eddy*, 36 Md. 368; Wharton on Negligence, sec. 36; Manly & Redfield on Negligence, secs. 36, 493.)

The important question, presented by the testimony, is whether the plaintiffs exercised ordinary care and the principal objection, urged by appellants, to the instruction is, that it was not applicable to the facts in the case. We are, however, of the opinion that there was some evidence that justified the giving of the instruction upon this point. There was testimony

ch parties as to the distance within which the train have been safely stopped. Kemp, a witness for plaintiff testified that a train running at the rate of twenty an hour could be safely stopped, by the use of air, in one hundred and twenty-five yards; that if the train was stopped in two hundred and twenty-five feet it would indicate a speed of about twelve miles an hour. The testimony upon the part of the defendant tended to show that the train was stopped within a distance of about two hundred and fifty feet.

It is true that this testimony was offered for the purpose of showing the rate of speed at which the train was moving. It is not improper to consider it with reference to another branch of the case. The defendant, for the purpose of showing that plaintiffs did not exercise ordinary care, produced several witnesses whose testimony tended to show that the obstructions upon and along the north side track did prevent the plaintiffs from seeing defendants' train at distances varying, as they approached the main track, from one hundred to five hundred feet, in ample time, after arriving at the north side track, to have stopped their team if they had been looking in that direction, and thereby have caused the injury.

The testimony, like the edges of a sword, cuts both ways. While it tended to prove a want of care upon the part of plaintiffs, it also tended in another direction to prove gross negligence on the part of the defendant. There was a direct conflict of evidence upon this point. If the jury believed the testimony upon the part of the defendant, it would have been their duty to determine whether the engineer of the train, had he been keeping a reasonable lookout, as it was his duty to do, could not have seen the horses attached to plaintiff's wagon before, or at least as soon as, the plaintiffs could have seen the train; and in view of this testimony it is perhaps proper for plaintiff to ask the court to submit to the jury the question whether the defendants' engineer, by the exercise of ordinary care and caution, after stopping plaintiff's team, have lessened the speed or

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stopped the train, with safety, in time to have a collision.

We are free to confess that we do not think it sary to introduce this element of gross or willful into the case; but we are unwilling to say that the evidence to which the instruction might apply. That the testimony of the defendant's engineer, offered for the purpose of showing that he was not as might be inferred from the testimony of other tended to support the plaintiffs' theory that the tions on and along the north side of the track them from seeing the train in time to avoid the This engineer testified that he was sitting in his u looking ahead and that he did not see the horses locomotive was right on to them, and that it was ble for him to have checked the speed of the train, it in time to prevent the collision.

But even if we should concede that the instruct some extent inapplicable to the facts, it would sarily follow that the judgment should be reve tainly not, if it is apparent from a consideration instructions that the jury could not have been mi by.

It is argued by appellants' counsel that the ins contradictory to and inconsistent with instructio four, given by the court of its own motion, as foll

"If you should believe from the evidence tha fendant was guilty of culpable negligence in ru train of cars into Reno on the morning of the June, A. D. 1877; nevertheless, the plaintiffs can n if they could have avoided the injury by the exer dinary care."

If these were the only instructions given, the would have more force. But from an inspecti record it clearly appears that instruction number given upon the theory that if plaintiffs' negligenc proximate cause of the injury they could not re that the jurors, as reasonable men, must have so r it, and that the instruction given at the request of



roduced another and different element for their consideration.

In *Radley v. London & N. W. R. R. Co.*, *supra*, Lord Hazen said that the law in these cases of negligence was well settled. "The first proposition is a general one, to the effect, that the plaintiff in an action for negligence can succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely: that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

In *Brown v. The Hannibal & St. Joseph Railroad Co.*, *supra*, the lower court instructed the jury as follows: "Even if the jury should believe from the evidence that the plaintiff was guilty of negligence or carelessness which contributed to the injury, yet if they further believe from the evidence that the agents or servants of defendant, managing the locomotives or machinery of the defendant with which the injury was inflicted, might have avoided the said injury by the exercise of ordinary care and caution, the jury will find for the defendant."

The supreme court said that this instruction was "entirely unobjectionable." In that case, as well as in this, it was argued that the negligence on the part of the plaintiff was "unaccountable and inexcusable," and that her carelessness was entirely inconsistent with the right to recover damages "founded on the negligence of the defendant."

The rule is well settled that all the instructions must be considered together, in order to determine whether or not the jury may have been misled. In the present case the plaintiff was repeatedly told, in the instructions of the court, that if they believed, from the evidence, that the plaintiff had not exercised ordinary care and diligence, or that their

negligence was the proximate cause of the injury, not entitled to recover, although the defendant, in not ringing its bell or blowing its whistle, in running its train at an unusually fast rate of speed, in violation of the principle was presented in every imaginable form of length, as strongly in favor of the defendant would warrant.

We quote but one instruction, in addition to those among the many that were given, to illustrate the principle announced by the court:

"Even though the jury may find that the defendant corporation did not on the occasion of the accident, in any respect, or in any respect, fulfill any obligation it had of giving usual and ordinary signals of its approach to warn passers of the approach of its train, in any circumstance, or those circumstances, does not shield the plaintiffs from the exercise of ordinary prudence on their part. The fact, if the jury should find it, that the train of the defendant corporation, in crossing of Sierra street without blowing a whistle where the whistle had usually been blown there, without ringing any bell, does not of itself authorize the plaintiffs to recover damages, if the plaintiffs, notwithstanding the negligence of the railroad company, voluntarily exposed themselves to danger; and if it appears that the injury complained of would not have occurred for their own misconduct or negligence, they cannot recover damages, but must bear the consequences of their own folly."

All that was said by the court, as to the right of the plaintiffs to recover, is embraced in the following instruction: "If you shall be of the opinion, after a candid, and unprejudiced review of all the testimony on behalf of the respective parties, that on the day of the year, and at the place alleged in the complaint, the plaintiffs, while exercising that due care which a prudent man under the circumstances of the case would exercise, were injured and their property destroyed by running into by the train of the defendant, and

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ion was wholly caused by the neglect and carelessness of the defendant corporation, or that after discovering the risks upon the track, the defendant could have avoided collision by the exercise of proper care, then the plaintiff is entitled to a verdict, *and not otherwise*."

I think it is manifest that the instructions given by the court, as well as some portions of the evidence, authorized the plaintiffs to ask and the court to give the instructions demanded of, and that in any event, it is apparent from a careful consideration of all the instructions given, that the court could not have been misled, to the prejudice of the defendant, as to the law of the case.

The judgment of the district court, in each case, is affirmed.

BELKNAP, J., dissenting:

The first instruction, which is fully set forth in the opinion of the court, charged the jury that if the engineer of the defendant train could, with safety to the passengers and property in his charge, have stopped his train and thereby "have avoided collision with the team, his failure so to stop amounts to negligence and rendered the defendant liable, \* \* \* such liability attaches even though the plaintiffs contributed to the injury by their own carelessness or negligence."

It is a general principle of the law of negligence that a plaintiff can not recover damages for injuries to which himself has contributed. In order, however, to bar a recovery on account of negligence of the plaintiff must be the proximate cause of the injury; it must be negligence occurring at the time the injury happened. If the defendant, after becoming aware of plaintiff's danger, could have avoided the injury by the exercise of ordinary care, an action may be sustained, notwithstanding plaintiff may have been remotely negligent in exposing himself to such danger.

It was therefore held in the case of *Davies v. Mann*, 10 W. 547, the leading case upon the subject of negligence, in a plaintiff which will not disentitle him to recover, that the plaintiff could recover notwithstanding he had

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negligently left his donkey to graze upon the high-  
way, its forefeet so fettered as to be unable to get  
out of the way of passing wagons, and while so situated was  
the negligent act of defendant in driving his  
wagon against it. The court based its decision  
on the ground that the mere fact of that negligence on  
the part of the plaintiff in leaving his donkey upon the public  
highway was no answer to the action, unless the donkey  
was there at the time there was the immediate cause of the injury; but  
the immediate cause of the injury was the neg-  
ligent too rapid driving of defendant's servant, plaintiff's  
cover. "For, although the ass may have been  
there," said the court, "still the defendant was  
driving along the road at such a pace as would be likely  
to cause mischief. Were this not so, a man might justify  
in driving over goods left on a public highway, or even  
lying asleep there, or the purposely running agai-  
nst a carriage going on the wrong side of the road."

This subject was considered and the doctrine  
established in *B. & O. R. R. Co. v. Trainor*, 33 Md. 542,  
in which plaintiff's intestate was killed in walking upon  
a railroad track. Said the court: "It is argued that  
the plaintiff ceased walking on the track, and his walking on  
the track was want of ordinary care, and the accident  
could not have happened if he had not walked on the track.  
Such walking was the proximate cause of the accident,  
and the plaintiff can not recover. \* \* \* By  
'remote cause' is intended an act which directly produces the  
injury, and is not intended in producing, the injury. By 'remote'  
is intended that which may have happened, and the  
injury have occurred, notwithstanding that no injury  
could have occurred if it had not happened. No man  
could have been killed on a railway, if he had never gone  
near the track. But if a man does, imprudently and  
carelessly, go on a railroad track, and is killed  
by a train of cars, the company is responsible,  
if it has used reasonable care and caution to avoid it.  
If the circumstances were not such, when the party  
was on the track, as to threaten direct injury, and pro-



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on the track he did nothing, positive or negative, to contribute to the immediate injury."

It has accordingly been held that if the owner of cattle permits them to range at large, and they stray upon a railway and are run over by passing cars, such owners may recover damages if the injury could have been avoided by the exercise of ordinary care upon the part of the railroad employee. In the class to which cases of this nature belong (and many of them are cited in the opinion of the court) it is observed that the plaintiff has been guilty of some degree of negligence touching his person or property, but that such negligence was the remote and not the proximate cause of the injury. In such cases it is well settled that a verdict may be had. An examination of the facts of this case, however, has convinced me that the general doctrine of proximate consideration (and which I can not admit was correctly expressed in the instruction) was inapplicable and misleading.

These are the facts: Upon the morning of the accident the plaintiffs were driving two horses before an open wagon in a southerly direction along Sierra street, a public street in the town of Reno, crossed at right angles by defendant's main track. In attempting to cross the track the wagon was struck by a train of cars approaching from the west, and the plaintiffs injured in their persons and property, as complained of. Plaintiffs' theory was that as they approached the crossing their view of the main track and of the collision was main moving upon it was obstructed, not only by buildings along the west line of Sierra street, but by passenger and freight cars upon a side track, and quantities of wood unloaded from defendant's cars. They show that the train entered the crossing where the collision took place upon a descending grade, at a high rate of speed, and claimed that it gave no warning by bell or whistle of its approach. Upon these facts I conclude that no question of remote consideration was or could have been presented. If plaintiffs were negligent at all, such negligence arose from their failure to listen for signals of the approaching train, or to have stopped the approach of the train, if that were possible, in

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time to have avoided the collision. But if they to exercise ordinary caution and were negligent, negligence occurred at the time of the accident. Negligence, if it existed, was the proximate cause of the collision and would defeat a recovery under all of the instructions. And it is equally well settled that, if the negligence was mutual, and the negligence of each party was the cause of the injury, no action can be sustained.

In justification of the instruction it is said that the testimony was introduced by defendant tending to show that the plaintiffs could have seen the approaching train and have avoided the collision, and, that, if this were true, the testimony at the same time proved that the engine was negligent. If the plaintiffs had seen the engine and avoided the collision, the engine could have seen the plaintiffs and avoided the accident. If the plaintiffs could have seen the approach of the train and avoided the accident, it must be admitted that the plaintiffs could have seen the approach of the train and did not see it when they could have seen it, or, if they assumed the hazard of crossing, they were alike negligent. Nor was the error in the instruction of the charge nullified by the giving of other instructions upon the subject of contributory negligence favorable to the appellant. It was as much the duty of the jury to follow the instruction that was incorrect as it was their duty to follow the correct instructions. As the instructions were mutually conflicting, the jury may have been misled.

For these reasons I think the judgment and order of the district court should be reversed.

#### RESPONSE TO PETITION FOR REHEARING.

By the Court, HAWLEY, J.:

In my opinion the decision heretofore rendered is sufficiently explicit upon all the points discussed in the petition for rehearing; but there are two questions presented which we will answer.

1. "Was there a substantial conflict in the testimony offered by the respective parties upon the question whether the plaintiffs might have seen the train

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defendant had they looked, and might they have heard the train if the defendant had they listened?"

We think, and it is so announced in the opinion of the court, that there is a decided conflict of evidence upon this point. It is true that we only discussed the question of conflict of evidence as to whether "the bell was rung and a whistle sounded;" because, in our opinion, there was less conflicting testimony upon that point than upon the one we are now asked to review. But we did examine all the evidence carefully, and considered all the questions raised by the plaintiff, and stated, in direct terms, our conclusion to be that upon all the material questions there is a substantial conflict of evidence."

The plaintiffs testified that as they approached the crossing they both looked and listened in order to ascertain whether a train was approaching; that they did not hear a bell rung or whistle sounded; that they were prevented from seeing the train by "the cars on the upper side of the track" and the woodpiles; that a train of cars was on the lower track below the crossing; that as they approached the lower side track the engine of the lower train "was blowing off steam;" that the near horse became frightened at the noise and his shying drew the team to the upper edge of the track. Bunting says that upon coming upon the lower side track he "heard a low rumbling sound;" that he thought it was the lower train starting, and he looked down and saw that train standing still, and as he looked up he saw an approaching train too near for him to either stop his team or to cross the main track in time to avoid the collision. To quote from the record: "When I looked down I noticed the train still standing, and just at that time, at that point, Mr. Harrison grabbed the lines and exclaimed: 'My God, we are killed!' and I looked up and saw the approaching train."

"Q.—What did you do then? A.—As soon as I saw it I had no time to pull the horses up, they got so far that I couldn't get them off the main track. I pulled them around and hit the off horse once or twice—twice, I think.

"Q.—Pulled them around east? A.—Yes, sir.

"Q.—What was your idea in pulling them a way? A.—To save my team and myself. I thought I could get off the track, but my wagon wouldn't go enough.

"Q.—You did try to turn them off the track? A.—Yes, sir. I saw that I had no time to get over the track, so I tried to pull them round.

"Q.—State to the jury what would have been the result had you, instead of pulling them around as you did, attempted to have gone straight over the track? A.—I don't think I had time to get over the track.

"Q.—Did you have time? A.—No, sir.

"Q.—Suppose you had gone on, instead of pulling them around as you did, what would have been the result? A.—I think the locomotive would have got me in the middle of the wagon—probably in the back. I had rushed my team over, loaded as I was with about a hundred pounds on the wagon.

"Q.—When you first noticed that train \* \* \* you have backed your horses and have got to the back of the train? A.—No, sir."

The testimony of the witnesses Wheeler, Buncell, Clelland, McFarland, Bates, and Faloon tended to corroborate plaintiff's statement.

Wheeler testified that he walked from McFarland's to the track; "that the cars and wood obstructed the view of the main track up to the center of the section above; in fact, you couldn't see Bragg's lumber until about half a mile above the crossing.

Buncell, in reply to the question, what "could be seen there were to sight or hearing" between "the main track and McFarland's," said, "There were box cars up to Jamison's corner and on the other side of the crossing, \* \* \* and then there was lumber and \* \* \* thrown in piles, \* \* \* some as high as the top of the doors of the box cars. \* \* \* I saw a smokestack; that is all I could see until it struck me. \* \* \* I don't think they (plaintiffs) had as good a chance to see it as I had from the distance I was off.



don't think they had any show of hearing the train;  
 \* \* there was no show for them to see the train, as  
 the height of the crossing was lower than the cars, \* \* \* don't see how  
 they could see the train."

McClelland, in answer to the question, "And then the  
 obstruction caused by the train of cars on the side track,  
 and the woodpile and lumber, etc.; taking into considera-  
 tion all of these circumstances, would it be anything remark-  
 able if Bunting couldn't hear the train approach?" said,  
 "Under these circumstances, I think not."

Bates testified that he "drove across the track a very few  
 minutes after Mr. Bunting, and there was a freight train  
 coming down. I drove across the crossing before I saw it.  
 It was very close. My off horse saw it before I did and he  
 jumped across the track, and the train was very close to me  
 when I got across."

"Q.—In passing over this point could you see anything  
 of this train? A.—I didn't see it. The horses saw it and  
 jumped as I passed by the cars.

"Q.—Did you see anything? A.—No, sir.

"Q.—Did you habitually look and listen for the train?  
 —Always."

Faloon, who was standing near the tank north of the  
 track, testified as follows:

"Q.—When did you first see the train? A.—Well, be-  
 fore Bunting got towards the railroad track I heard a kind  
 of a dumb sound coming, and I imagined it was the train.  
 I didn't see it at all until two seconds before it struck Bunt-  
 ing and his team.

"Q.—When his team got as far as the north side track,  
 if he had looked up the track toward the west, do you think  
 that he could have seen a train? A.—To the best of my  
 opinion I don't think that he could from where he was, with  
 the cars on the north side track. \* \* \* I don't think  
 that he could have seen the train. I don't think that he  
 could over the cars."

We did not deem it necessary to criticise the form of the  
 question, propounded by appellant's counsel, in answering  
 the point now under consideration, because if "there was

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a decided conflict of evidence upon this point," as that was, and is, not only a conclusive answer to the question, but is decisive of the case so far as this point is involved.

But inasmuch as the learned counsel has again argued with so much confidence, to "the mathematical conclusion as to the ability of the plaintiffs to see the approaching train had they looked for it as they came near the crossing," and again argued the case upon the assumption that it was possible for them to have seen the train at that point before coming upon the main track, they were guilty of contributory negligence because they did not deem it proper to say that, in our opinion, the question for the jury and court to decide was not "whether the plaintiffs might have seen the train of the defendant had they looked for it at some particular point, but whether under all the facts and circumstances testified to in this case, they made reasonable efforts to see and hear the approaching train." In this respect, exercised the due care and caution which the law requires. (*Bunting v. C. P. R. R. Co.*, 14 *Moore v. C. R. R. Co.*, 47 Iowa, 690; *Voak v. N. Y. C. R. R. Co.*, 75 N. Y. 323; *Laverenz v. C. R. I. and P. R. Co.*, The Reporter, vol. 13, 45.)

In *Shaw v. Jewett* the facts were in many respects similar to the case under consideration. Folger, C. J., in giving the opinion of the court of appeals, said: "The plaintiff was asked to charge the jury, that if they believed that the plaintiff could have seen the train at distance enough to have stopped his horse before reaching the crossing, his failure to see the train was negligent on his part, and he was not entitled to recover. The court refused the instruction, and exception was taken. We think the court did not err. The request was so couched that the proposition folded up in it had been given as a rule for the jury, it would have laid down as the rule that the plaintiff was bound to see the train at the distance named, and it was possible that it could be seen by any one from the crossing. This is not the rule. The plaintiff is not bound to see the train, but is bound to make all reasonable efforts to see that

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ent man would make in like circumstances. He is not  
 vide any certain result. He is to make effort for a  
 that will give safety; such effort as caution, care, and  
 nce will dictate. \* \* \* The question for the jury  
 ot alone whether he could have seen the coming train  
 indicated distance from the track, but whether, when  
 t distance, he looked and listened for it, and whether  
 so plain that at that distance he could and would  
 een it if he had looked; that his not seeing it was  
 that he did not look." (The Reporter, vol. 13, 22.)  
 We agree with counsel, that when a train is passing  
 ne road, and the engineer, while keeping a reasonable  
 t, "observes a team *at a safe distance from the track*,  
 not required to slacken his speed or stop his train  
 \* in order to ascertain whether the traveler upon  
 ghway has made up his mind to pause and let the  
 go by, or to go upon the track and stop the train,"  
 s the right, as we stated in *Solen v. V. & T. R. R.*  
 3 Nev. 123, "to act upon the assumption that a trav-  
 a walking upon or driving across its track, will use due  
 nd prudence to avoid impending danger." (*Cohen v.*  
*& P. R. R. Co.*, 14 Nev. 394.)  
 re is nothing in the instructions reviewed by us, or in  
 nion heretofore rendered, in conflict with these views.  
 is also the rule that railroad companies, as well as  
 rs, must exercise reasonable care and caution, and  
 present case, although the plaintiffs may not have  
 ntirely free from fault, if the engineer of defend-  
 rain saw the plaintiffs' team, as it was coming upon  
 ack, *in a position of great peril and danger*, and he  
 by the exercise of reasonable care, have lessened the  
 of his train, or stopped it, with safety, in time to  
 voided the collision, it was his duty to do so.  
 hearing denied.

KNAP, J., did not participate in this decision.

[No. 1,051.]

J. H. ALDERSON, RESPONDENT, v. JOSEPH  
ET AL., APPELLANTS.

SURETY ON OFFICIAL BOND CAN NOT RECOVER FULL DAMAGES.—A surety upon an official bond, that is joint and several, can not recover from his co-sureties the full amount of the damages he may have sustained by the wrongs of their common principal. *Idem*.—DEFENSE TO SUIT—CIRCUITY OF ACTION.—In a case where a surety can recover against another, and the latter can turn around and recover from the first, money back, the law, by way of rebuttal, and to avoid circuity of action, holds such liability a defense to the first action.

APPEAL from the District Court of the Sixth  
District, Eureka County.

The facts sufficiently appear in the opinion.

*C. J. Lansing and Crittenden Thornton*, for Appellants.

I. An action can not be maintained by a surety on the obligation of a principal who appears to be legally bound for the sum for which he sues, against all or any of his co-sureties. (1 Chitty Pl. 40; *Westcott v. Price*, Wright, 220; *v. Harris*, 5 Gill & Johns. 498; *Eastman v. Wright*, 316; *Warren v. Stearns*, 19 Id. 73; *Livingston v. Mills* (S. C.), 428; *Portland Bank v. Hyde*, 2 F. 315; *Griffith v. Chew*, 8 Serg. & R. 30; *Pearson v. Nestor*, 315; *Andrews v. Callender*, 13 Pick. 484; *Harri- Parish*, 23 Id. 112; *Brigden v. Cheever*, 10 Mass. 4; *Waring v. Newman*, 2 Bos. & Pul. 120; *Bosanquet*, 6 Taunt. 597; *Harvey v. Kay*, 9 B. & C. 356; *Holm- gins*, 1 Id. 74; *Teague v. Hubbard*, 8 Id. 345; *Codd*, 7 Id. 419.)

II. Gilmore, the principal obligor on the under- which the action is brought, is an indispensable party only to this, but to any action on the bond. (*Peop- 25 Cal. 523*; *City of Sacramento v. Dunlap*, 14; *Irwin v. Backus*, 25 Id. 214; *Mendocino Co. v. Mon- 145*; *People v. Evans*, 29 Id. 429; *People v. Hart- 585*; *People v. Kneeland*, 31 Id. 288; *Sacramen- Bird*, Id. 66; *People v. Ross*, 38 Id. 76; *Placer Co.*



## Argument for Respondent.

n, 45 Id. 12; *Tevis v. Randall*, 6 Id. 632; *State v. Nades*, 7 Nev. 438; *Kruttschnitt v. Hauck*, 6 Id. 163; *Pe v. Wells*, 8 Id. 105; *People v. Breyfogle*, 17 Cal. 510.)

II. The judgment in this case is erroneous on the face of the record. One surety can not recover from another law, more than that other's proportion of the joint liability. (*Judah v. Mieure*, 5 Blackf. 171; *Bradley v. Burwell*, 3 Ohio, 61; *Stallworth v. Preslar*, 34 Ala. 505; *Pitt v. Pursell*, 8 M. & W. 538; *Lucas v. Curry*, 2 Bailey (Law), 403; *Johnson v. Johnson*, 11 Mass. 359; *Crowdus v. Shelby*, 6 J. Marsh, 62; *Lidderdale v. Robinson*, 2 Brock. 160; *Mauri Jefferman*, 13 Johns. 58; *Colt v. Learned*, 118 Mass. 380; *Wash. Real Prop.* 651; *Challefoux v. Ducharme*, 8 Wis. 1; *Young v. De Bruhl*, 11 Rich. L. 638; *Clark v. Brown*, 509; *Aldrich v. Martin*, 4 R. I. 520; *Shove v. Dow*, Mass. 529; *Cutting v. Rockwood*, 2 Pick. 443; *Durant v. Johnson*, 19 Id. 544; *Sigourney v. Eaton*, 14 Id. 414; *Johnson v. Harris*, 5 Hayw. (Tenn.) 113.)

George W. Baker, for Respondent:

No authority is cited under the code which denies the right of maintaining an action in this form. The real question is, have the defendants been deprived of any right to make the same defense they could have pleaded in an equitable action? The plaintiff in this case sues for two thousand dollars. If plaintiff would be legally liable for any portion of this sum in an action for contribution, that fact might have been shown if properly pleaded in this action, and the plaintiff's claim reduced to the extent of his liability. (1 Chap. L. 1112; *Crary v. Goodman*, 12 N. Y. 266; *Rindge v. Crary*, 57 Id. 209; *Cavilli v. Allen*, Id. 508; *Bruce v. Burr*, 67 Id. 237; *Carpentier v. Oakland*, 30 Cal. 439; *Allen v. Perry*, 1 Black (U. S.), 132.)

III. The objection that the plaintiff had a legal interest in the subject-matter of the controversy is answered by the case of *Dowell v. Jacobs*, 10 Cal. 388.

IV. The plaintiff may sue all or any number of those liable on a joint and several undertaking, at his option.

(Civil Pr. Act, sec. 15; *People v. Love*, 25 Cal. 523; *v. Trilling*, 24 Wis. 610.)

IV. In an action upon a joint and several bond necessary to join the principal. (*Brainard v. J. How*, Pr. 569.)

V. This is an action for damages, caused by the wrongful and unauthorized act of the sheriff. It was not a jury sustained by all the sureties in common, but by the plaintiff alone; not because he was a surety on the taking of the sheriff, but because the wrongful act of the sheriff was committed against his property, just as it would have been against the property of any other citizen. The plaintiff in bringing suit for such wrongful act is controlled by the principles which govern actions for contribution.

VI. In an action between the sureties for contribution the plaintiff can be brought in and compelled to contribute in proportion of the amount of the damages sustained by the wrongful act of the sheriff with the other solvent sureties upon the undertaking. (*Bachelder v. Fiske*, 17 M. 100; *Burroughs v. Lott*, 19 Cal. 125.)

By the Court, BELKNAP, J.:

This is an action brought to recover the sum of two thousand dollars as damages for a breach of the official bond of George W. Gilmore, former sheriff of the county of Eureka. The bond is joint and several in form, and was executed by Gilmore as principal, and twenty-seven other persons as sureties, among whom the plaintiff and the two defendants against whom the action is brought. The breach consisted in the conversion of the plaintiff's property by Gilmore, a sheriff, during his term of office. A demurrer was interposed to the complaint on several grounds, one of which was that it did not state facts sufficient to constitute a cause of action. On the submission of the demurrer it was admitted that the plaintiff was a surety upon the bond, and thereupon the sum of two thousand dollars. The court

demurrer, and its ruling in this regard is one of the grounds upon which this appeal is taken.

The question presented is, whether one who is himself a party upon an official bond can recover from his co-sureties the full amount of damages he may have sustained by the wrongs of their common principal. If this question were answered in the affirmative and judgment passed against the defendants, there would be nothing to hinder them, after paying it, from recovering the same amount from the plaintiff; and thus the parties might alternately sue each other indefinitely. This would produce circuitry of action, which the law does not permit. The principle to which actions of this character are obnoxious is thus stated in 16th ed. of Chitty on Pleading, vol. 2, 363: "Whenever the interests of litigant parties are such that the defendant would be entitled to recover back from the plaintiff the same amount of damages which the plaintiff seeks to recover, the defendant may plead the facts which constitute such interests as a defense, for the purpose of avoiding circuitry of action."

This subject was considered in the case of *Gray v. Coffin*, 10 Cush. 206, under a statute imposing a personal liability on stockholders for the payment of the debts of insolvent corporations. In that case it was sought to enforce payment of the debt of an insolvent corporation against one of its stockholders by a creditor who was himself a stockholder. The court said: "And it is further argued that, because he may be the creditor, and have a judgment against the corporation, he may also, like any other creditor, have the collateral remedy over upon any individual member, as provided for by this statute. But this is by no means a just conclusion. The obligation is declared by this statute, but the remedy, as the case supposes, is sought at the common law; it must, therefore, be limited and controlled by the principles of the common law. Now, if the member, who has become a creditor of the corporation, say A. could recover against B., another member, B., by paying the debt, would, in his turn, become a creditor of the corporation, and might bring his action against any one or all of the other members,

## Argument for Appellants.

and, amongst the rest, against A., to recover the money again. Now when a case is so situated that, if one sues against another, and the latter can turn round and get the money back, the law, by way of rebuttal, and in the circuitry of action, holds such a liability a deferred action, yet he would have an immediate action on his first action. Supposing, by way of illustration, that there be a note in circulation, with a promisor and several indorsers, of whom A. is the first and B. the second, and indorsed by several others, and subsequently, in the course of business, comes again to A., as indorsee, after the first indorsements. As such indorsee, A. sues B. as his first indorser, which any other indorser might do. But B. knows that, though true it is, he is liable to pay it to A. as indorsee, yet he would have an immediate action on the note against A. as his prior indorser, and this shall be a good defense by way of rebuttal." (*Mitchell v. Turner*, 37 Ala. 66; *v. Bancker*, 3 Hill, 188.)

We are of opinion that this action can not be maintained. Judgment reversed.

[No. 1,067.]

FLOWERY MINING COMPANY, APPELLANTS,  
NORTH BONANZA MINING COMPANY,  
RESPONDENTS.

DEED—RECORDING OF SEAL NOT NECESSARY—WHEN ENSEALING PRESUMED.—The recording of the seal to a deed is not absolute. If the original instrument can not be produced, and the copy thereof is offered in evidence, the existence of the seal will be presumed from the statement in the deed that the grantor did set his seal thereon, and from the attestation clause that it was sealed, and delivered in the presence of witnesses.

APPEAL from the District Court of the First District, Storey County.

The facts are stated in the opinion.

R. H. Taylor and E. F. Preston, for Appellants

The court erred in sustaining the objection to



## Argument for Respondents.

of secondary evidence of the deed. The deed shows  
 ensealing. The subscribing witnesses attest the enseal-  
 The presumption is that it was sealed, and the bur-  
 of proof is upon the party making the objection. *Om-*  
*presumuntur rite et sollemniter esse acta donec probe-*  
*n contrarium.* (*Gray v. Gardiner*, 3 Mass. 398; *Pejep-*  
*v. Ransom*, 14 Mass. 144; *McQueen v. Farquhar*, 11  
 467; *Marine Inv. Co. v. Haviside*, 5 (L. R.) Eng. &  
 App. 630; 2 Best on Ev., sec. 362; *Talbot v. Hodson*, 7  
 t. 251; *Burling v. Paterson*, 9 C. & P. 572; *Doe v.*  
*os*, 9 Johns. 169; *Supervisors v. White*, 30 Barb. 78;  
*urney v. Gutter*, 18 Id. 211; *Jones v. Martin*, 16 Cal.  
*Estate of Sticknoth*, 7 Nev. 234.)

*wis & Deal*, for Respondents:

The word deed, as used in the statute (1 Comp. L.  
 means a written instrument under seal. That is not  
 the legal meaning of the word, but its common signifi-  
 n. (*Bouv. Dic.* 444; 1 Comp. L. 96; Civ. Pr. Act, sec.

A deed of real estate must be under seal except  
 e that formality is dispensed with by statute. (3 Wash.  
 real Prop., 244, 245; 2 Hill. on Real Prop. 424, 425;  
*e of Merritt v. Horne*, 5 Ohio St. 319; 4 Crui. 28; *Un-*  
*ood v. Campbell*, 14 N. H. 396; 1 Chitty on Cont. 4; 1  
 s Actions and Defenses, 674.)

[. There being no seal indicated in the record, there is  
 ore presumption that there was a seal than there would  
 been if the original deed had been presented without  
 l. (*Chillon v. People*, 66 Ill. 501.)

. The record offered must stand for itself, and can not  
 ded by any presumptions. (*Downing v. Haxton*, 21  
 178; *Georgia R. R. Co. v. Hamilton*, 59 Ga. 171.)

Without the production of the subscribing witness  
 his testimony as to the fact of the ensealing of the  
 the record stands as if there had been no subscribing  
 ss. If the original deed had been produced, it would  
 been necessary to produce the witness himself to prove

the execution of the deed. (1 Greenl. on Ev. and 569, A.)

By the Court, HAWLEY, J.:

Upon the admission of defendants' counsel that the original deed was lost, the plaintiffs offered in evidence a record of a deed from the Flowery mining company executed by William I. Cummings, late sheriff of the county of Storey, to John W. McKenney, as secondary owner, and its contents.

The attestation clause reads as follows:

"In witness whereof, the said sheriff, the said William I. Cummings, the first part, has hereunto set his hand and seal, this 1st day of January, 1880, and year first above written. W. I. Cummings,  
\* \* \* Signed, sealed, and delivered in the presence of Philip Stoner."

This deed was properly acknowledged before a notary public. The defendants objected to the admission of the deed in evidence upon the ground that there was no evidence of the ensembling of the deed. The court sustained the objection and granted a nonsuit. Did the court err in admitting the record of the deed as evidence? The question is rendered upon the principles of the common law. It is declared that it is just as necessary that a deed be sealed as that it should be signed and delivered. The defendants' counsel, therefore, claim that the record is evidence in the absence of any evidence to the contrary, must be held to be conclusive that the original deed was not sealed. This position has much reason to support it, and is supported by *Switzer v. Knapp*, 10 Iowa, 75, where the court held that the complainant further asks, what if the copy does not have a seal. A scroll stands for this, and how can a copy be copied? It is copied the same as a seal is, by a 'seal,' or by a scroll, or by this and the word 'sealed,' letters 'L. s.' without it. The copy of a deed without a mark indicating a seal, is evidence that there was no seal.

On the other side, appellant contends that the deed of the deed will be presumed, and that the burden

the contrary, rests upon the party making the objection. Counsel rely upon the authority of 1 Sugden on Powers, where, after stating that sealing is essential to a deed, the author says that 'where the instrument is a deed, and proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, still, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appears on the parchment or paper.' No authorities are cited, says the author, in support of this text. The text is, however, followed by Matthews on Presumptive Evidence, 36, and by Taylor on Evidence, sec. 128.

The court agree with respondents' counsel, that the English authorities cited by appellant do not support the text as above stated, and if the case rested upon the authorities presented in the briefs of the respective counsel, we would be inclined to sustain the action of the court in excluding the record of the deed. But, upon further examination, we find that the majority of the decisions in the United States are to the effect that the recording of the seal is not absolutely essential, and that if the original instrument can not be produced, the existence of the seal will be presumed, from the statement in the concluding portion of the deed, that the grantor set his hand and affix his seal thereto, and from the attestation clause, that it was signed, sealed, and delivered in the presence of witnesses.

In *Geary v. The City of Kansas*, 61 Mo. 379, no seal appeared on the record of the certificate of acknowledgment of the record copy of a deed. The court said: "It is not necessary for the recorder to attempt to copy the seal, nor is it necessary for him to note the place where the seal was placed in the original; the statement in the body of the certificate, that the clerk who made it affixed the seal of said city, authorizes the presumption that such seal was affixed, and the general current of authority favors this view. (*Hedley v. Overton*, 4 Bibb, 406; *Griffin v. Sheffield*, 38 Miss. 387; *Sneed v. Ward*, 5 Dana, 187; *Smith v. Dall*, 13 Cal. 307.)"

Our statute relative to the acknowledgment and record—Nev. Vol. XVI.—20.

ing of the conveyances is substantially the same as of California. Terry, C. J., in delivering his opinion in *Smith v. Dall*, *supra*, said: "The conveyance is required to be copied into the record, in order that it may determine its sufficiency and the character of the estate conveyed. To accomplish this end it is necessary that the seal should be copied upon the copy, not enough if it appear from the record that the copy is copied is under seal. This, we think, is sufficient evidence by the record of the conveyance from Richardson. It purports to be under seal, and to have been signed, sealed, and delivered in the presence of the subscribing witnesses."

Sanderson, J., in *Emmal v. Webb*, 38 Cal. 291, 10 P. 257, considered that the question admitted of debate, but decided it. In a recent decision by Mr. Justice Field, of the supreme court of the United States, he adds the force of his judicial sanction in terms direct, clear, and conclusive to the principles announced in *Smith v. Dall*. In *Richmond v. Richmond*, 5 Sawyer, 603, he said: "There is no doubt that a seal is essential to a conveyance of real property. The general doctrine with reference to instruments of real property is transferred is the same in California as in other states—the instruments must be sealed. A conveyance *inter vivos* can only be made by deed, and a deed implies sealing; its definition is 'a writing sealed and delivered by the parties.' (2 Blackstone, 295.)"

After copying the text from Sugden on Powers, Mr. Justice Field, quoted, he adds: "The presumption thus indulged in is just and natural where the original instrument is lost, and resort is had to secondary evidence of its contents. The statute, in providing for the record of deeds, does not require any note or entry by the recorder of the existence of a seal to the original; yet copies from the records are admissible in evidence with the like effect as the originals when the latter are beyond the possession or control of the party. The existence of the seal to the original is, therefore, in the majority of cases, where copies are used, but be a matter of presumption, and the fact may be presumed from any expressions in conclusion of the



## Points decided.

as in the copy produced in the present case or in the  
 tion indicating that a seal was affixed."  
 the light of these authorities we think the court erred  
 taining the defendants' objection.  
 judgment of the district court is reversed, and the  
 remanded for a new trial.

[No. 1,085.]

STATE OF NEVADA, RESPONDENT, v. CHARLEY  
HING, APPELLANT.

SENT FOR MURDER—WILLFUL, DELIBERATE, AND PREMEDITATED—  
 NICE AFORETHOUGHT.—In reviewing an indictment for murder: *Held*,  
 charging the homicide to have been with "malice aforethought" is  
 amount to an averment that the act was "willful, deliberate, and  
 meditated."

ANCE OF CHALLENGE FOR IMPLIED BIAS—NOT SUBJECT OF REVIEW.—  
 allowance of a challenge for implied bias is not the subject of  
 exception.

GENERAL OR PARTICULAR CAUSE OF CHALLENGE—CONSCIENTIOUS  
 IONS.—A juror was excused upon the ground that he entertained  
 conscientious opinions concerning capital punishment as would  
 lude his finding defendant guilty of an offense punishable with death:  
*Held*, that the objection to the juror did not go to the general cause of  
 lence; that he was disqualified from serving in any case, but to the  
 icular cause, that he was disqualified from serving on the case on  
 l.

ITY OF WITNESSES—INSTRUCTION.—In reviewing an instruction  
 tive to the credibility of a witness jointly indicted with defendant:  
*Held*, that the attention of the jury may be directed to the peculiar cir-  
 cumstances surrounding any witness that are proper to be considered in  
 rmining the weight to be attached to his testimony.

N TO GIVE INSTRUCTIONS.—The omission of the court to instruct  
 ry upon any particular point, when the same is not definitely re-  
 ted, is not the subject of an exception.

REAL from the District Court of the Fourth Judicial  
 t, Humboldt County.

facts appear in the opinion.

. *Buckner*, for Appellant.

A. *Murphy*, for Respondent.

By the Court, BELKNAP, J.:

Appellant was convicted of the crime of murder in the first degree, and sentenced to be executed. He appeals from the judgment and from an order overruling his motion for a new trial. The first assignment of error arises from the action of the court in overruling a motion in arrest of judgment, founded upon the alleged insufficiency of the indictment to support a judgment of conviction of murder in the first degree.

The indictment charges that the defendants CHARLEY and Tang Yan, "on the eighth day of May, A. D. 1908, at and thereabouts, and before the finding of this indictment, in the said county of Humboldt, state of Nevada, against the authority of law and with malice aforethought, did unlawfully murder a certain person, to-wit: [name], by the means of the statute defining the degrees of murder providing that murder in the first degree shall be committed by any person who shall unlawfully kill another person, with intent to kill, and with malice aforethought, by poison, or by lying in wait, torture, or by any other kind of willful and premeditated killing, or which shall be committed by any person who shall unlawfully kill another person, with intent to kill, and with malice aforethought, by robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder of the second degree. \* \* \*

From this definition of murder of the first degree, it is argued that as the indictment failed to aver willful murder, premeditation, and liberation, which are essential elements of the crime of murder of the first degree, the indictment shall be sufficient if it can be shown that the act therefrom "that the act or omission charged as constituting the crime is clearly and distinctly set forth, in ordinary language, without repetition, and in such a manner as to be understandable to a person of common understanding to know that the act intended," (Sec. 2323, Comp. L.)

The indictment meets all of the requirements of the statute; it follows the form prescribed by the legislature for indictments for murder, in charge of malice aforethought, and the charge is tantamount to an averment that the act

deliberate, and premeditated." (*People v. Dolan*, 9 Cal. ; *People v. Murray*, 10 Id. 309 ; *People v. Vance*, 21 Id. ; *State v. Thompson*, 12 Nev. 140 ; *State v. Crozier*, Id.

)  
The next point relied upon is the allowance of a challenge to the district attorney for implied bias to one James A. Minson, who had been returned upon the venire, and who was excused upon the ground that he entertained such contentious opinions concerning capital punishment as would preclude his finding a defendant guilty of an offense punishable with death.

In *State v. Larkin*, 11 Nev. 314, and in *State v. Pritchard*, 10 Id. 79, this court held that the allowance of a challenge to the district attorney for implied bias was not the subject of an exception. So it has been repeatedly held by the supreme court of California under a statute similar to ours. (*People v. Murphy*, 45 Cal. 137 ; *People v. Cotta*, 49 Id. 167 ; *People v. Vasquez*, 50 Id. 560 ; *People v. Atherton*, 51 Id. 495.)

The reason upon which this ruling is based is well stated in *People v. Murphy*, 45 Cal. 142, in the following language:

By the criminal practice act (sec. 433) it is provided that an exception may be taken to the decision of the court in a matter of law in *disallowing a challenge to a juror on account of implied bias*. The action of the court in *allowing* such a challenge is not included, but is omitted, and *ex industria* excluded; in other words, excluded by the statute itself as being the subject of an exception. This distinction was pointed out by the attorney general, in *People v. Stewart*, 7 Nev. 140, but was then apparently overlooked by the court. At least it was not adverted to in the opinion delivered in the case. The reason, and it is a sensible one, upon which the statute proceeds, is that when a competent jury, composed of the requisite number of persons, has been impaneled and sworn in the case, the purpose of the law in that respect has been accomplished; that, though in the impaneling of the jury one competent person be rejected, yet, if another competent person has been substituted in his stead, no injury has been done to the prisoner, certainly no

injury which a new trial would repair, because a venire *de novo* be awarded, it is not pretended that the prisoner could insist upon the excluded person being specially returned upon the panel. The result would be that the prisoner would probably be tried again by a competent jury, of which the excluded person would be a member, and so the new trial would only be a repetition of that which had been done already."

Upon this subject it is further contended that the decision of the court should be reviewed because the ground of challenge is, in fact, general rather than particular.

Section 1961 declares: "A challenge for cause may be taken by either party. It is an objection to a juror, and is either: First, general, that the juror is disqualified from serving in any case; or second, particular, that he is disqualified from serving in the case at hand." Section 1963 defines implied bias to be such a bias that the existence of the facts is ascertained, in which case the law disqualifies the juror, and this is properly maintained as a particular cause for challenge. The subdivision, in its ninth subdivision, declares that if a juror charged be punishable with death, the entertainment of conscientious opinions by the juror as would prevent finding the defendant guilty, shall be cause for challenge for implied bias. It is apparent that the objection to the juror did not go to the general cause of challenge, but that he was disqualified from serving in any case, but to a particular cause that he was disqualified from serving in this case on trial.

The third objection is taken to the giving of an instruction touching the matters proper for the jury to determine in determining the credibility to be given to the testimony of Tang Yan, who was jointly indicted with appellant.

The instruction is as follows: "The defendant, Tang Yan, has offered herself as a witness in behalf of the defendant in this trial, and in considering the weight and value to be given to her evidence, in addition to noticing the manner and the probability of her statements, taken in connection with the evidence in the cause, you should



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Points decided.

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relation and situation under which she gives her testimony, the consequences to her relating from the result of trial, and all the inducements and temptations which ordinarily influence a person in her situation. You must carefully determine the amount of credibility to which evidence is entitled. If convincing, and carrying with belief in its truth, act upon it; if not, you have a right to reject it."

The point of the objection appears to be that whilst this instruction was correct in so far as the testimony of Tang applied to herself, it placed her testimony relating to the defendant in a less favorable light before the jury than that of the other witnesses. The objection is untenable. Whilst it is customary for courts to instruct juries in reference to the testimony of defendants in criminal cases, who offer themselves as witnesses, the attention of the jury may be directed to the peculiar circumstances surrounding any witness, and proper to be considered in determining the weight to be attached to his testimony. Finally, it is claimed that the facts of the case required the application of a rule of law upon which no instruction was given. This objection is answered by the fact that no instruction on the subject was requested. The omission to instruct when not definitely requested is not the subject of an exception.

There being no error in the record, the order and judgment are affirmed and the district court directed to appoint counsel for the execution of its sentence.

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[No. 1,059.]

BROWN, RESPONDENT, v. L. A. ASHLEY, APPELLANT.

**RE JUDGMENT—RES JUDICATA.**—Where a former judgment has established the rights of the respective parties to the waters of a stream, the same question as between the same parties can not again be considered; it is *res judicata*.

**RIGHT FOR DIVERSION OF WATER—VINDICATION AND PRESERVATION OF A RIGHT—ADVERSE RIGHT.**—Where the act complained of is committed under a claim of right, which, if allowed to continue for a certain length

## Argument for Appellant.

of time, would ripen into an adverse right, and deprive of his property, he is not only entitled to an action for the loss of his right, but also for its preservation.

**IDEM—WHEN INJUNCTION SHOULD ISSUE—NOMINAL DAMAGES—USE OF WATER.**—In actions for the diversion of water, where there is a clear violation of an established right, and a threatened continuance of such violation, it is not necessary to show actual damages from the use of the water, in order to authorize a court to issue an injunction and make it perpetual.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts sufficiently appear in the opinion.

*R. M. Clarke*, for Appellant:

I. The owner of land upon a natural watercourse is entitled to make a reasonable use of the water for agricultural purposes. (*Angell on Watercourses*, secs. 119, 119a, 122; *Martin*, 2 Gray, 394; *Davis v. Winslow*, 51 Me. 29; *Wright v. Dow*, 1 Root, 535; *Weston v. Alden*, 8 Mass. 353; *Embrey v. Owen*, 1861, 15 Pick. 175; *Embrey v. Owen*, 1861, 15 Pick. 175; *Blanchard v. Baker*, 8 Greenl. 253; *Wadsworth v. Lotson*, 15 Conn. 366; *Gillett v. Johnson*, 30 Id. 1; *Merriweather v. Scam*, 476; *Union M. & M. Co. v. Dangberg*, 2 Saw. 190; *Union M. & M. Co. v. Dangberg*, 2 Saw. 190.)

II. Any use of water by a riparian proprietor which does not deprive the lower proprietor of a substantial use, and which does not work the lower proprietor a substantial injury and actual damage. (*Angell on Watercourses*, sec. 93a; *Union M. & M. Co. v. Ferris*, 2 Nev. 274; *Tyler v. Wilkinson*, 4 Mason, 397; *Embrey v. Owen*, 1861, 15 Pick. 175; *Howard v. Ingersoll*, 13 How. 426; *Farrell v. Ingersoll*, 30 N. J. Eq. 511.)

III. The law of riparian proprietorship has no application and does not exist in this state. On the contrary, the law in force, governing the use of water, is that of appropriation. (*Lobdell v. Simpson*, 2 Nev. 274; *Ophir v. Carpenter*, 4 Id. 534; *Barnes v. Sabron*, 10 Id. 1; *Hobart v. Wicks*, 15 Id. 418; Act of July 26, 1866, Stats. U. S. sec. 2339; *Atchison v. Peterson*, 20 Vt. 269.)

*v. Gallagher*, Id. 670; *Jennison v. Kirk*, 98 U. S. 453; *r v. Natoma W. Co.*, 101 Id. 274.) The common law, and in England, is not applicable to our situation, and is not the rule of decision here. (Petition for replevin, *Vansickle v. Haines*; Cooley's Const. Lim. 12; 244; 27 Cal. 482; *Boyer v. Sweet*, 3 Scam. 120; *Midway v. Pritchard*, Id. 510.)

The decree prevents defendant from using water, first, it would not reach plaintiff if not used; and second from using the surplus which plaintiff does not use or need. This is contrary to all reason, against all principle and subversive of the best interests of the country. (Authorities before cited.)

The former judgment is not conclusive, because properly interpreted it does not deny the use which defendant is making of the water. (See cases cited to support paragraph II.)

*is & Deal*, for Respondent:

The rights between the parties to this action, as to the waters of Coyote creek, were determined by the former decree of the lower court.

*M. Clarke*, in reply:

If the former judgment existed and was in force, it was *res judicata* between the parties, and was an estoppel as to matters which it involved: the same subject-matter could not be litigated again. (*Jackson v. Lodge*, 36 Cal. 28; *v. Petaluma*, Id. 230; *Barnum v. Reynolds*, 38 Id.

The respondent could no more litigate the subject-matter over again than the appellant. The estoppel is mutual and concludes both parties.

Admitting for argument respondent's title to the water, conceding appellant's violation of his strict right, and defendant's technical right to have nominal damages, nevertheless appellant should have had judgment for his costs. In the action is trespass, the injury reparable, the damages nominal, no injunction will lie, although the title of the water is undisputed. (*Thorn v. Sweeney*, 12 Nev. 251.)

III. In any event the decree is broader than the rights, and should be modified or reversed.

IV. The former decree must be interpreted in accordance with the settled principles of the law; and the denial of the right to use the waters of the stream for irrigation should be limited to such use as will injure respondent. It can not be construed to deprive him actual damage. It can not be construed to deprive the plaintiff the right to the surplus water in time of need.

By the Court, HAWLEY, J.:

In 1876 the plaintiff obtained a judgment against the defendant for damages and costs, and a decree "that the plaintiff be and he is the owner of the lands, tenements, and hereditaments in plaintiff's complaint, and that he is a riparian proprietor in respect to said lands and Coyote creek and the stream mentioned in plaintiff's complaint, and that he is entitled to have *all* the waters of said stream come to and upon said lands, except that the defendant may use such portion of said waters as may be necessary for domestic purposes *and not for irrigation.*"

In the present action, the complaint, among other things, alleges, and the court finds, that defendant, during the years 1877, 1878, and 1879, wrongfully and unlawfully diverted from the channel the waters of said Coyote creek and the same for irrigating his land, and thereby prevented the waters from flowing down upon the lands of plaintiff as they otherwise would have done. The plaintiff seeks to have the former judgment and decree.

The court, in its finding of facts, states that defendant did not divert the waters of the creek "except during the wet season of said years and during that portion of the season of said year when if not so diverted by defendant said water would have been absorbed by the soil of the sphere \* \* \* before it reached the lands of plaintiff, and that the volume of water was not, by the acts of defendant, so diminished "as in any manner to deprive plaintiff of sufficient water to irrigate" the crops grown on his lands, and for all domestic purposes.

Judgment was rendered in favor of the plaintiff.



Opinion of Hawley, J., on rehearing.

damages, and a decree was entered substantially the same as in the former action, and the defendant was enjoined "from ever hereafter diverting or obstructing in any manner any of said waters of said creek from the natural channel thereof, so as to prevent said waters, or any portion thereof, from flowing down to or upon the plaintiff's said land."

The former judgment was rendered on the merits, and it was conclusive between the parties as to their respective rights in the waters of Coyote creek.

Deciding that the former judgment was too broad, and that it would have been modified if the proper objection had been made, still it is apparent, upon well-established principles of law, that the same question can not again be relitigated. It is *res judicata*. (Freeman on Judgments, § 49, and authorities there cited.)

The diversion of the waters of Coyote creek, by the defendant, was a violation of plaintiff's rights, as established by the former decree, and entitled him to nominal damages and to the decree and injunction which he obtained in his second action. (*Barnes v. Sabron*, 10 Nev. 247.) The judgment of the district court is affirmed.

#### UPON REHEARING.

The Court, HAWLEY, J.:

I granted a rehearing in this case, in order to give appellant an opportunity to re-argue the questions whether the court erred in granting the injunction and in allowing costs. The examination of the authorities has strengthened our opinion that the former opinion was correct in every particular.

In *Arm v. Sweeney*, 12 Nev. 251, upon which appellant relies, there was no special application to the facts of this case. The principle therein announced, that a court of equity will not issue an injunction in cases of mere trespass where the injury complained of is not committed under any general claim of right or title in the defendant, and where there is no appreciable damage, and the remedy at law is adequate, is well settled.

It is equally as well settled by the authorities, that

where the act complained of is committed by defendant, under a claim of right, which, if allowed to continue for a certain length of time, would ripen into a permanent right, and deprive the plaintiff of his property, the plaintiff is not only entitled to an action for the violation of his right, but also for its preservation. This is true of actions for the diversion of water where there is a present use of the water, in the present case, a clear violation of an established right and a threatened continuance of such violation. See *Ang. & Ames on Watercourses*, 423-4; *Ang. & Ames on Watercourses*, 423-4; *Ang. & Ames on Watercourses*, 423-4; *Barnes v. Sabron*, 10 Nev. 247; *Parker v. Griswold*, 302-5; *Stein v. Burden*, 24 Ala. 148.)

In such cases it is not necessary to show actual injury or a present use of the water, in order to authorize the court to issue an injunction and make it perpetual. (See *Webb v. Portland Manufacturing Company*, 3 Sum. 197; *Boiling Springs B. Co.*, 14 N. J. Ch. 343; *Cornish v. I. & N. F.*, 34 Barb. 491-2; 40 N. Y. 191; 39 Bar. 191; *Crosby & Sons v. Lightowler*, 3 Eq. Cas. (L. R. 10 Eq. 311); *Lyon v. McLaughlin*, 32 Vt. 425; *Kerr on Injunctions*, 34; 226 (2); *Ang. on Watercourses*, sec. 449; *Injunctions*, sec. 556.)

In *Webb v. Portland M. Co.*, the court, in discussing the question, said: "If, then, the diversion of water from the plaintiff's right in the present case is a violation of the right of the plaintiffs, and may permanently injure that right, it will come, by lapse of time, the foundation of an adverse claim in the defendant, I know of no more fit case for the intervention of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. It will be a remedy for the plaintiffs at law for damages, but such a remedy is inadequate to prevent and redress the injury. If there be no such remedy at law, then, a court of equity ought to give its aid to vindicate and protect the right of the plaintiffs. A court of equity will indeed entertain a bill for an injunction in case of a trespass fully remediable at law. But if it might be irreparable mischief, or permanent injury, or a permanent right, that is the appropriate case for such a bill."

## Points decided.

In *Corning v. Troy I. & N. F.*, 40 N. Y. 206, the court said: "No man is justified in withholding property from the owner when required to surrender it, on the ground that he does not need its use. The plaintiffs may do what they will with their own. Upon established principles this is a proper case for equity jurisdiction. First, upon the ground that the remedy at law is inadequate. The plaintiffs are entitled to the flow of the stream in its natural channel. Legal remedies can not restore it to them and secure them the enjoyment of it. Hence, the duty of a court of equity to interpose for the accomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid, the legal remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and to endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no defect. The right of the plaintiffs to the equitable remedy sought is established by authority as well as principle."

The court did not err in taxing the costs of this suit against defendant. (*Brown v. Ashley*, 13 Nev. 252.)

The judgment of the district court is affirmed.

[No. 1,069.]

B. STRAIT ET AL., APPELLANTS, v. C. A. BROWN ET AL., RESPONDENTS.

APPROPRIATION OF WATER.—Prior appropriation gives the better right to running waters upon the public lands, to the extent of the appropriation.

DISTINCTION BETWEEN RUNNING WATER AND WATER PERCOLATING THROUGH THE SOIL.—Percolating water existing in the earth is not governed by the same laws that pertain to running streams. No distinction exists between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters running in distinct channels, whether upon the

## Argument for Appellants.

surface or subterranean, and those oozing or percolating through in varying quantities and uncertain directions.

**IDEM—FACTS—LAW OF PERCOLATING WATERS NOT APPLICABLE.**—The water of "Warm Springs," at one time, flowed through a natural channel to Duckwater creek. The calcareous properties of the springs have formed a light, porous limestone natural channel from the slough (near the springs) to the creek, closed, and by some subterranean means, which are not established, the waters find their way to the creek. The source of the creek, and the diversion of the water from the defendants, appreciably diminished the volume of water flowing in the creek: *Held*, upon the facts, that the law of percolating waters was not applicable, and that the law of appropriation governs the case.

**IDEM—SUBTERRANEAN STREAMS.**—Later appropriators can not acquire rights to the waters of the spring which constitute the creek, simply because the means by which the waters flow from the springs to the creek are subterranean and not well defined.

**APPEAL** from the District Court of the Fifth Judicial District, Nye County.

The facts sufficiently appear in the opinion.

*R. M. Clarke*, for Appellants:

I. The spring being the source of the stream, connected with it by subterranean channels, is in the head of it; and defendants have no more right to turn the water out of the springs than out of the stream itself. *Waterc.*, sec. 112 a, b, c; *Wheatley v. Baugh*, 20 Cal. 528; *Arnold v. Foot*, 12 Wend. 330; *Smith v. Paige*, 435; *Frazer v. Brown*, 12 Ohio St. 300; *Illius*, 25 Conn. 583.)

II. The principle governing percolating waters has no application to this case. Defendants do not own the land on which the spring is situated, and do not cut off its hidden supplies by a proper use and enjoyment of the land which belongs to them. They can not invoke the maxim *est solum ejus est usque ad cælum*. (Ang. on Waters, 109-112; *Dexter v. Providence Aq. Co.*, 1 Story, 330; *Stanton v. Bensted*, 1 Campb. 463; *Dickinson v. Grand*, 7 Exch. 282.) The waters are not percolating. The uncertainty which is the reason of the rule does not ex-



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ing is the ascertained and determined source of the stream.  
Ang. on Waterc., sec. 114 c; *Roth v. Driscoll*, 20 Conn.

J. Lansing, for Respondents:

The record fails to show that there is any defined, own, and existing surface or subsurface channel or watercourse through which the waters of "Warm Springs" usually flow into Duckwater creek. No action lies for the diversion of any subterranean waters, or to determine corrective rights thereto. If there be such diversion resulting in damages to the plaintiffs it is *damnum absque injuria*. The plaintiffs, in order to maintain this action against the defendants, must prove a natural, visible watercourse, or surface channel through which the waters of the Warm Springs usually flow into Duckwater creek. (*Chasemore v. Richards*, 7 H. L. Cases, 349; *Acton v. Blundell*, 12 M. & C. 324; *Rawtrom v. Taylor*, 11 Exch. 369; *Broadbent v. Hasbotham*, Id. 602; *Trustees v. Youmans*, 50 Barb. 316; 1 N. Y. 362; *Goodall v. Tuttle*, 29 Id. 459; 35 Id. 528; 8 C. 369; High on Inj., secs. 509, 556; 9 Cush. 174; 11 Id. 108; 108 Mass. 219; 21 Barb. 230; 4 Coms. 195; Wash. on Inj., sec. 7; 18 Pick. 117; *Wheatley v. Baugh*, 25 Pa. St. 117; *Hanson v. McCue*, 42 Cal. 303; 27 Id. 476; 33 Id. 316; 18 Pick. 117; Ang. on Waterc., secs. 112, 114; *Brown v. Brown*, 25 Conn. 593; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 117.)

by the Court BELKNAP, J.:

This is a suit in equity to establish the right of the plaintiff to the waters of Duckwater creek. The sources of the creek are springs, known as the "Warm Springs," the waters of which, after running a short distance through a natural surface channel, are discharged into a large slough. The slough has no natural surface outlet. Its westerly border consists of concretionary limestone, formed by the waters, and this formation extends to the defined surface channel of the creek, a distance of about half a mile. The land hereby embraced is a portion of the unoccupied pub-

lic domain, and is unfitted for agricultural purposes. Its surface gradually slopes from the creek. The waters of the creek were appropriated by plaintiffs during the years 1867, 1868 and 1869 for the purpose of irrigating their farming lands adjacent to the creek. Ever since then plaintiffs have used the waters of the creek for the purpose of their appropriations, except when debarred by the acts of the defendants hereinafter stated.

In the year 1875, the defendants, in order to for the purpose of irrigating their lands, w situated that they can not be irrigated by wat creek, diverted the waters of the Warm Spri purpose. The principal object of this suit is defendants from diverting these waters.

The court before whom the cause was tried, in the determination of the questions of fact in jury, to whom certain interrogatories were submitted, the court adopted the answers of the jury to the interrogatories, and in connection therewith made further findings of fact. Many of the interrogatories submitted to the jury, as well as the findings made by the court, were in relation to the question of the mode by which the water from the springs reach the creek. Upon this subject the jury made a finding in the findings. For instance: The following interrogatory was submitted to the jury:

"Is there any subterranean stream or percolation from Warm Springs to Duckwater creek?" The jury responded, "No." Afterwards they answered to the following interrogatory: "Do the waters of Warm Springs connect with Duckwater creek and form one of the waters usually flowing therein by subterranean channels?" But throwing out of view the question in the findings, and considering all of them together, we think we are justified in assuming that at some time the waters of the springs flowed through a surface channel to the creek; that the calcareous deposits of the waters of the springs have formed a hard limestone, by which the natural channel from the springs to the creek has been closed, and that by some

means, which do not appear to have been satisfactorily established to court or jury, the waters of the springs find their way to the creek. There is no conflict with the finding that the springs are the source of the creek, and that the diversion by the defendants appreciably diminishes the volume of water naturally flowing in the creek. Upon these facts the district court rendered judgment in favor of the defendants.

No question of riparian proprietorship arises in this case. Both parties claim by virtue of appropriations of the waters. The doctrine of appropriation of surface waters as established in the Pacific states is conceded by respondent. This doctrine declares that prior appropriation gives the better right to running water upon the public lands to the extent of the appropriations. If this law, as thus established, is applicable to the facts of this case, the judgment must be reversed.

Counsel for respondents contend that the judgment should be sustained, because there is no known or defined channel through which the waters of the springs reach the creek; but if these waters at all reach the creek, they do so by percolation or other unknown means, and that to such cases the law of watercourses does not apply.

It has been conclusively established by a long line of decisions that percolating water existing in the earth is not governed by the same laws that have been established for running streams. No distinction exists in the law between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters running in distinct channels, whether upon the surface or subterranean, and those oozing or percolating through the soil in varying quantities and uncertain directions. The grounds for the distinctions are clearly pointed out in the authorities.

The subject was carefully considered in the case of *Chatfield v. Wilson*, 28 Vt. 54. The court there said: "The secret, unchangeable, and uncontrollable character of underground water, in its operations, is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build

upon it a system of rules, as is done in the case of surface streams. Their nature is defined, and their position upon the surface may be *seen* and *known*, and is *unified*. They are not in the earth and a part of it, and no person can move them, but they assume a distinct character from that of the earth, and become subject to a certain great law of gravitation.

There is, then, no difficulty in recognizing a right of use of water flowing in a stream as private property, and regulating that use by settled principles of law.

We think the practical "uncertainties" which attend subterranean waters is reason enough why it should not be attempted to subject them to certain and settled principles of law, and that it is better to leave them to be controlled absolutely by the owner of the land, as one of its advantages, and in the eye of the law a part of it, as we are warranted in this view by well-considered authority.

In *Haldeman v. Bruckhart*, 45 Pa. St. 519, upon the same subject, the court said: "In case of an underground stream, a spring or well, or a stream emerging upon land of a proprietor, the water does not flow openly in a channel, but the owner of the soil under which it passes, therefore, no reason for implying consent or agreement between the proprietors of the adjoining lands beneath which the underground currents exist, which is one of the foundations upon which the law as to surface streams is supposed to be based, and for the same reason no trace of positive law is to be inferred. Again, if the lower proprietor has a right to an undisturbed flowage of water through subterranean channels in his neighbor's land, he has the power of preventing his neighbor from using the water on his own soil, and may not use it and return it to its old passageway, which he may do in the case of a surface stream. Such a right, if it exists, also exposes the upper proprietor to the possibility of incurring fruitlessly heavy expenditures in efforts to prevent or use his land, since he can have no knowledge of when his outlay is made, that his contemplated use will be interfered with any rights or interests of an adjoining owner. A surface stream can not be diverted without knowledge

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ersion will affect a lower proprietor. Not so with an unknown subterranean percolation or stream. One can hardly see the rights upon another's land which are imperceptible, of which neither himself or that other can have any knowledge. Such right can be supposed to have been taken into consideration when either the upper or lower tract was purchased. The purchaser of lands on which there are unknown surface currents, must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downwards, and the purchaser of land upon which a spring rises, ignorant whence and how the water comes, can not bargain for any right to a secret flow of water in another's land. It would seem, therefore, most unreasonable that the latter should have a right to prevent his neighbor from enjoying his own land in the ordinary way, either by digging wells, cisterns, drains, or by quarrying and mining." Because of these reasons courts have treated percolating waters as part of the soil, and upon the principle that the owner has the land, even to the sky and to the lowest depths, he is permitted him to dig as deep and build as high as he pleased.

Accordingly, in *Mesier v. Caldwell*, 7 Nev. 363, a case involving the rights of adjoining owners of land to water percolating through the soil, this court followed the general sentiment of authority. In that case plaintiffs appropriated the waters of a spring upon their own lands. Afterwards the defendants, owning adjoining lands, dug a well thereon. The diversion caused the spring to dry up, but there was no visible connection between the spring and the well, the flow of water being by percolation. It was held that the damage done by defendants sinking their well was not the subject of legal redress.

We fail, however, to appreciate the force of the argument which undertakes to make the law of percolating waters applicable to the facts of the case under consideration. One of the defendants, it is true, is the owner of the land upon which the Warm Springs are situated, and it is also true, as a general principle, that the owner of land in its proper enjoyment may cut off or divert with impunity the water per-

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colating through his soil; but the difficulty of position is that they have not been sued for diverting percolating waters. It is not charged that in digging sinking wells, or working mines, or otherwise improving property, they have interfered with waters through the earth, as was the fact in the cases to have been referred. On the contrary, they have found the source of the creek and diverted living surface waters.

To these waters plaintiffs had acquired a prior right by virtue of an earlier appropriation. But because from the springs to the creek the waters either percolate through the earth or are conveyed by unknown subterranean channels, it is urged that the law relating to surface waters should be applied.

It seems clear that none of the reasons upon which the law of percolating water is based exist in this case. There is no uncertainty, either as to the existence of the water or the amount of water which defendants have diverted from plaintiffs. Nor is it reasonable to suppose that defendants could have been ignorant of the effect upon the diversion of the waters would produce upon the lower down the creek. It may fairly be assumed that plaintiffs acquired their lands from the fact that the waters of the creek could be made available for irrigation; and that having appropriated the waters prior to the appropriation by defendants, such prior appropriation should be protected.

It would be a mere pretense of protection of the rights acquired by the earlier appropriators of the waters of the creek to say that later appropriators could lawfully divert the rights to the springs which constitute the source of the creek simply because the means by which the waters are conveyed from springs to creek are subterranean and not well understood. For these reasons we are of the opinion that the judgment is against law and should be reversed. As there may be a retrial of the case we consider it proper to add that under the facts established, plaintiffs are entitled in their pleadings and evidence to treat the waters of the springs as a part of the creek. Judgment reversed.

## Argument for Appellant.

[No. 1,073.]

S. SEVER ET. AL., RESPONDENTS, v. E. GREGOVICH,  
APPELLANT.

MINING GROUND—DISCOVERY INTEREST—WHEN ONE PARTY IS ESTOPPED FROM DENYING THE INTEREST OF OTHERS.—G. joined with S. in claiming a discovery interest in a mining location, and afterwards recognized his claim to the mining ground, including the discovery interest, as being valid, and accepted from S. and his grantees, their proportionate share of the money expended for work and labor upon the entire claim. G. subsequently relocated the entire claim in his own name, claiming that the original location was void, because the locators were not the discoverers of the lode, and because S. was at the time of the location an alien. S. became a citizen before the relocation of the claim: *Held*, that G. was estopped by his conduct and acts from denying the rights claimed by S. and his grantees as owners in the claim.

APPEAL from the District Court of the Third Judicial District, Esmeralda County.

The facts are stated in the opinion.

W. H. Tompkins and A. C. Ellis, for Appellant:

I. Sever and Gregovich were limited to two hundred feet each, for the reason that the discoverers of the Victor mine were the original discoverers of the lode on which the mine in controversy was located and had availed themselves of the two hundred feet to which they were entitled on account of their discovery. The evidence offered was therefore material and relevant, and the court erred in rejecting it. He could not make a valid location of this mine. (Rev. Stat. U. S., secs. 2319, 2321; *Golden Fleece & S. M. Co. v. Cable Con. G. & S. M. Co.*, 12 Nev. 312; *Chapman v. Toy Long*, 4 Saw. 35.)

II. Sever could take nothing by a retransfer of part of the interest transferred by him to Evanovich, for the simple reason there was nothing to transfer or retransfer. (*Sickels' Mining L. and D.* 88, 96.)

III. The location of the mine by Sever being void, it was subject to relocation by any citizen of the United States.



*P. Reddy and T. H. Wells, for Respondents:*

Gregovich is estopped from denying the title of ents. (3 Phil. on Ev. 367; 1 Greenl. on Ev. 222; Copp's Land Owner, 98.)

By the Court, HAWLEY, J.:

This is an action to recover the possession of divided one-half interest in a mining claim. Plaintiff obtained judgment and defendant appeals.

The facts are, that on the first of August, 1867, and E. Gregovich located the mining ground in controversy, viz., six hundred feet in length of the George W. lode, two hundred feet thereof being for a discovery claim; that on the fifteenth of February, 1873, Sever conveyed his interest therein, by deed, to B. Evanovich; that on the nineteenth of May, 1874, Evanovich conveyed the interest to the plaintiffs; that on the twenty-fourth day of September, 1872, Evanovich declared his intention to become a citizen of the United States, and received his naturalization papers on the eighth of September, 1873; that on the first of June, 1876, Sever declared his intention of becoming a citizen, and afterwards, and before the relocation of the premises by the defendant Gregovich, he was duly naturalized, and became a citizen of the United States; that on the eighteenth of February, 1880, the defendant Gregovich located the mining ground in controversy in his own name, without the consent of plaintiffs, or either of them, during all the time from the first location of the claim by Sever and Gregovich until the relocation of the premises as above stated; the work and labor as required by the statutes of the United States, and the laws of the mining district, where said claim is located, was performed by said parties, and that during all of said time Evanovich, or said plaintiffs, with the consent and assistance of said defendant, and jointly with him, had the work and labor performed, and that during said time said Sever and Ohiatovich have paid to the said Gregovich various sums of money for his doing their proper part of said work and labor.



## Points decided.

Upon the trial, the defendant offered to prove that the mining claim was discovered and located for several years prior to the first of August, 1867, and was upon the same lode as the George Washington claim. The object and purpose of this evidence was to show that the locators of the George Washington claim were not the discoverers of the lode.

The appellant, Gregovich, claims that the court erred in refusing to admit this testimony, and that Sever, being an owner at the time of the first location of the claim, had no right to hold or claim an interest therein, and for these reasons the relocation of the claim by himself was valid, and the respondents have no valid interest or claim to any portion of said mining ground. We are, however, of the opinion that the judgment of the district court is correct.

The appellant is not in a position to take advantage of the facts, if any exist, in plaintiff's title to the ground in dispute. He joined with Sever in claiming two hundred acres of the ground as a discovery claim, and afterwards relinquished the claims of Sever, Evánovich, and Chiatovich in the mining ground, including the discovery claim of two hundred feet, as being valid. He accepted from them their proportionate share of the money expended for work and labor done upon the entire claim, and for these reasons he was estopped, by his conduct and acts, from denying the claims claimed by Sever and Chiatovich as owners therein. See *Greenl. on Ev.*, secs. 207, 208; *Herman on Estoppel*, sec. 1. *Lessee of Merritt v. Horne*, 5 Ohio St. 318.)

The judgment of the district court is affirmed.

[No. 1,068.]

CARSON OPERA HOUSE ASSOCIATION, APPELLANT, v. J. H. MILLER ET AL., RESPONDENTS.

**ACT OF INDEMNITY—FILING MECHANIC'S LIENS.**—A covenant, in a contract, "to secure the plaintiff and keep it harmless from all liens and claims of liens" is a contract of indemnity, and is not violated by simply permitting liens to be filed. It would only be broken when plaintiff was actually damaged by reason of liens or claims of liens.

## Argument for Respondents.

**MECHANIC'S LIENS—WHEN PROPERTY OWNER CAN NOT WITHHOLD FROM CONTRACTORS.**—In construing the statutes relating to liens: *Held*, that plaintiff was not authorized to withhold a contract price, until the suits to enforce the liens were pending; it could not refuse to pay money according to the contract until the contractors were in default.

**IDEM—LIABILITY OF SURETIES.**—If plaintiff had paid the contractors according to their agreement it could have held the sureties, and the payments were made, suits to enforce liens had been pending; at that time plaintiff had suffered damages by compulsory suits and liens filed.

**IDEM—FAILURE TO MAKE PAYMENTS TO CONTRACTORS—RELEASE OF SURETIES.**—The failure of plaintiff to pay the contractors according to the terms of the agreement, the contractors not then being in default, and the application of the money due the contractors to the payment of liens filed before the completion of the contract, released the contractors upon the contractors' bond.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

*R. M. Clarke and T. Coffin*, for Appellant:

I. The failure of plaintiff to make the payments at the time specified in the contract, is not such a violation of the contract as will discharge the sureties. (*Brandt v. Ship*, secs. 296, 345.)

II. After the liens were filed in the record, plaintiff had the right under the statute to retain the money due upon the contract and apply the same in satisfaction of the liens.

*C. S. Varian*, for Respondents:

I. The question is whether the plaintiff has deposited the money with the sureties. (*Quillen v. Arnold*, 234; *Bragg v. Shain*, 49 Cal. 134; *U. S. v. Howell*, 125 U. S. 620; *Calvert v. Soudon Dock Co.*, 2 Keen, 63; *On Suretyship*, secs. 79, 80, 102, 345.)

II. The provision of section 10 of the lien law that the money shall be paid to the contractor, is no part of this contract as claimed by plaintiff. (*Con. 515*; *Bish. Con.*, secs. 573, 603.)

III. The contract was not to prevent the filing of liens.

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to save harmless against the results of such filing. There is a manifest distinction between an indemnity against liability and the consequences of the liability. (*Thompson v. Taylor*, 30 Wisc. 68; *Jones v. Childs*, 8 Nev. 121.)

IV. Payment at the time and in the manner specified was a condition of the contract assumed and to be performed by the plaintiff. It must show performance. No demand by the contractors was necessary. (2 Pars. Con. 636; Bish. Con., § 700.)

V. All doubts are generally resolved in favor of the plaintiff. (*Stull v. Hance*, 62 Ill. 52.)

By the Court, LEONARD, C. J.:

The respondents, Miller and Cook, entered into a contract with the appellant, dated April 27, 1878, whereby the former agreed, within three months from that date, to fully erect, construct, and finish, with first-class material, to be furnished by them, a theater or opera building, in strict accordance with certain plans, details, drawings, and specifications adopted by the parties; also to secure appellant and keep him harmless from all liens and claims of liens for material or labor upon said building, under the laws of the state; also, to execute and deliver to appellant a bond in the sum of ten thousand dollars, with sufficient sureties, conditioned that said Miller and Cook should perform the terms and conditions of said contract on their part; and appellant agreed to pay said Miller and Cook therefor the sum of ten thousand and five hundred and fifty-six dollars, as follows: Five hundred dollars each week, after two weeks from the date of said contract, until the said sum should be fully paid. On the same date a bond was executed, as agreed, with Miller and Cook as principals, and respondents, Hatch, Hymers, Marsh, Smith, Clark, and Hoole, as sureties.

It is alleged in the complaint that "the said plaintiff performed each and every of the covenants and stipulations as set out in the said contract, and paid to the said J. H. Miller and Frank Cook the several sum and all the money mentioned in said contract, according to the terms and conditions of the said contract, and at the times therein speci-

fied, except as follows: On or about the ——— d. A. D. 187—, and whilst the said Miller and Cook engaged in and about the construction of said building under said contract, the liens hereinafter mentioned were filed in the office of the county recorder of said county, after which date the said Miller and Cook, or either of them, made any demand upon plaintiff for the payment of any further sums of money due after accruing upon said contract, or then due and left the money accruing upon said contract, to wit: the sum of one thousand four hundred and seven dollars and three cents, in the hands of plaintiff, which sum was so accruing and remaining in the hands of plaintiff, and plaintiff was at all times ready and willing to pay the same on said contract, according to the stipulations thereof, which said sum of money not being demanded of plaintiff, the plaintiff applied in part satisfaction of said contract, in the manner hereinafter particularly set forth."

It is then alleged that said Cook and Miller, did and keep plaintiff free or harmless from liens for materials and labor upon the said building under the said contract, but that, on the contrary, they suffered and permitted two persons named, to acquire, file, and record against said Opera House building for materials furnished and used in and about the construction thereof, in and to the sum of two thousand eight hundred and seventy-three cents, which said liens were declared against plaintiff and its said building on the twenty-seventh day of March, 1880, and which said sum, together with the costs and attorney's fees, amounting to four hundred and fourteen dollars and eighty-five cents, plaintiffs were afterwards compelled to pay, and did pay, less the sum of one thousand four hundred and seven dollars and seventy-three cents, paid out of moneys in plaintiff's hands by said Cook and Miller, and due to them upon said contract, as before stated.

This action is to recover one thousand eight hundred and fourteen dollars and eighty-five cents, which p



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pelled to pay, and did pay, out of its own separate  
 de, in order to clear its building of liens. The  
 respondents, the sureties, alone appeared. They de-  
 clared to the complaint as follows, to wit: "That the same  
 does not state facts sufficient to constitute a cause of action  
 against them, or either of them: That it is ambiguous, un-  
 intelligible and uncertain in this, viz: That it appears the con-  
 tract of these defendants was that of suretyship. That it ap-  
 pears that plaintiff agreed to pay the full sum of ten  
 thousand one hundred and fifty-six dollars in installments  
 of five hundred dollars each week, after two weeks from  
 April, 1878. That it failed to pay to the contractors  
 the sum, but retained one thousand four hundred and  
 seventy-three cents thereof, in violation  
 of said contract; it appearing that there was no obligation  
 on the part of the contractors to demand the same; and it  
 does not appear that plaintiff ever offered to pay the same,  
 that these defendants, sureties, ever knew or consented  
 to such violation of the contract. It appears that plaintiff  
 has no right to make the application of the money as al-  
 leged." The court sustained the demurrer. Plaintiff refused to  
 amend, and thereupon the court ordered judgment in favor  
 of the defendants, the sureties, for their costs. This appeal is  
 from that judgment, and it will be seen that the principal  
 question presented is, whether the application of the four-  
 thousand and odd dollars to the satisfaction of the liens,  
 stated, instead of paying it to the contractors according  
 to the terms of the contract, released the sureties from the  
 obligations upon the bond. The only alleged violation of the contract by the con-  
 tractors is in suffering the liens to be filed and foreclosed.  
 The presumption is, therefore, that, in other respects, it  
 was performed according to its terms. It follows that the  
 building was fully completed on or before July 27, 1878.  
 It is not stated when the foreclosure suit was commenced.  
 It only appears that the decree was made March 27, 1880,  
 that the liens were filed before the building was fully  
 completed, that is to say before July 27, 1878. Under the

contract all the money was to be paid in five months, one week after about the middle of May, 1878, or about the twentieth of October, 1878. After the time filed the contractors did not demand, nor did plaintiff offer to pay, the one thousand four hundred and eighty dollars according to the contract, although it was a ready and willing to pay the same according to the conditions. That sum was never paid to the contractors. The sum was applied in part satisfaction of the liens, on March 27, 1880, the date of the decree of foreclosure.

It must be borne in mind that this appeal is taken from the judgment in favor of the sureties alone, and the law applies only to their liability. We have not to do with the liability of the contractors. It is not necessary to settle some matters of a preliminary character before coming upon a discussion of the more important question presented.

And first, it is claimed that the contract was made on the part of the contractors by permitting liens to be filed, though appellant suffered no damage by the mere filing of the contract of defendants was to prevent the filing of liens. We do not think so. We think it was purely a contract of indemnity. It was "to secure the plaintiff and keep him free from all liens and claims of liens." In other words, the parties agreed that plaintiff should suffer no harm, injury, or loss from any liens or claims of liens. It is not claimed that the filing was in any manner injurious. After the filing may be said there was a liability for damage, but the contract did not cover a mere liability. In *Churchill v. Denio*, 321, it is said that, upon obligations of indemnity, "the right of action becomes complete on the default or failure to do the particular thing he agreed to perform." In *Webb v. Lansing*, 19 Wend. 424, the covenant was to indemnify and save harmless the plaintiff from his loss on said bond and mortgage, and to pay to him all damages," etc. The court said: "The covenant was simply to indemnify and save harmless against the loss, but it is to indemnify and save harmless the plaintiff from his liability on the bond." It was, therefore, his

use of action arose when there was a legal *liability* to offer damage, and that no actual damage on payment need be shown in order to sustain the action. Upon a similar case it was so held in *Jones v. Childs*, 8 Nev. 125. See, also, *Thompson et al. v. Taylor*, 30 Wisc. 69.

We think the contract was not violated by permitting liens to be filed merely. It was broken as soon as plaintiff failed in any manner actually damnified by reason of liens or claims of liens.

It is also said that there is no good reason why the sureties should insist upon a strict performance of the contract on the part of appellant, as to the five hundred dollars weekly payments, as a condition precedent to their liability, when their principals, Cook and Miller, defeated a strict performance by their negligence in not calling for payments and by their failing to prevent the filing of liens against the building.

As before stated, Cook and Miller agreed to do three things, and plaintiff agreed to do one. The first undertaking was to finish the building in the manner specified in the contract, and to secure plaintiff and keep it harmless from all liens and claims of liens. They also agreed to execute and deliver to plaintiff a bond, with sureties, conditioned that they should comply with the contract then made; and in consideration of the stipulations of the contractors, plaintiff agreed to pay Cook and Miller a certain amount of money at certain stated times. The building was finished and the bond was executed according to contract; but after plaintiff's failure to make payments as agreed, the latter suffered damage by reason of compulsory payment and satisfaction of a judgment foreclosing liens from which Cook and Miller undertook to keep them harmless.

It will thus be seen that plaintiff violated its contract as to making payments before there was any breach on the part of the contractors, unless it is true, as claimed by counsel for appellant, that section 10 of the lien law (Stat. 1875, 124) became a part of the bond, and that, under said section, it was plaintiff's right and duty to apply moneys not paid to the contractors in satisfaction of the liens. If we are correct thus far,

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it is unnecessary to decide what the result would have been had the contract had been that no liens should be filed. It had been to the effect that plaintiff should be kept free from all liability on account of liens and claims of any cause, under the contract which the bond was given. Cook and Miller did not stipulate that no liens should be filed, but only that plaintiff should suffer no damage from. It is not claimed that plaintiff was injured by filing, and it therefore follows that defendants, though they were not derelict in not preventing the same. It follows that they are not precluded from insisting upon performance of the contract upon the part of plaintiff on condition precedent to their liability, if such is the relation to sureties. Nor is it true, at least as to the sureties, that it was Cook and Miller's duty to demand payment for payments. Plaintiff agreed to pay them weekly, and his duty was to do so or offer to do so. Such payment was the sole consideration of defendants' promises, and its condition was upon plaintiff. It was not more the duty of Cook and Miller to demand payment than it was incumbent upon plaintiff to demand of the former that they should perform the building according to the terms of the contract. (See *On Contracts*, sec. 700; 2 *Pars. on Contracts*, 636.)

It is next urged that the statute above referred to is as much a part of the contract as it would have been had it been incorporated in the contract, and that, under the statute, the liens were filed plaintiff had the right to retain the money of money due to the contractors and apply the same to the satisfaction of such liens.

Section 10 of the statute provides that "the owner shall be entitled to recover, upon a lien filed by the contractor, such amount as may be due to him according to the terms of his contract, after deducting all claims of other contractors for work done and material furnished as aforesaid; in cases where a lien shall be filed under this chapter upon work done or material furnished to any contractor, he shall defend any action brought thereupon, at his own expense, and during the pendency of such action the owner may withhold from the contractor the amount of money for which



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d; and in case of judgment against the owner or his  
 rty upon the lien, the said owner shall be entitled to  
 t, from any amount due or to become due by him to  
 ntractor, the amount of such judgment and costs; and  
 amount of such judgment and costs shall exceed the  
 nt due by him to the contractor, or if the owner shall  
 settled with the contractor, he shall be entitled to re-  
 back from the contractor any amount so paid by him,  
 aid owner, in excess of the contract price, and for  
 the contractor was, originally, the party liable.”  
 will be noticed that, even as between the plaintiff and  
 and Miller, the statute did not allow any portion of  
 ntractor price to be withheld from the contractors until  
 it to enforce the liens was pending. But it nowhere  
 rs in the complaint that payments were made accord-  
 the contract, up to the time the foreclosure suit was  
 ended. It does not affirmatively appear, therefore,  
 even as to the contractors, plaintiff was justified in  
 olding any part of the contract price. It may be that  
 became due, under the contract, before the suit was  
 ng to enforce the liens. It was all to be paid on or  
 October 20, 1878, and the decree enforcing the liens,  
 ot rendered until March 27, 1880. Under such cir-  
 umstances it is not improbable, at least, that the time for  
 ent had expired before the foreclosure suit was pend-  
 Plaintiff having had no right, even as to Cook and  
 , to retain any portion of the contract price until the  
 o enforce the liens was pending, and admitting, with-  
 eciding, that it had the same right as to the sureties,  
 the pendency of the suit of foreclosure, it was neces-  
 o allege and prove, in an action against the sureties,  
 condition precedent to a right of recovery, that suit  
 ending before any of the contract price was withheld.  
 admitting its obligation to make weekly payments, it  
 incumbent upon plaintiff to justify its failure to do so  
 ler to hold the sureties. It invokes the statute as a  
 eation, but fails to bring itself within its provisions;  
 he result in the same as though the right to withhold  
 ent at any time had not been given.

In this connection it is proper to consider another principle. It is a well-recognized principle that a surety has no benefit of any security which the creditor has where a creditor has the means of satisfaction in his hands upon which he has a lien, and which he has the right to appropriate in payment of his demand, and which he chooses to retain it, but suffers it to pass into the hands of the principal, the surety to that extent will be discharged. On the other side of the statute, was it the plaintiff's duty, to have it, it have the right, to retain sufficient of the contract to satisfy all liens, and if so, when, under the contract it be withheld?

We have seen that, under the statute, plaintiff was authorized to withhold any part of the contract until the suit to enforce the liens was pending. It is plain that it could not refuse to pay according to the contract, until the contractors were in default. Plaintiff fit to promise to pay a certain amount weekly, and the condition that it should be kept harmless from liens, that a certain bond should be given conditioned as above. How, then, could it refuse to pay as agreed, until some of the conditions of the bond or some of the conditions of the contract was broken?

Suppose, after the completion of the building, plaintiff to the contract, after the liens were filed, but before the bringing of an action for their enforcement, Cook had brought suit to recover the amount due to him under the contract, and plaintiff had contested the action on the ground that liens had been filed against the building. The court would have said: "The opera house association is to pay on certain dates which are past, and Cook has as yet, have not failed to comply with their contract. At present, the association is in no manner harmed by the filing of the liens. The contractors have not yet broken the contract, and until that occurs, payments must be made as agreed." Such being the case, it was not plaintiff's duty to the sureties, or its right, under the contract, under the statute, to delay payments, at least until the contract was held it harmless from liens was broken, which

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as the complaint shows, until February, 1880. Plaintiff could have limited its obligation to pay, to the condition that no liens should be *filed*, but it did not do so. It was content to do otherwise, and its rights and duties must be tested by the terms of the contract made.

It has been held that, if the maker of a promissory note has funds on general deposit *after the note falls due*, the bank is bound to apply them in payment of the note, or the indorser is discharged. (*McDowell v. President, etc., of the Bank of Wilmington*, 1 Harr. (Del.) 369; *Dawson et al. v. the Real Estate Bank*, 5 Ark. 284.) Of the correctness of those decisions, we express no opinion. It has, however, never been held that such funds can be so applied until the note is due, or the principal fails to comply with its agreement. Until that time the depositor has full control of his money or credit. So in this case, it can not with any good reason be claimed that, outside of the statute, there was a right, as to the contractors, or that as to the sureties, there was any right or duty, on the part of plaintiff, to delay payment, at least until the contract was broken by the contractors.

But authorities are numerous to the effect that, if plaintiff had paid the contractors according to their agreement, it could have held the sureties, although when the payments were made, suits to enforce liens had been pending, or if, at that time, plaintiff had suffered damages by compulsory satisfaction of liens filed. (*Coombs v. Parker et al.*, 17 Ohio, 91; *Perrine v. Fireman's Ins. Co.*, 22 Ala. 577; *Sibley v. McAllaster*, 8 N. H. 390; *Hunt v. Bridgman*, 2 Pick. 583; *Blazier v. Douglass*, 32 Conn. 398; *Wright v. Simpson*, 6 Ves. Jun. 73; *King v. Baldwin*, 17 Johns. 399; *Concord Bank v. Rogers*, 16 N. H. 16; *Pittstown v. Plattsburg*, 15 Johns. 435; *Ex. of Baker v. Marshall et al.*, 16 Vt. 524; *Price v. Kirkham*, 3 H. and C., Eng. Exch. 439; *Looney v. Hughes*, 26 N. Y. 522.)

We now come to the principal question presented: Did plaintiff's failure to pay the contractors, as agreed, discharge the sureties? Upon similar facts, we are answered in this question in favor of the sureties, in *Truckee Lodge v.*

*Wood*, 14 Nev. 309, and might content ourselves with the conclusion there reached, but shall pursue the inquiry a little further. If there is any principle well settled, it is that the liability of a surety is not to be extended, beyond the terms of his contract, which is a principle of law. *juris*. "To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may be injured by the change in the contract, or that it may be for his benefit. He has a right to stand upon the terms of his contract, and if he does not assent to any variation, and a variation is made, it is fatal." (*Miller v. Wheat*, 703; *Smith v. United States*, 2 Wall. 234.)

And in *Ludlow v. Simond*, 2 Cal. Cas. 58, the rule is thus plainly stated: "This rule is founded upon the most cogent and salutary principles of public policy and justice. In the complicated transactions of life, the aid of one friend to another; in the character of a contract or bail, becomes requisite at every step. With constant acts of mutual kindness and assistance, the progress of business and commerce would be prodigiously retarded and disturbed. It becomes then excessively important to have the rule established that a surety is never to be complicated beyond his specific engagement. Calculating the exact extent of that engagement and having no other concern in the subject-matter for which he is bound, he is not to be supposed to bestow his attention to the details of the action, and is only to be prepared to meet the consequences when it shall arise in the time and mode prescribed in the contract. The creditor has no right to increase the obligation without his consent; and can not, therefore, vary the original contract, for that might vary the risk." (*Am. Lead. Cas.* 390) it is said. "It is evident, that in order to a recovery on a contract by one party, the performance by another, there must not only have been the assent by the plaintiff to the default for which he sues, but he must himself have fulfilled every condition precedent to the right of suit. \* \* \*. But this is wholly irrespective of the direction taken by the



when executed, and applies with the same force whether the suit be against a principal or guarantor; the only difference being that the principal will be answerable on a new implied contract for whatever he actually receives, whether it be that for which he stipulated or not, while the liability of the guarantor is founded solely on the original agreement, and will not accrue unless that he pursued in every particular. The requisitions of the contract may, no doubt, be waived or varied without impairing or defeating its force or efficacy, but then the waiver by the principal cannot bind the guarantor."

In *Bethune v. Dozier*, 10 Ga. 240, the court say, "We hold to be the duty of the obligee to *aver* and *prove* the performance, not substantially, but literally, of the original agreement. It is a condition precedent to his right of recovery." In *Dobbin v. Bradley*, 17 Wend. 422, the defendant guaranteed the paper of Smith, to be *made payable at a particular bank*. Smith gave his note to the plaintiffs, in the course of business mentioned in the guaranty, but made payable generally, or in other words, *without specifying any place of payment*. And although the note was deposited in the particular bank, before it came to maturity, it was held that the defendant was not liable, and the court refused to go into the inquiry whether the surety had been injured, saying it was enough that the case did not come within the terms of the contract. In *Maynard v. Boyd*, 5 Md. 109, the court has expressed itself; "The indorsement by the defendant of the maker's notes to the plaintiff was based upon the security afforded by the mortgage, and therefore the mortgage may be regarded as the consideration of the agreement into which the surety entered when he consented to indorse the notes. The terms of the mortgage, therefore, must be strictly complied with by the plaintiff, in order to bind the defendant as indorser. One of these terms, is there shall be no sale of the mortgaged property until default of the principal debtor pay the notes upon their maturity. We think this part of the contract between the several parties thereto has been departed from in the sale which has taken place under the

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circumstances detailed in the evidence. \* \* \* may be said that, although this might have been inferred from the strict letter of the contract between the parties, yet it can not be shown that the indorsers intended thereby, or their liability enlarged. Whether or was not the result of the premature sale does not present the question. Any dealings with the principal which the creditor which amount to a departure from the contract by which the surety is to be bound, and which would increase the liability, might materially vary or enlarge the latter's liability without his consent, operates as a discharge of the contract.

So, in the case at bar, the contract to pay was made, and was the consideration of the promise of the surety. It may have been strictly complied with in order to make the payment. We refrain from making other quotations, but, in support of the following authorities will be found, upon examination, to sustain the views of this court heretofore expressed upon the point under consideration: *Grier v. Russell*, 23 U. C. (Q. B.) 27; *Wright v. Russel*, 3 Wils. 530; *Myers v. Edge*, 7 T. R. 254; *Walrath v. Hall*, 6 Hill, 541; *Whitcher v. Hall*, 5 B. & C. 270; *Johnson*, 8 Wend. 518; *Walsh v. Bailie*, 10 John.

If we were permitted to make the inquiry whether the sureties knew that the sureties were not injured by plaintiff's failure to make the payments as agreed. It may be that Carson and Miller would have been able to satisfy the liability if they had been paid weekly. It may be they required the money for other business operations, and that the loss of the money compelled them that they were unable to perform their contract. But speculations are useless. The law is so plain upon this subject that but one conclusion is possible, that by plaintiff's own laches the sureties were released.

The judgment of the court below is affirmed.

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[No. 1,058.]

MEYER, APPELLANT, v. VIRGINIA & TRUCKEE  
RAILROAD COMPANY, RESPONDENT.

DECLARATIONS OF AN AGENT—WHEN INADMISSIBLE IN EVIDENCE.—The declarations of an agent in charge of a station and warehouse belonging to the defendant, at the time the goods of plaintiff and his assignors were burned therein, as to what occasioned the fire: *Held*, upon the facts stated in the opinion, inadmissible in evidence.

INSTRUCTIONS—REFUSAL OF, WHEN WILL BE SUSTAINED.—Where the record on appeal fails to show that an instruction was applicable to the evidence, the action of the court in refusing it will be sustained even if the reason given by the court for its refusal was not sufficient.

INSTRUCTIONS—NOT PERTINENT TO ISSUES.—Instructions that are not pertinent to any issues in the case should be refused, although they embody correct propositions of law in the abstract.

INSTRUCTIONS—REPETITION OF, WHEN NOT PREJUDICIAL.—Plaintiff complained of an instruction given by the court of its own motion: *Held*, that even if it was erroneous it could have done no harm to plaintiff, because it was but a repetition, in substance, of one given at his request.

APPEAL from the District Court of the Third Judicial District, Lyon County.

The facts are stated in the opinion.

*Lewis & Deal*, for Appellant;

The points and authorities cited by counsel appear in the opinion.

*B. C. Whitman*, for Respondent.

By the Court, LEONARD, C. J.:

It is alleged in the complaint herein, that on the thirteenth day of September, 1879, the plaintiff and other persons named were the owners of certain personal property to the value of two thousand six hundred and forty-nine dollars and eighty-five cents, which property was, on said day, stored by defendant in its warehouse, at the Mound House, on the line of its road; that the claims for damage to the other parties mentioned were, prior to the commencement of this action, for a valuable consideration paid

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by plaintiff, sold, assigned, transferred, and plaintiff; that defendant's locomotives were so constructed and so deficient in the usual and appliances used on locomotives to prevent the escape of sparks, and coals, and said locomotives were so run and managed by defendant's agents, servants, and employés, that said warehouse was fired and destroyed by fire carelessly and negligently done, and thrown from said locomotives; and all said property in the complaint described was destroyed thereby, whereby plaintiff and the other parties were damaged in the sum of two thousand six hundred and nine dollars and eighty-five cents.

Defendant answered and admitted that the warehouse and the said property of plaintiff and his assigns were destroyed by fire at the time and place alleged; but, as to other things, denied all allegations charging inattention to the construction of its engines and deficiency in the use of the ordinary appliances used thereon to prevent the escape of fire, sparks, and coals. It denied all allegations of carelessness or negligence in running or managing its locomotives, that the fire was caused by any act or omission of its agents, employés, or servants; or that plaintiff or any of his assignors, had been damaged in any way by reason of any carelessness or negligence of the defendant, or any of its agents, servants, or employés. The costs and judgment were for the defendant. This appeal was from an order overruling a motion for new trial and for the judgment.

1. It is urged by appellant that the court erred in allowing witness Burnett to answer the following question, asked for the purpose of showing that defendant's engines fired the warehouse, viz.: "At the time the warehouse was burning, did you make any statement to J. L. Shaw as to what occasioned the fire? If so, what was the statement?" Shaw was one of the owners of goods burned, one of plaintiff's assignors, and he was also asked whether or not Burnett told him, at the time the warehouse was burning, what occasioned the fire, and, if so,



statement was. The court refused to permit the witness to answer, and its action in respect to these questions presents an important subject for our consideration. No part of the evidence admitted is set out in the transcript. It is only shown that, at the trial, "each party introduced evidence tending to establish the issues raised by the pleadings;" and it is agreed that, at the time of the fire, Barnett was defendant's agent, having charge of the station and the warehouse burned. In its order overruling the motion for a new trial, the court said: "Burnett's agency was confined to the charge of the station and warehouse; he had no charge over the engines, or any authority to run or manage them. His business, as station and warehouse agent, had no connection with the construction or the management of the engines." There can be no serious difference of opinion in relation to the law of evidence touching the question at hand, but it is oftentimes difficult to apply the law to the facts presented.

Mr. Justice Story thus states the general principle: "Where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestæ*." (Story on Agency, sec. 134.)

And in *Enos v. Tuttle*, 3 Conn. 250, which has since been followed in the same state, and been recognized as sound law by other courts, it said that declarations to become a part of the *res gestæ*, must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction.

In *Franklin Bank v. Navigation Co.*, 11 G. & J. 33, the court said: "In general, declarations or statements by third persons are inadmissible; that, however, is not the universal principle, and does not apply to the authorized declarations or representations of an agent. The rule springing from the relation of principal and agent being that the representations or declarations of an agent made in the course

of and accompanying the transaction which is the subject of inquiry, and, acting within the scope and limit of his authority, may be proved. But it does not extend to declarations or statements made after the transaction, in relation to it; and the principle upon which declarations or representations of an agent within the scope of his authority, are permitted to be proved is that, such declarations, as well as his acts, are considered and treated as declarations of his principal. Whatsoever is done by an agent is done by the principal through him as his instrument. So, whatsoever is said by an agent in the making a contract for his principal, or at the time of accompanying the performance of an act within the scope of his authority, having relation to, and connected with, and in the course of, the particular contract or transaction in which he is then engaged, is, in legal effect, the declaration or admission of his principal, and admissible in evidence; because it is the declaration or admission of an agent, and on the ground that, being made at the time of, and in the making, the contract or transaction, it is treated as the declaration or admission of the principal, constituting a part of the *res gestæ*, a part of the contract or transaction, and upon him if in fact made by himself. But declarations or admissions by an agent, of his own authority, and not accompanying the doing of an act in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon the principal, not being a part of the *res gestæ*, and are not admissible in evidence, but come within the general rule of law excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done or omitted, and not a part of the transaction, but only statements or admissions respecting it, and if they relate to anything within his knowledge material to either party, may be proved by his testimony, and not by evidence of his assertion, which is no proof of it."

From the great number of cases bearing upon this question, but presenting different facts, we refer to the authorities cited, which establish the rule as stated above:

*stings*, 10 Ves. Jun. 125; *Kirkstall Brewing Co. v. Furs Railway Co.*, 9 Law Rep. Q. B. Cas. 470; *Haynes v. ter*, 24 Pick. 245; *Ashmore v. Penn. S. T. & T. Co.*, 38 N. L. 14; *Byers v. Fowler*, 14 Ark. 105; *Penn. Railroad Co. Brooks*, 57 Pa. St. 343; *Magill v. Kauffman*, 4 S. & R. ; *Franklin Bank v. Cooper*, 39 Me. 555; *Luby v. Hud- River R. Co.*, 17 N. Y. 131; *Runk v. Ten Eyck*, 24 J. L. 760; *Gerke v. Cal. Nav. Co.*, 9 Cal. 256; *Bradford Haggerthy*, 11 Ala. 701; *Verny v. The B. C. R. & M. Co.*, 47 Iowa, 551; *Thalhimer v. Brinckerhoff*, 4 Wend. ; *Bank of the Northern Liberties v. Davies*, 6 W. & S. ; *Pemigewassett Bank v. Rogers*, 18 N. H. 261; *Maury Talmadge*, 2 McLean, 159.

It remains to apply the law to the facts as they are pre-  
sented. There were two important facts which plaintiff  
was bound to prove, in order to recover. First, that the  
fire was caused by sparks or coals from the defendant's  
engines; and second, that their escape from the engines  
was due to the imperfect construction of the latter, or the  
careless or negligent management of the same. These were  
independent, vital issues. The station agent's duties had  
no connection with either; that is to say, as to the origin  
of the fire or the negligence charged, he was not the inculpat-  
ed party, and no negligence is alleged against the defendant by  
reason of his failure to use all means in his power to save  
the goods. The interval of time that elapsed between the  
escape of the sparks or coals from the engines, and the mak-  
ing of the statement, is not shown. It seems, however, from  
the form of the question, that it was while the building was  
burning. The goods may have been destroyed at the time,  
and, consequently, the entire injury to owners may have  
been complete when it was made. It may be, therefore, that  
in any view, the declaration was a mere narration of a past  
transaction, and that for this reason alone, according to all  
authorities, it was inadmissible. But whether it was  
or not, a question we do not decide, our opinion and con-  
clusion will be based upon other facts.

For many reasons we are satisfied that Burnett's declar-  
ation was inadmissible. Under the circumstances shown

any declaration by him as to the *origin* of the fire have been competent testimony, although the fact, if that had been in issue, under certain circumstances might have been proven by the agent's declaration on possible conditions a statement by the agent of the burning might have been within the line of his duty in the absence of special authority it could not have been any part of his duty, or in his power, to explain the fire originated. It was Burnett's duty to deliver the engines when they were called for; and if Shaw had not been there they had been burned, or were in such condition that they could not be delivered, and had demanded their delivery inquiries in relation to them which rendered it necessary for Burnett to deliver them, or upon failure to do so to give a reason for his failure, then any statement by him as to the cause of the failure, necessary to explain the same, would have been admissible; but the only necessary statement would have been to the effect that they had been burned. Any statement beyond that fact would not have been required in order that the agent might perform his duty to Shaw; and not having been engaged in the performance of any act or duty within the scope of his authority at the time, he had no implied power to make any statement which the defendant was under no obligation to receive.

Any inquiry as to the origin of the fire was outside the scope of Shaw's authority, and it was no consequence to Shaw, except as a means of proving the essential facts in this case in order to bind the defendant, a fact which the latter was in no manner bound to receive. A statement as to the origin of the fire did not aid Shaw in obtaining the goods, and it was of no possible consequence except as a means of establishing defendant's liability as above stated. It was, then, a declaration voluntarily made by Burnett. It was outside of his duty as agent, and beyond the scope of his authority. If he had been authorized to state how the fire originated, under the circumstances he had power, also, to declare that the engines were negligently managed or improperly constructed. Such statements would not have been necessary for the purpose of this case.

erge of his duties to Shaw, and he had no implied authority to make them, and thereby bind the defendant.

This is, perhaps, a sufficient answer to appellant's claim of error upon this point, but there are others, some of which proceed to state.

It was not shown that Burnett at the time the declaration was made, was engaged in the performance of any act or duty imposed upon him by his employment, or that it was done in pursuance of any duty as agent. True, he was an agent, and as such, had charge of the station and warehouse; but for aught that appears, *he was doing nothing as agent*, either within or without the line of his duty. He may have been standing idly by, or sitting down at a safe distance from the scene of conflagration. The remark may have been a casual remark made by the agent of his own motion, or it may have been made in reply to a question asked by Shaw for the purpose of gratifying his curiosity, or of acquiring information which neither the defendant nor its agent was under any legal or moral obligation to impart. In *Franklin Bank v. Steward*, 1 Me. 524, the witness, at the request of Steward, called on the bank and inquired of the cashier if a note, on which Steward was surety, had been paid, and the cashier replied that it had been. Witness communicated the answer to Steward, who then gave up security held by him, and the maker of the note thereafter became insolvent. The court held that it was not the duty of the bank to communicate such information further than it was to be ascertained from its records and papers, and said: "Such communications are matters of courtesy and convenience, not of right. Be it so, no more matters of duty on the part of a bank than on the part of an individual, its cashier can not be considered its official or authorized agent to make them, unless they constitute a part of some transaction performed at the time of making them."

And although in *Hynds v. Hays*, *supra*, it was decided that it was a part of the official duty of a bank manager to deliver bills that had been paid, *when called upon so to do*, yet his failure to do so when demanded was an act for



which the bank was responsible, and that the declarations at the time, in explanation of the fact that the bank was not a party to the first part of the act, and, consequently, admissible in evidence, were not a part of the act. Still, the court said: "The declarations of an agent, made in the course of a business, while actually transacting for his principal the business in which the declarations relate are admissible in evidence, if they are part of the *res gestæ* and are proper for the jury to understand the acts. They are said to be part of the *res gestæ*. By the oral admissions of even a party are often made, which are inconsiderately made, and are then, in the very nature of things, very unreliable evidence, and it is not a rule of justice would not often be better attained without such evidence. We do not think it would be wise, at any rate, to make such a rule so as to make evidence of the admissions of a party, when not engaged in the business which the declarations tend to explain. A man does not weigh his words, and is very liable to be misunderstood. It is enough to hold him responsible for his own words, and not also charging him with those of his agent, who is employed to bind him by utterances, except in connection with the business, and while it is being done. (And see *Howard*, 8 Bing. 453.)

*Pool v. Bridges*, *supra*, was an action of trover by a deputy sheriff who attached wool, etc., as the property of one Scholfield. Plaintiff claimed it, and at the trial the plaintiff was permitted to testify that the plaintiff had told Scholfield about a week before he absconded, that he had made what progress he made in manufacturing his wool. Scholfield then showed him wool, yarn, and bales of wool, which he said were plaintiff's, and which plaintiff examined and found that the wool, etc., thus shown were the same that were attached by the defendant. Upon these facts the court said: "The property in question is supposed to have been in the possession and under the control of Scholfield. It is also, that it was so situated in regard to other property of the same kind belonging to Scholfield himself, and to other persons, that none by Scholfield could distinguish it. If he had been heard to say that the particular property in question belonged to the plaintiff, without being

any transaction relating to the property, this would be a declaration and hearsay. But if he was then employed in any act respecting the goods, such as separating different parcels for the purpose of distinguishing what belonged to one person and what to another, what he said while he was doing it would be considered as a part of the transaction, and admissible in evidence. It would be like labeling the goods with the name of the owner, which though in one sense a declaration, yet would be construed an act indicative of proprietorship of the goods." "Declarations standing by themselves are hearsay; there must be some fact in fact or act, which is itself admissible in evidence." *Mund v. Inhabitants, etc., supra*, and *Mason v. Croom*, 24 Cal. 216; *Matear v. Brown*, 1 Cal. 224.)

So in *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 10, this language is used by the court: "As principal evidence it was incompetent, being the declaration of a third person, who, though an agent of the defendants, was not then engaged in the performance of any act relating to his agency, so as to bring the case within the rule which allows the declarations of an agent as part of the *res gestæ*."

*Roberts v. Bunks*, 12 Am. Dec. 325, was trover against our defendants. Two of them were the owners of a warehouse, and the other two did business for them as warehouse agents. The only testimony adduced to charge the owners was the acknowledgment of the agents that the goods were in the warehouse, and that they had taken them out and shipped them aboard of a boat belonging to the owners of the warehouse, and at their order, to make up a deficiency in the load. We quote from the opinion: "The principle that the declarations or confessions of an agent, except they were made at the time and compose a part of the act done by him for his principal within the scope of his authority, cannot be given in evidence to charge the principal, is too well settled to need authority to support it. The confessions of agents in this case do not appear to have been made at the time of doing the acts, nor does it appear that they were executing any authority given them, except by their own declarations. The evidence was, therefore, incompetent as

to the keepers of the warehouse and insufficient a verdict against them."

But it is urged that the declaration was ad cause it was a part of the agent's right and duty and, consequently, that he had authority so to bind defendant thereby.

Let us admit that an agent authorized to conduct business enterprise is to be regarded as empowered to take the steps necessary to carry on the business; that he has implied authority to do all things necessary for the protection of property intrusted to his keeping, or for the performance of duty which he has to perform; that an agent's authority binds his principal if the former is delegated to conduct business of such a nature that its due and orderly execution requires admissions to be made by him within the exercise of the discretion which it is his duty to use in conducting the business intrusted to him. Still, none of these principles justify the admission of the agent's statement in this case. Burnett had charge of the warehouse and the goods. Presumably his duty was to protect them and deliver them to the owners when demanded, and payment of charges due; and if for any reason he failed to deliver them upon demand, it is probably his failure to do so would have been an *act*, and not a mere omission. Conditions necessary for a proper explanation thereof would have been admissible, if made at the time. But it is not shown that there was a demand or inquiry prior to the statement, or that when the latter was made, any proper explanation was required by Shaw, in order that he might deliver the goods, or how the goods were situated, and that they could be delivered. It certainly was not the agent's duty to deliver the goods without request so to do; and it was not his duty to make explanation of the cause of inability to deliver. Shaw was already aware of it. Until delivery was demanded, duty there was no failure on the agent's part; or, if there was, there was no act to be qualified or explained, so that for this reason the statement was incompetent.

Three cases are cited by appellant in support of the claim that it was the agent's right and duty to state that



the goods were burned, but, also, as to the origin of the fire.

The first is *Morse v. Conn. River Railroad Co.*, 6 Gray, 450. The case shows that the next morning after a trunk had been lost, in accounting for it, upon inquiry made by the owner, or in his behalf, the conductor or baggage-master told the witness that, the night before, a gentleman stepped up and claimed and took a trunk of the same description. But the same morning, the station agent told the witness that he thought the trunk was carried to Northampton, the night before, with other baggage. At the trial the court refused to allow the facts above stated to be given in evidence. This was held to have been error, and the court said: "It was part of the duty of those agents to deliver the baggage of passengers and to account for the same if missing, provided inquiries for it were made within reasonable time. These declarations were, therefore, made by them as agents of the defendants, within the scope of their agency and while it continued." The distinctions between that case and this are so apparent that comment is unnecessary. For ought that appear, it may have been proven that it was a part of the agent's duty to account for missing baggage. If so, that fact was decisive against the defendants. But at all events, it was his duty to deliver the baggage of passengers when called for, and it is shown that inquiries were made on behalf of the plaintiff in relation to the same. Under such circumstances it may well be said that failure to deliver was an *act*, and that statements made by him explanatory thereof, were a part of the *res gestæ* and admissible. But in the case at bar, as we have seen, it is not shown that he demanded the goods, or expected to receive them, or that the agent was at the time in any manner engaged in the performance of any duty required of him, or that he was empowered to make the declaration, or that it was necessary for the proper discharge of his duties.

The second case is *Burnside v. Grand Trunk R. Co.*, 47 F. H. 554, and the principle decided is the same as in the one just referred to. Commenting upon this case in *Packet Co. v. Clough*, 20 Wall. 541, the court said: "It simply

decides that the statement of the general freight to the condition of goods delivered to him for transportation, made while the goods are still in transit, duty of the carrier continues, are admissible against the company. This was a case of a contract executed, and while it remained unexecuted, the power to vary it; had in fact complete control of the transaction was still depending, and the agent the execution of an act which was within the authority." It was the defendant's duty under to deliver certain bags at Milwaukee, and it was duty to see that the contract was carried out. were delivered to the agent for transportation 1862, and in April, 1863, plaintiff applied to the information concerning them. The agent told ascertained they were at Sarnia, in defendant's a large lot of flour. It was plainly within the authority and the line of his duty to find and property at the time the plaintiff applied to his statement explanatory of defendant's failure to carry its contract was undoubtedly admissible as part of the *gesta*.

The third case, (*Lane v. Railroad Co.*, 112 M. of the same nature, and the principles decided are with those enunciated in the sixth of Gray.

The court did not err in rejecting the agent's

2. It is claimed the court erred in refusing the jury that, if they believed from the evidence that a defective engine, property constructed and skillfully would not set fire to a building near the railroad to inflammable material that could, when set on, communicate fire to such building; and that, if that from the evidence, plaintiff's property was destroyed by fire or sparks from defendant's engines, without negligence on the part of plaintiff or his assignors, find for the plaintiff.

The reason assigned by the court for refusing the instruction was, that there was no evidence of inflammable material that did, or could, if ignited, com-

to the building. There is nothing before us to show that there was any evidence that an engine, properly constructed and skillfully managed, would not set fire to a building or inflammable material along the track. The instruction, therefore, may have been properly refused, even though the charge given by the court was not sufficient. (*Fulton v. Day*, 10 Nev. 84.) Every presumption is in favor of the action of the court, and if there was error it must be shown.

Appellant objects to the second instruction given for the defendant, to the effect that, under the pleadings, the jury should find for the defendant, if they believed from the evidence that its engines were properly constructed and skillfully run. The point of objection is, that the requirement of skill in the management of engines was ignored. Appellant deems it unnecessary to declare whether or not an engine can be carefully run or managed, so far as the defendant is concerned, in the absence of skill on the part of the driver. The defendant was not charged with unskillful management of the engines. It is only alleged in the complaint that the engines were carelessly and negligently run and managed. If there is a distinction between carelessly running an engine and unskillfully running it (a question we do not decide), proof of the latter fact was not admitted under the pleadings, and an instruction that the defendant was bound to manage its engines skillfully would have been error. Instructions that are not pertinent to any issue in the cause should be refused, although they embrace correct propositions of law in the abstract. (*Conlin v. Nevada and S. J. R. R. Co.*, 36 Cal. 410.)

Complaint is made because the court instructed the jury that the defendant was required to use the "best generally known practical appliances within its reach," to prevent the destruction of the property by fire.

We shall not consider this instruction with a view of ascertaining whether it is or is not correct in principle. The defendant was only charged with negligence in failing to use appliances having the usual and ordinary appliances for preventing the escape of fire; and at the request of plaintiff, the

## Argument for Appellant.

court charged the jury that "the defendant was to use the best known appliances to prevent injury from fire, and to employ careful and competent engineers for a railroad company which fails to use *the best known* practical appliances within its reach, to prevent destruction of property, does not exercise the care of common prudence." The instruction complained of by the court of its own motion, even though it could have done no harm to plaintiff, because its repetition, in substance, of the one given at his request.

We find no error in the record, and the orders of the court and the judgment appealed from are affirmed.

[No. 1,057.]

A. D. TREADWAY, RESPONDENT, v. JONAS WILDER, APPELLANT.

**FINDINGS OF JURY UPON SPECIAL ISSUES—PRESUMPTION OF FAULT.**—An equitable defense is raised and a jury is called "to aid in the findings of fact" upon certain special issues stated: *Held*, that the jury inferred that all other questions of fact were reserved for the consideration of the court without the aid of the jury.

**PAROL AGREEMENT TO CONVEY LAND—WHEN EVIDENCE IS NOT RELEVANT—PURCHASE OF TREES AND SHRUBS.**—Defendant sought to prove a parol agreement upon the part of plaintiff to convey upon the issuance to him of a patent, and, for that purpose, to show that while he was in possession of the land the plaintiff had removed from him some fruit-trees and shrubs growing upon the land, and that they were to be removed therefrom: *Held*, that this evidence was not connected with the question relative to the agreement; that it was not necessary to establish its existence, and that it was properly refused.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

N. Söderberg, for Appellant:

I. All the essential facts must be found by a jury in order to enable the court to give a judgment upon the matter in issue. (Proffatt on Jury, 436, 437; *Rea v. Plummer*, 12 Mod. 628; *Lodge v. Gilbert's Eq.* 255.)

Opinion of the Court—Belknap, J.

I. The findings do not support the judgment. The issues by the answer were material. Upon most of them the findings are silent. (*Davis v. Caldwell*, 12 Cal. 125; *Phipps v. Harlan*, 53 Id. 83; *Johnson v. Squires*, Id. 37; *Shaw v. Adesforde*, Id. 300.)

II. Every error in the court below in the rejection of evidence is *prima facie* an injury, and it rests with the other party clearly to show that no harm could have been or was caused by the error. (*Jackson v. F. R. Water Co.*, 14 Cal. 18; *Le M. T. Co. v. Stranahan*, 20 Id. 198; *Carpentier v. Wilson*, 25 Id. 167; *Norwood v. Kenfield*, 30 Id. 393.)

V. The rejected evidence corresponded with the allegations in the answer, and was confined to one of the points in issue. It was the best circumstantial evidence of which the fact in issue was susceptible. It was relevant, for it tended to the proof of a pertinent hypothesis in the case. The tendency was to make one of the propositions at issue probable. (1 Best. on Ev. 2; 1 Whart. on Ev., secs. 20, 21, 45; *Ins. Co. v. Weide*, 11 Wall. 438.)

C. Ellis, for Respondent:

No brief on file.

By the Court, BELKNAP, J.:

This is the fourth appeal in this case. (8 Nev. 91; 9 Id. 12 Id. 108.) The plaintiff acquired the title of the premises to the premises on the tenth day of May, 1866. Within five years from this date he brought this action of ejectment. Defendant pleaded an equitable defense, to the effect, that at the time proceedings were instituted by plaintiff to acquire the patent defendant was the owner of the necessary right to the premises and entitled to pre-empt the same; that in consideration of these facts, and of his agreement to pay plaintiff the proportionate share of the expenses of acquiring title to a tract of land, of which the premises in controversy were parcel, and interposing no objection to plaintiff's application for patent, plaintiff agreed to convey unto defendant upon the issuance of the patent the premises described in the complaint.



The case turned upon the question whether such agreement had been made, and a jury to whom the issue was submitted answered in the negative. Other issues, bearing directly upon the alleged agreement, were submitted, but the court instructed the jury that they should find that the agreement set up in the answer had not been made, it would be unnecessary to answer the other interrogatories. Agreeably to the instruction, the jury found no other fact.

The finding thus made appellant claims is a special verdict of the jury, and as such special verdict is defective in not finding other and further facts sufficient to support its judgment. The record refutes the theory that the finding of the jury was a special verdict, and shows that it was a finding upon one particular issue.

A jury was called at appellant's request, not to determine generally the facts at issue, but "to aid the court in its findings of fact" upon certain special issues stated in the transcript, p. 22.) From this language we must infer that the jury were called to determine only those special issues which were submitted to them, and that all other questions were reserved for the consideration of the court, to be aided by the jury.

The other exception arose upon the exclusion of evidence to prove that after plaintiff had obtained the patent, he had purchased from the defendant some fruit-trees and shrubs, and planted them upon the land, and caused them to be removed from the land. The court sustained an objection to the admission of this evidence upon the ground that it was immaterial under the facts of the case. The only question left in the case was the existence of the agreement to convey the premises to the appellant. If this evidence tended to prove such an agreement, or constituted a link in the chain of proof, it was material, and should have been received. If, however, the fact sought to be proved by the rejected evidence was incapable of affording any reasonable presumption or inference as to the disputed fact, it was properly excluded. We do not think this evidence would have conducted to a different result. The evidence of the agreement in controversy.

Opinion of the Court—Belknap, J.

The fact of the purchase by plaintiff of trees and shrubs growing upon the land was so completely disconnected from the question relating to the agreement that the jury should not have been allowed to have inferred the existence of one from proof of the other.

Judgment affirmed.

[No. 1,097.]

THE STATE OF NEVADA, EX REL. R. H. SCOTT, v.  
W. A. TROUSDALE, AUDITOR OF HUMBOLDT COUNTY,  
RESPONDENT.

LONG-TERM COUNTY COMMISSIONERS—SALARY OF REGULATED BY SALARY ACT.

The compensation of county commissioners is regulated by the provisions of the salary act. (Stat. 1879, 133.)

ITEM—MILEAGE.—The provision allowing mileage in the former law was intended as a part of the compensation of commissioners for their services. The language of the salary act that the salaries fixed "shall be in full for all services," excludes the idea that the legislature intended to allow the former provision upon that subject to stand.

ACCEPTANCE OF AN OFFICE—NOT A CONTRACT.—No contract is created between the government and the officer by his acceptance of the office.

APPLICATION for mandamus before the Supreme Court.

The facts are stated in the opinion.

*M. S. Bonnifield and T. W. W. Davies*, for Relator.

No appearance for Respondent.

By the Court, BELKNAP, J.:

At the general election held in November, 1878, relator was elected a county commissioner of the county of Humboldt for the period of four years from the first Monday in January, 1879. He duly qualified, and on the last-named day entered upon the duties of his office, and has ever since continued to form the same.

At the first meeting of the board of county commissioners in the year 1879, the compensation of its members was fixed at six hundred dollars per annum, payable in

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Opinion of the Court—Belknap, J.

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equal quarterly payments of one hundred and fifty dollars. The board allowed relator's claim for services for the year ending June 30, 1881, at the rate then fixed by law, with mileage. After the respondent, who is the recorder and *ex officio* the auditor of Humboldt county, refused to allow the same for the reason that the statute which relator's compensation had been fixed, and which permitted him to receive for his services not exceeding a sum of six hundred dollars per annum, together with mileage (sec. 3086, Comp. Laws), had been repealed by an act of March 11, 1879, commonly known as the statute (Stats. 1879, 133.)

This act by its first section provides that "from and after the first Monday in January, 1881, the several named officers of the several named counties in this state shall receive the following annual salaries, which shall be paid in full for all services, and all *ex officio* services rendered by them." The succeeding sections are severally devoted to the affairs of each county of the state.

The seventh section provides that each of the commissioners of Humboldt county shall receive the sum of five hundred dollars.

The auditor claims that the compensation of the commissioners is regulated by the provisions of the last-mentioned law, rather than by the law in force at the time the act met in January, 1879, and admits that relator is entitled to one fourth of five hundred dollars for his quarterly services, ending June 30, 1881, but not to mileage.

The views of the auditor are correct. The language of the first section of the salary act, above quoted, is to be construed to admit of construction. If the legislature intended to include long-term county commissioners, elected at the session of 1878, from the operations of the general statute and to have continued their compensation at the rate heretofore established during the continuance of the term for which they were elected, language expressive of such intention should have been employed.

The law, as it stands upon the statute book, applies to county officers, irrespective of the time of their



Opinion of the Court—Belknap, J.

and we can not, in defiance of its language, interpolate any exception to its provisions. The provision allowing mileage the former law was intended as part of the compensation commissioners for their services. Mileage is not mentioned in the present law; but the language of the first section, providing that the salaries fixed "shall be in full for all services," excludes the idea that the legislature intended to allow the former provision upon that subject to stand. It is also said that the law of 1879 is obnoxious to the objection that it impairs the obligation of a contract, contrary to the prohibition of the constitution of the United States.

Under analogous facts the same objection was made by the mayor of Philadelphia to an ordinance of the council of that city reducing his salary. The court determined, in accordance with every well-considered case upon the subject, that no contract was created between the government and the officer by his acceptance of the office. The court said: "These services rendered by public officers do not, in any particular" (that of compensation), "partake of the nature of contracts; nor have they the remotest affinity thereto. As to stipulated allowance, the allowance, whether annual, or *per diem*, or particular fees for particular services, depends upon the will of the law-makers; and this whether it be the legislature of the state or a municipal body empowered to make laws for the government of a corporation. This has been the universal construction. \* \* \*." (*Commonwealth v. Bacon*, 6 Serg. & R. 322.)

The subject received a very thorough investigation in the case of *Connor v. The City of New York*, 2 Sandf. 355. In that case the compensation of the plaintiff, the clerk of the city and county of New York, was changed by an act of the legislature so as to take effect during his term of office. The court considered that there was no contract, express or implied, between the government and the officer, because there was no agreement that he should fulfill the duties of the office for any specified time, but that he could resign at his pleasure, irrespective of the desire of the government.

In discussing the subject the following language was

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Opinion of the Court—Belknap, J.

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employed: "In our opinion a public officer is elected or appointed to perform certain political duties in the administration of the government. The legislature prescribes these duties, and gives to the officer compensation for their discharge as it deemed just. The sovereign power which prescribes the duties may at pleasure. It may increase them without enhancing compensation. (*Andrews v. The United States*, 202.) In like manner the same power may diminish compensation without lessening the duties. If the officer receives fees it may abolish some, reduce others, or give him all and compensate him by a salary. His right to the office and the emoluments of the office is held subject to all these modifications. All these consequences flow from the political character of the agency and the supremacy of the government in prescribing it for the public good." Following this reasoning the court was of opinion that an officer created by the constitution, with its term and salary defined, could not be removed by the people in their sovereign capacity without the adoption of a new constitution.

The constitution of the state of New York, like the constitution of Nevada, enumerated certain special cases in which the legislature was forbidden either to increase or to diminish the salary during the term for which the officer was elected. This constitutional prohibition was relied on by the court in New York (and it is as applicable here as there) for the purpose of showing that in all other cases the legislature was unrestricted in its authority to change the compensation of officers. (See also *Conner v. Mayor of New York*, 285; *Denver v. Hobart*, 10 Nev. 28.)

Mandamus denied.

REPORTS OF CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEVADA,  
JANUARY TERM, 1882.

[No. 1,088.]

ABBOTT ET AL., APPELLANTS, v. A. PRIMEAUX,  
RESPONDENT.

MENT—PATENT TO SURFACE GROUND OF MINING CLAIM—WHEN NON-  
IT SHOULD NOT BE GRANTED.—Plaintiff claimed title to a town lot  
der a patent issued for a mining claim embracing the land in contro-  
ray. The court granted a nonsuit upon the ground that it had not  
en alleged or proven that plaintiff required said land or had any use  
r the same in the working of the mining claim: *Held*, that the patent  
ade out a *prima facie* case for the plaintiff, and that the court erred in  
anting a nonsuit.

PEAL from the District Court of the Seventh Judicial  
ict, Elko County.

e facts sufficiently appear in the opinion.

*R. Bigelow and G. F. Talbot*, for Appellants:

The plaintiffs having shown a patent title from the  
d States, instead of being nonsuited, were entitled to  
gment in their favor. The plaintiffs were not called  
show that they required said ground, or had any use  
ne same in working their mining claim. They showed  
bsolute title to it, and were entitled to its possession.  
ut regard to what use they might put it to afterwards.

Opinion of the Court—BENJAMIN, J.

A patent imparts absolute verity, only to be questioned by a direct proceeding against it. (*Leese v. Clark*, 16 Id. 323; *The Eureka case*, 4 Id. 324; *Doll v. Meador*, 16 Id. 323; *The Eureka case*, 4 Id. 324. Producing a patent makes out a *prima facie* case. (*Athern*, 34 Cal. 511.) A patent conveys the entire soil with all its incidents and appurtenances. (*Haines*, 7 Nev. 249, 261, 283.) And entitles the holder of it to the possession of the land. (*Bagnell v. B. & O. R. Co.*, 10 Pet. 450; *Gibson v. Chouteau*, 13 Wall. 102; *Smaw*, 17 Cal. 199, 224, 226.) The grant itself is conclusive that every prerequisite to its issuance had been complied with. (*Patterson v. Winn*, 11 Wheat. 383; *Doll v. Meador*, 16 Id. 323; 3 Wash. Real Property, 193.)

II. The defendant had shown no title to the land, nor any interest therein that would authorize him to sue. He could do true title to his aid, if plaintiffs did not have it. He cannot do this before he can be permitted to question the title held by plaintiffs. (*People v. Stratton*, 25 Cal. 102; *Meador*, 16 Id. 324; *Dodge v. Perez*, 2 Saw. 654.)

#### A. W. Fisk, for Respondent:

I. The common law doctrine, that he who owns the surface of the earth owns all to the center of the earth, has been greatly modified as to the rights of miners and as to the public lands. One may be entitled to the surface, another to the veins of mineral running under the said land. (*Bullion M. Co. v. Cræsus G. & C.*, 10 Nev. 168.)

II. The laws of this state do not recognize the surface ground of a mine as property, i. e., property subject to taxation. (Stat. 1865, 271, sec. 4.)

III. The mine owner is only entitled to the surface for working purposes of his mine. The cases cited by the appellant do not apply. They are all in relation to land taken up either for agricultural or town-site purposes.

#### By the Court, BENJAMIN, J.:

In an action of ejectment for a lot of land in the town of Tuscarora, in Elko county, in which the answer



the possession of the defendant, plaintiffs' evidence showed that they deraigned title through a patent issued to their predecessor in interest by the government of the United States for a mining claim embracing the premises in controversy.

Thereupon plaintiffs rested their case, and the court, upon defendant's motion, nonsuited plaintiffs for the reason "that the evidence showed the ground in dispute to be the surface ground of a mining claim, and that it had not been alleged or proven that the plaintiffs required said ground, or had any use for the same in the working of said mining claim."

From this order and judgment of nonsuit the appeal is taken.

The patent contains no reservation or qualification whatever, but unconditionally conveys the premises to the predecessor in interest of plaintiffs. The title thus presented in connection with the defendant's admitted possession, made a *prima facie* case for plaintiffs. Whatever bearing the question of the necessity of the use of the ground by plaintiffs for the purpose of working their mining claim may have had upon the controversy, depended upon the nature and character of defendant's claim to the premises.

Upon the facts before the district court at the hearing of the motion for nonsuit, it did not appear what the nature of defendant's claim was, whether he had a legal or equitable, or any title, or that he was not a mere trespasser.

Judgment reversed.

[No. 1,091.]

JANE LAKE, RESPONDENT, v. M. C. LAKE, APPELLANT.

**DIVORCE—APPLICATION FOR COUNSEL FEES—NOTICE MUST BE SERVED UPON ATTORNEY.**—In an action for divorce, the notice of application for the allowance of counsel fees must, under the provisions of the statute, be served upon the attorney (if there is one), instead of the party.

**DEM—WHERE NOTICE HAS ACCOMPLISHED ITS PURPOSE, ERROR NOT PREJUDICIAL.**—Where a notice served upon the party accomplished its purpose in bringing the attorney into court, and he stated that he was prepared to proceed with the hearing, subject to the objection that the notice was

## Argument for Appellant.

not served upon him, and the court ruled that the notice was *Held*, that the ruling was technically erroneous, but as it did not prejudice the defendant, the error should be disregarded.

**ALLOWANCE OF COUNSEL FEES, WHEN MAY BE MADE.**—The power of the court to make an allowance of counsel fees, while the cause is incident to divorce suits, and may be made as often as the circumstances of the case may require.

**IDEM—AFTER DIVORCE IS GRANTED.**—Where the wife obtained a divorce, and the court adjudged a large estate, claimed by the husband as community property, to be the separate property of the husband, and awarded it all to him: *Held*, that the court was justified in making an allowance of counsel fees to enable her to proceed further and answer a question relating to the property, it appearing that such expenses were contemplated in good faith.

**APPEAL—WHEN ALLOWANCE OF COUNSEL FEES WILL BE GRANTED BY THE SUPREME COURT.**—Where the husband appeals from an order of the district court allowing counsel fees to the wife, the supreme court has the power to make an allowance of counsel fees to the wife, so as to enable her to appear, by counsel, in the supreme court upon such appeal.

**APPEAL from the District Court of the Second Judicial District, Washoe County.**

The facts appear in the opinion.

*R. M. Clarke*, for Appellant:

I. In all cases where a party has an attorney in the suit, or proceeding, the service of papers when required to be made on the attorney, instead of the party. (*Griffith v. Griffith*, 47 Cal. 644.)

II. The court had before ordered the payment of counsel fees generally in the case, and by such order had satisfied the service and exhausted its power. (Div. 1, sec. 27; 2 Bish. Mar. and Div. 416; *Wilde v. Wilde*, 306.)

III. There was no motion for new trial pending the order in question was made. The court had jurisdiction of the case, and its jurisdiction could not be defeated by a motion.

IV. The matter in issue complained of by plaintiff had been determined adversely to her by the court; and as her counsel fee to further prosecute it was a gross waste of money in the discretion. (2 Bish. Mar. and Div., sec. 405-407, *Wilde v. Wilde*, *supra*.)

V. The plaintiff was, when the order was made, a *feme sole*. She was no longer his wife. As to him she was a stranger in the law, and she was not entitled to call upon his separate estate to clear the expenses of her litigation.

C. S. Varian, for Respondent, cited the following authorities relating to the allowance of counsel fees in actions for divorce. (2 Bish. Mar. and Div., sec. 384 *et seq.*, 421; *Armstrong v. Armstrong*, 35 Ill. 114; *Jenkins v. Jenkins*, 91 Id. 68-9; *Collins v. Collins*, 29 Ga. 518; *Sprayberry v. Merk*, 10 Id. 82; *Ex parte King*, 27 Ala. 390; *Phillips v. Phillips*, 17 Wisc. 255; *Weishaupt v. Weishaupt*, Id. 625; *Moul v. Moul*, 30 Id. 203; *Graves v. Cole*, 19 Pa. St. 173; *Goldsmith v. Goldsmith*, 6 Mich. 286; *Llamosas v. Llamosas*, 62 N. Y. 619.)

By the Court, BELKNAP, J.:

In a suit for divorce between the parties hereto, a decree was entered in favor of the plaintiff, dissolving the bonds of matrimony between herself and defendant, and awarding her the custody of their offspring, but adjudging a large estate, claimed by plaintiff as community property, to be the separate property of the defendant husband.

Dissatisfied with the portion of the decree touching the question of property, and desiring to proceed further thereupon, and being destitute of means, the district court ordered defendant to pay plaintiff's attorney for services to be rendered in such further proceedings the sum of six hundred dollars, which amount the court found to be a reasonable and proper fee.

From this order defendant has appealed.

Preliminary to the hearing of the appeal plaintiff has asked this court to make its order directing defendant to pay to her attorney the further sum of two hundred dollars, which amount is admitted to be a reasonable counsel fee for an appeal of this nature. Substantially the same reasons are urged against the allowance of the motion by this court as are urged against the order from which the appeal is taken. The appeal and the motion will, therefore, be considered together.

The first question presented relates to the sufficiency of the service of the notice of hearing of the application for divorce. The service of notice was made upon the defendant, personally, instead of his attorney of record in the suit. The statute relating to marriage and divorce was amended at the session of the legislature of 1865, providing that the district courts may at any time after the filing of the complaint in a divorce suit, and after "due notice" has been given to the husband or his attorney, require the husband to pay such sums as may be necessary to enable the wife to carry on or defend the suit, etc. (Comp. L., sec. 220.) Subsequently, and at the session of the legislature of 1869, the present civil practice act became a law. This act, in relation to the service of papers, at section 1561 (Comp. L., sec. 1561), provides:

"\* \* \* But in all cases where a party has an attorney in the action or proceeding, the service of notice, when required, shall be upon the attorney, instead of upon the party. \* \* \*" This latter statute must be construed in relation to the statute regulating the service of notice directed to be made in 1865. If the party has an attorney in the action, the service must be made upon such attorney, instead of upon the party. Tested by this requirement, the service of notice in this proceeding was insufficient. The defendant appeared by counsel at the hearing of the motion for judgment thereon, upon the ground of the insufficiency of the service.

It appearing to the court that the defendant had not given the notice to his counsel the day before, the court asked counsel whether he required any additional time for the hearing. Counsel replied that he did not. The court then presented that the hearing should proceed subject to the objection touching the service of notice. The court held the service sufficient, and directed the hearing to proceed.

In this ruling the court erred. For the reason that the service was insufficient, but the ruling was not reversed, as warrants a reversal of the order appealed from, the object of the notice was to bring the defendant into



Opinion of the Court.—Belknap, J.

time when he, presumably, would be prepared to proceed with the hearing. The notice had the effect of bringing him into court, and when there he stated in substance that he was prepared to proceed with the case. Thus the notice accomplished its purpose. The ruling was technically erroneous, but as it could not have prejudiced the defendant it must be disregarded.

The next objection involves the question of the authority of the court to allow counsel fees in a suit in which an order had previously fixed such fees. The statute provides that the court or judge may, "at any time after the filing of the complaint, require the husband to pay such sums as may be necessary to enable the wife to carry on or defend" the suit, &c.

At common law a wife destitute of means was entitled to an allowance sufficient to enable her to defray her expenses in the suit. The power to make such allowance was considered incident to divorce suits, and the allowance appears to have been made as frequently as circumstances required. In *Graves v. Cole*, 19 Pa. St. 178, the supreme court of Pennsylvania, proceeding according to the common law, declared: "The court, having jurisdiction of the suit between the husband and wife, is, from time to time, to make the proper allowance according to the circumstances."

The statute of this state is only affirmatory of the common law. Under a similar statute in the state of New York, Judge Woodruff held, in the progress of the divorce suit of *Forrest v. Forrest*, that although "alimony pendente lite had once been fixed and allowed to the plaintiff, the amount may be altered and increased, upon its appearing that the necessities of the plaintiff require it, and the amount of defendant's property is such that the increased allowance is reasonable." (5 Bosw. 672; *Morrell v. Morrell*, Barb. 480.) The reasonableness of this rule is illustrated by the present case.

At the commencement of this litigation, the court directed defendant to pay plaintiff's counsel a fixed fee, which probably at that time appeared to the court to be a proper fee for the trial of the cause. Afterward the court made a fur-

ther and greater allowance for the same purpose the court made the order from which this appeal. It would appear from these facts that the contest had been more protracted and severe than was anticipated when the first allowance was made. In the early stages of the case it may have been impossible to have a proper amount of money necessary for the litigation. Justice to both parties, therefore, requires that orders of this nature should be made as demands change the changing circumstances of the case.

Objections are also made to the order, upon the ground that an allowance for counsel fees to further the present matter which had been determined adversely to the wife was an abuse of discretion in the court, and that there was no authority to make such order after the entry of the decree of divorce and when the parties were no longer husband and wife.

The object of the law is, to afford a wife with the funds necessary to prosecute or defend suits in equity and at law. This object would be frustrated, if, after a divorce were rendered, courts should withhold the means necessary for a reasonable review of the case. She is entitled to proper allowance so long as the case is pending and until it is finally determined. (*Ford v. Ford*, 5 Bosw. 672; *Jenkins v. Jenkins*, 91 Ill. 1; *Phillips v. Phillips*, 27 Wisc. 252; *Goldsmith v. Goldsmith*, 286.)

Nor did the court abuse its discretion in granting the allowance. The fact, that a decree of divorce was rendered against the wife, was not considered sufficient ground by the authorities cited to deny an allowance for counsel fees on appeal.

In this case, strong reasons would appear for granting the allowance. The wife means to take such further action as she may be advised are proper. She had obtained the decree of divorce in her favor, but in the opinion of the district court, the property involved was the separate property of the husband, and for this reason none of it was awarded to her. The importance of the result of this battle to the plaintiff, in connection with the fact that

## Points decided:

proceedings appear to have been contemplated in good faith, not vexatiously, are matters which doubtless addressed themselves to the sound discretion of the court, and justify action.

No statutory provision authorizes an allowance for counsel in this court. But such right has been exercised by courts of similar jurisdiction in conformity with the decisions of the ecclesiastical courts of England. (*Goldsmith v. Goldsmith*, and *Phillips v. Phillips*, *supra*.) The exercise of such authority is based upon the presumption, that jurisdiction in divorce cases carries with it by implication the incidental power to make such allowances. The power is indispensable to the proper exercise of jurisdiction in guarding the rights of wives.

The order of the district court is affirmed and the motion of respondent allowed.

[No. 1,072.]

JOSEPH MENDES, APPELLANT, v. MATTHEW KYLE, RESPONDENT.

FRAUDULENT SALE—INSTRUCTION—WHEN MAY BE MISLEADING.—The court gave an instruction correctly stating the various facts and circumstances that might be considered by the jury in determining whether the sale of personal property was fraudulent; but, after the separate statement of each fact, the court repeated the words: "And the jury are at liberty to find that the sale was fraudulent and find for the defendant: *Heid*, that by this repetition the jury may have been misled into the belief that if any of the facts mentioned as tending to prove fraud existed, they would be justified in finding a verdict for defendant independently of the other facts of the case, and that such a construction would be prejudicial to the defendant."

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are sufficiently stated in the opinion.

J. Lansing and Bishop & Sabin, for Appellant.

Thomas Wren and Crittenden Thornton, for Respondent.

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By the Court, BELKNAP, J.:

This is an action for the recovery of personal property. The respondent justified the taking, as sheriff of Eureka, under certain writs of attachment issued by the court, in satisfaction of judgments brought against one Frietas. The plaintiff claims to be the owner of the property by purchase from Gerome, who was the vendee of Frietas. Defendant contends that the sale from Frietas to Gerome was fraudulent as to the attaching creditors, and as plaintiff purchased the property after the attachment he was not a *bona fide* purchaser. The case turned upon the *bona fides* of the plaintiff, Frietas to Gerome.

Among other instructions the court gave the jury:

"The jury are instructed that in arriving at a verdict as to whether the sale from Frietas to Gerome was fraudulent or not, they are to take into consideration all the circumstances surrounding the alleged sale. If they shall find from the testimony that the price alleged to have been paid for the property was much less than its value, that is a fact tending to prove that the sale was fraudulent as to the creditors of Frietas, and the jury are at liberty to find that the sale was fraudulent, and find for the plaintiff.

"If the jury shall find from the testimony that the plaintiff had no immediate delivery of the property after the sale, that is a fact tending to prove that the sale was fraudulent as to the creditors of Frietas, and the jury are at liberty to find that the sale was fraudulent, and find for the plaintiff.

"If the jury shall find from the testimony that the plaintiff, after the alleged sale, continued to use the property as he had used it before, that is a fact tending to prove that the sale was fraudulent as to the creditors of Frietas, and the jury are at liberty to find that the sale was fraudulent, and find for the plaintiff.

"If the jury shall find from the testimony that the plaintiff, after the alleged sale, concealed the fact until the trial, that is a fact tending to prove that the sale was fraudulent as to Frietas' creditors, and the jury are at liberty to find that the sale was fraudulent, and find for the plaintiff.



Points decided.

ty to find that the sale was fraudulent, and find for the defendant."

The instruction is correct in stating that inadequacy of consideration, concealment of the sale, and the vendor's applying the property to the same use after as before the sale, are facts tending to prove fraud. The instruction was also correct in directing the jury to take into consideration all of the facts and circumstances of the sale, in determining whether it was fraudulent. But the repetition of the words, "and the jury are at liberty to find that the sale was fraudulent, and find for the defendant," following the separate statement of each fact tending to prove fraud, may have misled the jury. From it they may have understood that if any of the facts mentioned as tending to prove fraud existed, they would be justified in finding a verdict for the defendant, independently of the other facts of the case. The constant repetition of the words last quoted was calculated to make this impression. The proper construction of the charge is, that if any one of the badges of fraud mentioned be established, such fact, in connection with other circumstances of a fraudulent intent on the part of the vendor, is sufficient evidence to support a finding of fraud. But it may have received the other construction, and thereby prejudiced the rights of appellant.

We find no other error in the record.

Judgment reversed.

[No. 1,095.]

THE STATE OF NEVADA EX REL. W. O. SMITH, v.  
FOURTH DISTRICT COURT, RESPONDENT.

COMMENT—WHEN, AND HOW, MAY BE SET ASIDE—JURISDICTION—STATUTE.  
The manner of vacating judgment is regulated by statute, and the statutory provisions must be complied with, in order to authorize the court to act. The court has no jurisdiction to set aside a judgment upon a mere motion.

CERTIORARI before the Supreme Court.

The facts are stated in the opinion.

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Opinion of the Court—Hawley, J.

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*C. S. Varian*, for Relator.

*M. S. Bonnifield* and *N. Söderberg*, for Res.

By the Court, HAWLEY, J.:

Relator brought suit and obtained judgment in justice's court against Lowery, Carpenter, and Lowery, promissory notes. An appeal was regularly taken to the district court, and the cause was therein tried by the court, and resulted in a verdict and judgment in favor of the defendants.

Two days thereafter, Lowery and Carpenter, by their attorneys, served upon relator's attorney the following notice: "You will please take notice, that the defendants, Lowery and Carpenter, will move the court, on the 1st of August, 1881, at the court-room of said court, at said place, at ten o'clock A. M., to set aside the judgment rendered in said action, upon the ground that the court had no jurisdiction over the subject-matter of the suit; that the title and right of possession to real property was not involved in the action; that plaintiff denied the possession of said defendants to the land named in the complaint, and insisted therein during the trial, and said possession were disputed by plaintiff during the trial, and the result of the case. Defendants will use all the evidence in the case and the testimony given at the trial, and the argument of plaintiff's attorney, on the hearing of said motion."

The court, upon the hearing of said motion, set aside the judgment previously rendered.

Relator claims that the court, in making said judgment, exceeded its jurisdiction, and this is the only question presented for consideration. The power of vacating judgments is incident to courts of record at common law. (*Cook*, 18 Md. 138), and such practice prevails in the general courts. (*Doss v. Tyack*, 14 How. 312.) But the power of vacating judgments in this state is regulated by statute, and we are of opinion that the statutory provisions have been complied with in order to authorize the court to set aside the judgment. Attention has not been called to any provision

## Points decided.

justice act that authorizes the court to set aside the judgment in a case like this upon a mere motion. The case does not come within any of the provisions of section 68, and in other cases the remedy must be as provided for in article 1, section 194 *et seq.*, Stat. 1869, 226, 227, in relation to appeals. (*McKinley v. Tuttle*, 34 Cal. 239; *Nuckolls v. State*, 2 Neb. 66.) None of these provisions were complied with. We are, therefore, of the opinion that, upon the facts presented by the record, the court exceeded its jurisdiction, and its order setting aside the judgment is hereby annulled.

[No. 1,096.]

THE STATE OF NEVADA EX REL. NEVADA ORPHAN ASYLUM v. J. F. HALLOCK, STATE CONTROLLER.

**CONTROLLER—DUTIES OF.**—It is the duty of the state controller to refuse to draw his warrant for any money that is to be used for unconstitutional purposes.

**ARTICLE 10 OF ARTICLE XI. OF THE CONSTITUTION—MEANING OF "SECTARIAN PURPOSES"—HOW ASCERTAINED—RELIGIOUS SECTS.**—For the purpose of ascertaining the meaning of the words "sectarian purposes" used in the constitution, the court examined the history of the state, its relation to appropriations, as shown by the statutes and legislative journals: *Held*, that the words were used in the popular sense; that a religious sect is a body or number of persons, united in tenets, but constituting a distinct party by holding doctrines different from those of other sects, or people, and that every sect of that character is sectarian within the meaning of that word as used in the constitution.

**NEVADA ORPHAN ASYLUM—SECTARIAN INSTITUTION.**—Upon a review of the testimony: *Held*, that the Nevada Orphan Asylum of Virginia City is a sectarian institution, and as such is prohibited by the constitution from drawing any money from the state treasury to be used for sectarian purposes.

**MONEY USED FOR SECTARIAN PURPOSES.**—*Held*, that if the money claimed, under the act "for the relief of the several orphan asylums of this state" (stat. 1881, 122), should be given to the Nevada orphan asylum, it would be used for the relief and support of a sectarian institution, and in part, at least, for sectarian purposes, and that it is impossible to separate this use of the money from that which might be used for other purposes that are not forbidden.

APPLICATION for mandamus.

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Argument for Relator.

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The facts are stated in the opinion.

*Lewis & Deal* and *B. C. Whitman*, for Relator.

I. The state, by the act in question, has offered to receive and provide for orphans, regardless of creed. Upon a compliance with those terms on the part of the asylums, and the performance of all the conditions of the act, the state obligates itself to pay the amount therein provided for in the act, and has appropriated the necessary funds for the payments. This is a simple contract, and the state, having performed its part, it is the duty of the relator to compel the respondent to carry out the contract on its part of the state.

II. The legislature did not impose upon orphan asylums any duty as to the moral and religious training of the orphans provided for. So far as the training of orphans as to their duties toward God and toward man, the act is silent. That is safely left to the parents and conscience of the managers of such institutions.

III. The word "sectarian," as used in the act, does not prohibit the teaching of any doctrine which all Christian denominations agree. So far as the religious training of the Church is concerned, under the constitution of the state, all denominations of Christians are members of it. They are only called "sectarian" in so far as they differ from each other. As to those general doctrines upon which all Christians are orthodox. Christianity is a part of the law of the state of Nevada, as it is of the United States. (See *Vidal v. Girard's Ex'rs*, 2 How. 19; 5 Durrant, 559; Webster's Works, vol. VI. 175; S. C. Const. sec. 1877.) If the instruction given the orphans in religious matters in the Nevada Orphan Asylum is in accordance with those principles in which all Christians believe, how can it be claimed that there has been a violation of the constitution in this respect, the teaching being simply in accordance with the constitution itself.

IV. The religious training occupies but a small



Argument for Respondent.

the day. The main purpose of the asylum is to provide for the physical wants of the orphan.

V. Even if the Nevada Orphan Asylum is a sectarian institution, the money asked is not used for sectarian purposes. The money is used to feed the children. It is no more than is sufficient for that purpose, as the testimony shows, and is in fact used for that purpose.

VI. This court can not inquire into the religious belief of the managers of any orphan asylum claiming the benefit of the act of 1881. To do so would be to proscribe citizens according to their creed. If such inquiry can be made, an orphan asylum could ever derive any benefit from the act, except such as should be managed by infidels or persons without any fixed religious belief.

VII. The act being constitutional, it was the duty of the respondent to obey the law and carry it into effect. (Patterson v. Durriss on Stats. 202, 203; Sedg. Stat. and Const. Law, 409, 410.)

M. A. Murphy, Attorney General, for Respondent:

I. The Nevada Orphan Asylum of Virginia City is a sectarian institution, owned, controlled, and presided over by a religious organization known as the "Sisters of Charity,"

all of whom must be Catholics. "Religious orders," the technical name for associations of men or women in the Roman Catholic Church, whose members live in common in convents. The common bond of union among all the religious orders and which distinguishes them from other classes of associations, is retirement from the world, celibacy, and their organization by means of solemn vows into communities of an entirely ecclesiastical character. (14 New American Encyclopedia, 22, title "Religious Orders;" Webster's Dictionary, title "Nun.")

II. The Nevada Orphan Asylum of Virginia City and the school known as the St. Mary's School, which is attached thereto, and a part thereof, are sectarian, because those under whose control they are, are Catholics, members of a Catholic order organized by a Catholic priest in the year 1855, which order was confirmed and approved in the year

Opinion of the Court—LEONARD, C. J.

1660 by the pope, who is the head of the Catholic Church, and they have to report to the mother house. (2 *Encyclopædia*, title "Sisters of Charity;" 4 *New Amer.* 722, title *Charity, Sisters of*.) The asylum and other Catholic institutions, presided over by Catholics, in which are taught and preached the tenets and doctrines of the Roman Catholic religion and church, and the tenets of other denominations have never been permitted to be taught therein, and the tenets of other religious denominations have never been permitted to be taught therein.

III. Under the provisions of our constitution, no religion but Christianity nor any other system or religion is a law of this state. We have no union of churches, nor has our government ever been vested with authority to enforce any religious observance simply because of religion. (Sedg. on Stat. and Const. Law, 512, 578; Const. Lim. 471; *Bloom v. Richards*, 2 Ohio Kent's Com. 633.)

IV. The framers of our constitution understood by the word sectarian to mean all religious denominations. (Sedg. in Const. Conv. 561, 578. See, also, *People v. Board of Education*, 13 Barb. 400; *St. Patrick Orphan Asylum v. Board of Education*, 34 How. Pr. 227; *Jenkins v. Atwood*, 101 Mass. 94.)

By the Court, LEONARD, C. J.:

This is an application for a writ of mandamus to compel respondent to audit an account for one thousand and seventy-nine dollars and seventy-nine cents, and to issue his warrant on the state treasurer for the balance in favor of petitioner, the Nevada Orphan Asylum, said account having been apportioned and allowed to petitioner by a majority of the board of asylum commissioners, for the support and maintenance of orphans and half orphans, and in accordance with the provisions of the statute of this state, entitled, "An act to appropriate funds for the support of the several orphan asylums of this state, approved March 3, 1881." (See Stat. 1881, 122.)

Respondent refused and refuses to audit said

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his warrant upon the state treasurer therefor, on the ground that the Nevada Orphan Asylum is a sectarian institution; and that under section 10 of article XI. of the constitution of this state, he is forbidden to audit any account or draw any warrant upon the state treasurer, for the purpose of any institution of a sectarian character. The provision of the constitution referred to reads as follows: "Section X. No public funds of any kind or character, whether state, county, or municipal, shall be used for sectarian purposes."

The respondent admits that the claim of petitioner is valid in every respect, except as above stated, and it is not claimed that the statute referred to is unconstitutional. In short, the respondent concedes it to be his duty to audit the account and draw his warrant therefor, if by so doing he would not use the state's money for sectarian purposes; but, on the other hand, he conceives it to be his duty to refuse compliance with petitioner's demand, if, in fact, the Nevada Orphan Asylum is a sectarian institution, notwithstanding the constitution.

That the legislature, under the constitution, could not appropriate moneys for sectarian purposes, is too plain for argument; and it is equally plain that state funds cannot, and can not, be used for such purposes in any case as the statute is written, any more than they could have been so used if the statute had contained a proviso relating to asylums or institutions of a sectarian character. The officer is justified in obeying the letter of a law if in so doing he violates the spirit and letter of the constitution. It was claimed at the oral argument, by counsel for petitioner, that respondent's only power in the premises was to determine whether petitioner is such an asylum as that defined in the statute; whether its officers had done the duties required of them; whether the board of asylum commissioners had performed their duties, and whether the amount claimed was just as to the amount claimed. It was urged that he had no power to refuse to draw his warrant, although, by so doing he would be using the funds of the state for sectarian purposes.

As we construe the second brief of counsel for petitioner this position is abandoned; but whether we are right in or not, it can not be maintained. The amendment to the constitution above quoted was intended to be self-acting. It requires no legislation to become operative. It is a duty upon the financial officers of the state, and the counties, cities and municipalities of the state, and its efficacy is independent of legislative action. The only way to give effect to its provisions is for such officers to refuse to violate its plain commands. (*State ex rel. Salomon & Simpson v. Graham*, 12 La. Ann. 407; *Bowie v. Lott*, 24 Id. 215; *Cooley's Case*, 10 Lim. 73.)

The constitutional amendment, adopted subsequent to the enactment of the statute relied on by counsel for petitioner, is controlling upon the point in question, even though the statute itself sustains counsel's position, which we do not now concede. (*Sias v. Hallock*, 14 Nev. 332; *State ex rel. Keyser & Elrod v. Hallock*, Id. 202; *State ex rel. Hallock v. Hallock*, ante, 152.) In those cases we recognized the fact that the controller had power, under the statute, to do what he has done in this case under the amended constitution, but the point now being considered was not made by counsel.

Counsel for petitioner next say that petitioner has formed its part of a contract, and the state should not be required to perform the contract on its part. The constitution, as amended, was in force when the statute was passed, and petitioner is presumed to have had knowledge of its provisions. It knew, also, that it could not receive the benefits and privileges of the statute, if such action would violate the constitution. In fact, if payment of petitioner's claim would be using the state's moneys for sectarian purposes, it had no right to suppose that the statute was intended for its benefit.

We now come to the principal question presented:

Is the Nevada Orphan Asylum a sectarian institution, and would the payment of its claim be using the state's funds for sectarian purposes? We agree with counsel for petitioner that this court should not, and will not, consider whether



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statute is wise or unwise, or whether it will or will not diminish the public revenues, but that it will preserve the constitution.

The amendment to the constitution with which we have to deal was proposed by the legislature of 1877. It was adopted by a majority of the succeeding legislature, in 1878. It was approved and ratified by the people at the election of 1880, when it became a part of the constitution of the state. When the amendment was proposed and ratified the constitution made it the duty of the legislature to provide for a uniform system of common schools, by which a school should be established and maintained in each school district at least six months in every year; \* \* \* and no school district which should allow instruction of a sectarian character therein might be deprived of its portion of the interest of the public school fund during the absence of such instruction. (Const. art. XI. sec. 2.) Section 2 of the same article also provided that, "No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this constitution." The object of those provisions was to keep all sectarian instruction from the schools. For some reason the framers were not satisfied with the constitution as it was. They demanded something more, and they embodied in the fundamental law a prohibition against the use of the funds of the state or of any county or municipality for sectarian purposes. Two legislatures by their acts declared the amendment to be a wise and needful measure, and the people at the election adopted as their own the judgment of their legislators. Our constitution can be amended only after a long time and much labor. When an amendment is made it is reasonable to conclude that, in the minds of the people, there is good reason for the change; that it is wise to avoid the possible recurrence of evils borne in the past, or the happening of those which threaten them in the future, or, it may be, both. Constitutions, as well as statutes, are to be construed in the light of previous history and surrounding circumstances. (*Kennedy v. Gies*, 25 Mich. 83; *Story on the Constitution*, vol. 1, sec. 405 a.)

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"The object of construction, as applied to a written constitution, is *to give effect to the intent of the people in adopting it.*" (Cooley's Const., Lim. 54.) It is true that, possible, or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere." (Id.) "If, however, a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford. And one of these aids is a contemplation of the object to be accomplished or the mischief designed to be remedied or guarded against by the clause in which the ambiguity is met with." \* "The prior state of the law will sometimes furnish a clue to the real meaning of the ambiguous provision, and it is especially important to look into it, if the constitution is the successor of another, and in the particular instance, essential changes have apparently been made." (65.)

In this case there is, in one sense, no ambiguity. It is plain that no public funds can be used for sectarian purposes; but it is not plain, from the amendment itself, what the people meant by the words "sectarian purposes." In taking the view of gathering their meaning, their intention in this respect, and of ascertaining whether this case comes within the constitutional prohibition, we shall examine the history of the state in relation to appropriations, as it is shown in the statutes and legislative journals.

And stating first the result of our investigation, we find that, with one exception, petitioner has been, and is now, the only applicant for state aid, where the question of sectarianism could have been raised, since the adoption of the constitution.

The exception stated was this: In 1866 a bill was introduced in the assembly, entitled, "An act appropriating money for the benefit of St. Paul's Episcopal Parish School at Virginia City. The amount asked was ten thousand dollars. That bill was indefinitely postponed. (Assembly Journal, second session, 276.)

At the same session a bill was introduced in the senate, entitled "An act appropriating moneys for the benefit of the orphan asylum, conducted by the Sisters of Charity at Virginia City." The amount mentioned in the bill was ten thousand dollars. This bill passed both houses, but was vetoed by the governor. (Senate Journal, second session, 1881.) It was claimed by the friends of the *senate* bill that the *assembly* bill was introduced for the purpose of defeating the *senate* bill, and the advocates of the latter bill opposed the passage of the other. (Assembly Journal, 246.) On the thirteenth of February, 1886, Mr. Lockwood, in the senate, moved to refer the *senate* bill to a committee, with instruction to amend, by inserting a section as follows: "No sectarian instruction shall be imparted or tolerated in any school or university that may be established or maintained under this act." That amendment was voted down. (Senate Journal, 147.)

The senate committee of ways and means of that session, to whom the above bills were referred, reported against their passage, in part for the following reasons: "They ask for the sum of twenty thousand dollars, substantially for the purpose of training up children in the tenets or religious belief of the respective churches, without regard to the question of religious opinions of the parents of such children, which is commendable zeal for the progress of those denominations, as the right training of the children is the best way to build up churches. But the state contribute twenty thousand dollars towards building up and strengthening those churches, and making provision thus for future increase of Episcopal pastors and Protestant and Catholic priests, nuns, and laymen, other denominations, such as Presbyterians, Methodists, Baptists, Unitarians, will feel equally entitled to similar appropriations; and thus the revenues of the state might be absorbed to such an extent as to endanger its ability to pay bonds, interest, and other obligations, for which it is already pledged, or which may be necessary for ordinary current expenses."

At the next session of the legislature, an appropriation of

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five thousand dollars was made "to provide for fostering and supporting the Nevada Orphan Asylum, a duly incorporated institution, located at Virginia City," and the board of county commissioners of any county in the state was authorized and empowered to send to the asylum any orphan child or children, under twelve years of age, left parentless while residing in the state. (Stat. 1867, 130.)

At the next session, 1869, a similar law was passed appropriating six thousand dollars. (Stat. 1869, 107.) At the next session, 1871, the sum of five thousand dollars was appropriated for the same purpose. (Stat. 1871, 103.) At the next session, 1873, an appropriation was sought, but a bill introduced in the assembly to obtain it, but at the request of the sisters in charge, it was withdrawn. (Assembly Journal, sixth session, 225). At the eighth session, 1877, when the amendment to the constitution was proposed, a bill appropriating five thousand dollars was introduced and passed in the senate, but it was defeated in the assembly. (Assembly Journal, eighth session, 244, 327, 330.) At the session of 1879 an appropriation was sought, and a bill therefor introduced, which was laid on the table, where it remained. (Senate Journal, ninth session, 311.)

This, we think, concludes the history in brief, of appropriations made by the state, on behalf of any institution against which the objection of sectarianism could possibly have been urged, until the passage of the statute under which the petitioner claims the amount now demanded. It is proper to state here, that in 1873 "An act for the government of the State Orphans' Home" was passed, the fifth section of which made it the duty of the board of directors to instruct the trustees of the Nevada Orphan Asylum that they were to receive all orphans in their charge then maintained in the manner by the state, and would bear all the necessary expenses in their removal, at any time when desired by the trustees of said Nevada Orphan Asylum.

A few of the facts above shown will bear repeating. In every session of the legislature from 1866 to 1881, inclusive, with the exception of the session of 1875, petitioner asked for an appropriation from the state. During that time,



before the amendment was proposed, sixteen thousand dollars were appropriated. At the session of 1877, when the amendment was proposed, an appropriation was asked, but the bill failed to pass. No other institution, save one, of a sectarian character, whether petitioner is so or not, has applied for state aid; and as to that one, the advocates of petitioner's application in the legislature of 1866, charged that its motives were sinister; that its real object in asking an appropriation was to defeat petitioner's application. The friends of petitioner's application in 1866, refused to adopt Mr. Lockwood's amendment that *no sectarian instruction should be imparted or tolerated in school*. If there was no intention of imparting such instruction, it is difficult to perceive what objection could have been made to the amendment offered. It was certainly in keeping with the letter and spirit of the constitution in relation to public schools, and entirely unobjectionable if sectarian instruction was not to be imparted. And one of the sisters in charge testified in this case that, "the same course of treatment has been pursued during the last year as in the years previous thereto." Upon the above facts alone we are strongly impressed with the idea that, in the minds of the people, the use of public funds for the benefit of petitioner and kindred institutions, was an evil which ought to be remedied, and that petitioner's continued applications greatly, if not entirely, impelled the adoption of the constitutional amendment. But we need not rest here. Let us examine the testimony and see where it leads us. There are before us depositions of persons other than the sisters in charge; but we shall confine ourselves to their testimony. They certainly know the facts, and upon their statements alone, outside of what has been already shown, shall it be decided whether or not the Nevada Orphan Asylum is a sectarian institution. It is admitted by the attorney general that petitioner does not make any distinction in its reception of orphans on account of creed or sect, and that it has never made such distinction. It is admitted by counsel for petitioner that the St. Mary's school is a part or branch of the Nevada Orphan Asylum; that it is controlled exclusively by officers of the latter, who

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are Sisters of Charity, members of the Roman Catholic Church, and who can not become sisters unless they are members of that church. The petitioner is a branch of the "mother house" at Emmettsburg, Maryland, and has to report to it. The testimony which we are to consider shows this: The amount demanded by petitioner does not exceed the cost of the orphans' living. The books used at the school are those in common use in public schools, and the children are taught in the different branches embraced therein. They are also taught in music, needle-work, house-keeping, etc., when it is proper and best to do so, the principal object being, says sister Frederica, "to make them good women and good mothers afterwards."

*All the children*, after dressing in the morning, are required to repair to the washroom, when all kneel down in their playroom, where prayers are said aloud by one of them for four or five minutes. This exercise is repeated at night. These prayers are the Lord's prayer, the angelical salutation, the apostolic creed, the acts of faith, hope, and charity, and the prayer for the president. In the act of faith are these words: "*O my God, I firmly believe all the sacred truths Thy holy Catholic Church believes and teaches, because Thou hast revealed them, Who canst neither deceive nor be deceived.*" Protestant children are not required to say those prayers, but they must be present, and, "for form's sake, and the preservation of order, must kneel down during the time occupied in saying them. If objection is made, they need not kneel, but may sit instead. And, as a matter of fact, some do object, and sit, rather than kneel down."

"Only to Catholic children are instructions given in the doctrines of the Catholic Church," and this is done "at the request of their friends." "*The Protestant children are asked to say their prayers in silence to themselves.* If they asked to do otherwise, they would be permitted to do so, but they have never asked it."

"According to the regulations of the organization, should a minister of a denomination other than the Catholic ask to hold services at the orphan asylum, the children of Catholic

ents would be permitted to attend, *provided that his subscription would not be on religious matters.*"

"In speaking of religious services held at the asylum," says Sister Vibianna, "I mean exclusively Catholic services. We could permit other religious services to be held, if we have not children enough. We would permit any orphan to come down and see children of his own belief. We would give him a room for the purpose of giving them instruction." Sister Frederica says: "I require all orphans, half orphans to attend morning and evening prayer, unless ordered by friends or parents to the contrary. I do not have passages in the Bible read—but they have catechism for the Catholic children every morning. I do not require them to attend to the exercises when the catechism is read. If they are present in the room. Any orphan or half-orphan may read any bible, and pray as they wish—that is, *privately*. We do not permit it in the room used for prayer." \* \* \*

In regard to religious instructions, we are guided by the instruction of the orphan's friends. We instruct the Catholic children in the Catholic faith."

From all the preceding facts it seems to us, that but one conclusion can be arrived at, which is, that the Nevada Orphan Asylum is a sectarian institution. Webster defines sectarian as follows: "Pertaining to a sect or sects; peculiar to a sect; bigotedly attached to the tenets and interests of a denomination." He also defines the word as "one party in religion which has separated itself from the established church, or which holds tenets different from those of the prevailing denomination in a kingdom or state,"

it was argued by petitioner's counsel that the word was not used in this sense in the constitution. We do not think so.

It was used in the popular sense. A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or churches. In the sense intended in the constitution, every church of that character is sectarian, and all members thereof are sectarians. The framers of the constitution undoubtedly considered the Roman Catholic a sectarian church.

(Const. Debates, 568 *et seq.*) The people understood it in the same sense when they ratified it.

Counsel for petitioner lay great stress upon what are claimed to be the facts; that is to say, that *Protestant* children are taught only those things which are common to all Christian people, and that only the children of *Catholic* parents are taught the principles of the Catholic Church. In the first place, the facts are not so, and in the second place, if they were, the instruction given to the Catholic children would stamp the institution as sectarian.

The facts are, that all exercises of a religious nature are of one kind, exercises appertaining to the Catholic Church, and they are regular, and form as much a part of the daily routine, as does the study of geography or arithmetic. And those exercises, although brief, are such as leave their impress upon the plastic mind of the child. We refer now to the exercises of a religious nature, in which all take part. The act of faith is repeated by some child, in the presence of all the rest in a kneeling posture, and in doing so he is required to say he believes "all the sacred truths Thy holy Catholic Church believes and teaches, because Thou hast revealed them, Who canst neither deceive nor be deceived." It is idle to say that the kneeling Protestant children are not required to join in those prayers, simply because one child articulates the words for all. Their very posture is a sufficient answer to the proposition. And in addition to these general daily exercises, the children of Catholic parents are taught the catechism, which imparts all the fundamental doctrines of the church.

It does not matter that Catholic parents desire their children taught the Catholic doctrines, or that Protestants desire theirs to be instructed in Protestantism. The constitution prohibits the use of any of the public funds for such purposes, whether parents wish it or not. If all the children at the asylum were Catholics, and all their parents or friends wished them taught Catholic dogmas, those facts would not make the institution non-sectarian. *It is what is taught, not who are instructed, that must determine this question.* If the instruction is of a sectarian character,

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The school is sectarian. A church is as much sectarian if every person in attendance is a communicant, as it would be if a part were of one belief and the balance of another. The word "sectarian," in the amendment, is evidently used in the same sense as in the original constitution. It was intended that public funds should not be used, directly or indirectly, for the building up of any sect. And any instruction or exercises which, in common schools, would be of sectarian character, are so at the St. Mary's School. Suppose that, in the public schools of Virginia, the teachers could require all the children, twice each day, to go through the religious exercises of the St. Mary's School, could any one, Protestant or Catholic, hesitate to say that sectarian instruction was being imparted? Would any trustee, regardless of his religious faith, after taking an oath to support, protect, and defend the constitution of the state, dare to say it was not being violated each morning and evening? Would any teacher of the Presbyterian faith be permitted to require the whole school to kneel while one could repeat the Catholic article of faith, after substituting "Presbyterian" for the word "Catholic?"

People of nearly all nationalities and many religious beliefs established our state. They met on common ground, and in the most solemn manner agreed that no sect should be supported or built up by the use of public funds. It is a wise provision and must be upheld.

One other question requires consideration. It is claimed that even if petitioner is a sectarian institution wherein sectarianism is taught, still the money now demanded, if paid, could not be used for sectarian purposes, but for the physical necessities of the orphans, and that it is no more than required therefor.

It can not be doubted, that the appropriation was intended to be a mere charity. The act is entitled, "An act to appropriate funds for the relief of the several orphan asylums of this state." All asylums "established on a self-sustaining basis, where the inmates are required to pay for admission, support, and maintenance therein, and such asylums as are now supported entirely by state aid, shall not

## Points decided.

be entitled to the benefits of this act, but only such as are supported and sustained wholly or in part by *charitable* donations." (Stat. 1881, 122.) And it is alleged in the petition that petitioner has been, ever since its organization, and still is, almost entirely supported by contributions of money and other assistance from the charitable.

The seventy-five dollars appropriated for each orphan is a contribution only. Should it be given, it would be used for the relief and support of a sectarian institution, and in part, at least, for sectarian purposes. Should it be admitted that it would be used in part for legitimate purposes, still, it is impossible to separate the legitimate use from that which is forbidden.

Mandamus denied.

[No. 1,071.]

JOSEPH MENDES, APPELLANT, v. FRANK FREITERS, DEFENDANT, AND HIRAM JOHNSON ET AL., INTERVENORS AND RESPONDENTS.

**ATTACHMENT UPON ACCOUNT STATED FOR GREATER AMOUNT THAN IS ACTUALLY DUE—WHEN NOT CONSTRUCTIVE FRAUD—SUBSEQUENT ATTACHING CREDITORS.**—When a party acts in good faith, he is not guilty of constructive fraud in commencing an attachment suit upon a stated account for a greater sum than is actually due. His attachment to the extent of the amount actually due to him is valid against subsequent attaching creditors.

**AMENDMENT OF COMPLAINT—BETWEEN PARTIES.**—As between the plaintiff and the defendant, plaintiff had the right to amend his complaint by adding a count for goods sold and delivered, and money advanced by him to defendant, which included the same items that were embraced in the original complaint upon an "account stated."

**MISTAKE IN ORIGINAL COMPLAINT—WHO CAN TAKE ADVANTAGE OF.**—If the plaintiff made a mistake in declaring upon an "account stated" instead of for goods sold and delivered, etc., the defendant is the only one that could have taken advantage of the error.

**AMENDMENT—EFFECT OF UPON ATTACHMENT—DEFENDANT.**—Defendant could not demand a release of the property attached because of the amendment. As to him, plaintiff's lien was in force after as well as before the amendment.

**IDEM—INTERVENORS.**—An amendment changing the form of action merely, or adding a new count for the same, will not dissolve the attachment as to intervenors.

## Argument for Appellant.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

*C. J. Lansing and Bishop & Sabin, for Appellant:*

I. Admitting that the account as stated was for a greater sum than was actually due, parol evidence was admissible to show that the settlement was not made as a final settlement, and was not so considered by the parties at the time it was made, but was approximately correct, and was to be corrected when the true balance was determined.

II. Such an agreement is valid. There is neither actual or constructive fraud in the transaction. By the terms of the contract, and under said accounting, the true balance due from defendant to plaintiff could be recovered from the defendant, but nothing more.

III. Upon the evidence and the facts in the case, every act of plaintiff was honest and legal, no act of his was fraudulent, nor can it be legally so construed. (*Travis v. Epstein*, Nev. 117; *Batterman v. Pierce*, 3 Hill, 171.) The original complaint was sufficient to sustain the attachment.

IV. If the case had been tried without the amended complaint, the correct balance due plaintiff could have been proven, notwithstanding the amount fixed and named in the account stated.

V. The complaint being properly amended, the attachment was not rendered nugatory or ineffectual. The attachment was properly issued in the first instance, and is still valid. (*Hathaway v. Davis*, 33 Cal. 161.)

VI. The statement of the account in no way affected or impaired the original debt, so long as said statement or writing remained unpaid. (*Brewster v. Bours*, 8 Cal. 501; *Bole v. Sackett*, 1 Hill, 516.)

VII. The attachment lien of plaintiff could not be postponed to the liens of the intervenors, even if there was parol fraud on the part of the plaintiff. The most that could be done in this way would be to postpone the attachment lien of plaintiff for the amount found to have been fraud-



## Argument for Respondents.

ulently claimed, after the payment of the true amount found to be due to the plaintiff from the defendant. (*Coghill & Co. v. Marks*, 29 Cal. 673; *Patrick v. Montader*, 13 Id. 434; *Gamble v. Voll*, 15 Id. 509.)

*Thomas Wren and Crittenden Thornton*, for Respondents:

I. The original complaint of plaintiff stated a cause of action which did not exist. There never was an account stated between the plaintiff and the defendant Freiters.

II. The amended complaint does not state facts sufficient to constitute a cause of action. The judgment rendered in favor of plaintiff against the defendant Freiters falls for lack of support by a proper pleading. The intervenors can attack the judgment in this manner. If the plaintiff's judgment is erroneous, and ought to be reversed for error on direct attack, he has no standing in court to assail the judgment which postpones the lien of his attachment to those of the intervenors. If he ought not to have a judgment, he ought not to have a lien by attachment superior to those of the intervenors.

III. An account stated may be opened by either party upon proof of fraud or mistake seasonably discovered. (*Perkins v. Hart*, 11 Wheat. 256; *Lockwood v. Thorne*, 1 Ker. 170; *Toland v. Sprague*, 12 Pet. 300.)

IV. The second count unites an attempt to state a cause of action for goods furnished and delivered, with an attempt to state a cause of action for moneys advanced, paid out, and expended. Such a complaint is bad in substance. (*Buckingham v. Waters*, 14 Cal. 147; *Cordier v. Schoss*, 13 Id. 580; *Watson v. S. F. & H. B. R. R. Co.*, 41 Id. 19.)

V. An attachment upon a cause of action not yet due, or for a sum greater than that actually due, is void against subsequent attaching creditors. (The authorities cited are referred to in the opinion of the court.)

VI. A lien by attachment is good or bad as a whole. It is either wholly good or entirely bad. (*Fairfield v. Baldwin*, 12 Pick. 397; *Pierce v. Partridge*, 3 Metc. 44; *Wilder v. Fondsey*, 4 Wend. 104; *Kendall v. Lawrence*, 22 Pick. 545.) The point for which we contend has for a century been the



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settled doctrine as applicable to contracts of every class within other sections of the statute of frauds. (*Lord Lexington v. Clark*, 2 Vent. 223; *Chater v. Bickett*, 7 T. R. 201; *Crawford v. Morrell*, 8 Johns. 253; *Sherrill v. Crosby*, 14 N. H. 358; *Moran v. Hays*, 1 Johns. Ch. 339; *Botsford v. Burr*, 2 Id. 405; *Steere v. Steere*, 5 Id. 1; *Fuller v. Reed*, 38 Id. 99.)

VII. No right of action accrues to an accommodation-maker, or indorser, or guarantor, or surety against his principal, until payment in fact of their common obligation. (*Chilton v. Whiffin*, 3 Wils. 13; *Goddard v. Vandergymden*, Id. 262; *Young v. Hockcliffe*, Id. 346; *Taylor v. Higgins*, 3 East, 269; *Maxwell v. Jameson*, 2 B. & A. 51; *Don v. Goodrich*, 2 Johns. 213; *Powell v. Smith*, 8 Id. 249; *Summing v. Hackley*, Id. 202; *Hoyt v. Wilkinson*, 10 Pick. 3; *Morrison v. Berkeley*, 7 S. & R. 238; *Miller v. Howry*, 1 P. & W. 380; *Hodges v. Armstrong*, 2 Dev. 253.)

VIII. The attachment of the plaintiff for the amounts not due was unquestionably voidable by the intervenors as subsequent attaching creditors. The inference of fraud in such a case is not a mere presumption, disputable and inconclusive, but a legal conclusion, incapable of refutation. (*Wilcombe v. Dodge*, 3 Cal. 260; *McFarland v. Pico*, 8 Id. 26; *Pierce v. Jackson*, 6 Mass. 242; *Swift v. Crocker*, 21 Pick. 241; *Smith v. Gettinger*, 3 Ga. 140; *Hale v. Chandler*, 5 Gibbs, 531.)

By the Court, LEONARD, C. J.:

This appeal is from a judgment in favor of the intervenors above named, whereby it was ordered and adjudged that the lien of plaintiff's attachment upon certain personal property be postponed to the liens of the intervenor's attachment, and that the sheriff should sell said property, and that of the proceeds of such sale pay, first, the judgments of the intervenors against defendant in the order in which they were issued; and, second, out of the surplus, if any, satisfy plaintiff's judgment in whole or part. Plaintiff's attachment was prior in time, and his judgment was for seven thousand nine hundred and fifteen dollars and ninety-

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seven cents. The aggregate of intervenor's judgments was three thousand five hundred and eighty-eight dollars and forty-nine cents. The value of the property attached is insufficient to satisfy plaintiff's judgment. The defendant is insolvent, and has no other property out of which the several judgments can be satisfied.

In his original complaint plaintiff declared upon an account stated between him and defendant on the eighth day of August, 1879, and alleged that upon such statement, a balance of ten thousand one hundred and one dollars and ninety-four cents was found due to him from defendant, no portion of which sum had been paid, and asked judgment for that amount. Subsequently defendant filed a demurrer to the complaint, which he afterwards withdrew, and his default was duly entered; but in the meantime the petitions of intervenors had been filed and served. Thereafter, with permission of the court, and without objection on the part of intervenors, plaintiff filed an amended complaint upon an account stated between him and defendant, on said eighth day of August, but alleged that both he and the defendant made a mistake and error as to the amount really due from the latter to him, and that the amount due on said date was seven thousand nine hundred and fifteen dollars and ninety-seven cents, instead of ten thousand one hundred and one dollars and ninety-four cents. And "for further cause of action" he alleges that, "on the eighth day of August, 1879, defendant was, and now is, indebted to plaintiff in the sum of seven thousand nine hundred and fifteen dollars and ninety-seven cents, upon a balance due for goods furnished and delivered, and for moneys advanced, paid out and expended, for defendant, at his special instance and request, between January, 1871, and the eighth day of August, 1879.

The petitions of intervention charged that plaintiff's action was brought, and his attachment issued, to hinder, delay, and defraud the creditors of defendant, by collusion between plaintiff and defendant. Intervenor Colerick also alleged, upon information and belief, that when the action was commenced defendant was not indebted to plaintiff in

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sum; and intervenor Johnson in the same manner alleged that defendant was not indebted to plaintiff in the sum of ten thousand one hundred and one dollars and ninety-four cents; that, if he was indebted in any sum, it was several thousand dollars less than that amount, and that he did not know and had no means of knowing or ascertaining the exact amount due, if anything. Plaintiff answered, denying all charges of fraud stated by the intervenors, and made allegations similar to those set out in the amended complaint, as to the amount due to him, and as to error and mistake in stating that amount, and in commencing the action for a larger sum than was actually due. It will be seen that one of the issues raised between plaintiff and the intervenors was as to the amount actually due to the former from the defendant, and another was upon the alleged fraud. Plaintiff was permitted, without objection on the part of intervenors, to introduce evidence to sustain his allegations in the amended complaint as to the amount actually due, and to repel the charges of fraud. Among other things, the court found that there was no collusion between plaintiff and defendant, and that plaintiff did not intend to hinder, delay, or defraud the other creditors of defendant, but that on the evening previous to commencing his action plaintiff demanded an acknowledgment from defendant of the latter's indebtedness, which was given in writing for the sum of ten thousand one hundred and one dollar and ninety-four cents, with the understanding that said amount was not due, the acknowledgment should be corrected so as to conform to the truth; that when plaintiff received the acknowledgment he did not know exactly how much was due, but did know it was not as much as the sum acknowledged, and that he took it with margin enough in his favor to cover all that defendant owed him, and all that (plaintiff) had become defendant's surety for; that plaintiff knew at the time he commenced his action for ten thousand one hundred and one dollars and ninety-four cents, that defendant did not owe him that amount, either directly or indirectly, on account of indorsements or otherwise. As to the execution of the acknowledgment, plaintiff tes-

tified, in substance, that defendant signed it; that they guessed at the amount due; that they did not examine the books; that it was given and received with the understanding that, if there was a mistake, it should be corrected.

As conclusions of law, the court found, 1. That plaintiff was guilty of constructive fraud in taking an acknowledgment for a sum greater than was actually due; 2. That there never was an accounting; 3. That in commencing his action upon an account stated, plaintiff commenced upon a cause of action that did not exist, and that the attachment issued upon said cause of action was invalid and void as to subsequent attaching creditors; and, 4. That plaintiff was entitled to judgment against defendant for the sum of seven thousand nine hundred and fifteen dollars and ninety-seven cents, the amount claimed in the amended complaint. The amount of this judgment was made up of the following items, viz:

a. There was due to plaintiff, on direct account, five thousand three hundred and sixty-one dollars and eighty-five cents.

b. A note executed for defendant's benefit, upon which plaintiff was joint maker, for one thousand dollars. This note was due when the action was commenced, and according to plaintiff's testimony, it was paid by him before the commencement of the action.

c. A note for six hundred dollars, of like character, not due when the action was commenced, nor when the amended complaint was filed. Plaintiff testified that he paid this note the next day after the attachment.

d. An account against defendant in favor of Dunkel & Co., for which plaintiff was responsible. There is no evidence that this bill has ever been paid.

We deem it unnecessary to decide whether or not the evidence supported an action upon an account stated. The question is, Did the court err in postponing the attachment lien of plaintiff to those of intervenors, and in awarding to the latter priority of payment to the extent of their judgments?

There was a large amount of money actually due to plaintiff, and this action was commenced to recover it, even though

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The action was for a larger sum. A cause of action was well stated in the original complaint, whether in fact it existed or not. It was a cause of action upon which an attachment could be had, and the court acquired jurisdiction of the whole subject-matter.

It may be admitted that the pleader first mistook his form of action; but, as between the original parties, it can not be doubted that, upon leave granted, plaintiff had the right to amend as to form merely, by declaring upon the original demand only; or that he could amend by adding a new count upon that demand, setting forth the subject-matter of the original debt, especially where, as in this case, it is apparent upon the face of the amended complaint, that the demand stated in each count is in fact the same. (*Vibband v. Underick*, 51 Barb. 627; *Tierman's Ex. v. Woodruff*, 5 McLean, 136.)

The amendment having been rightfully made, it relates back to the commencement of the action, and makes the complaint as if it had been originally drawn as amended. (*Dana v. McClure*, 39 Vt. 201; *Ward v. Kalbfleish*, 21 How. 295.)

Again, if the pleader made a mistake in declaring upon the account stated in the original complaint, we are of the opinion that the defendant alone could have taken advantage of the error. (*Moresi v. Swift*, 15 Nev. 220; *Patrick v. Montader*, 13 Cal. 448.)

In *Ball v. Clafin*, 5 Pick. 306, the court said: "But it is said that on the *indebitatus assumpsit*, as for goods sold, the plaintiff could not have prevailed, so that a second attachment would come in. We do not understand that it is the right of third parties, either creditors or bail, to avail themselves of a mere defect in the form of declaring. If it were so, no amendment could be allowed, and the rule would be obligatory. It is to cure defects of form that the statute and the rule were made, and where the plaintiff has the right to the value or the price of goods which have come to the hands of defendant in such a manner as that he is accountable on implied or express contract for the value or the price, the form of the action is wholly unimportant to third

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persons, although they may eventually be interested in the suit. There is but one contract, one cause of action, one single matter of the suit. The plaintiff has mistaken the manner of declaring for it. This is the very case where, by virtue of the statute, he is entitled to amend."

It is plain that defendant could not have demanded a release of the property attached because of the amendment, and consequently that, as to him, plaintiff's lien was in force after as well as before the amendment.

The effect of the amendment upon intervenors remains to be considered, and upon this question a fair result of all the authorities is that, an amendment changing the form of the action merely, or substituting or adding a new count for the same, will not dissolve an attachment. (*Laighton v. Lord*, 29 N. H. 257; *Austin v. Town of Burlington*, 34 Vt. 512; *Hill v. Smith*, Id. 541; *Wright v. Brownell*, 3 Vt. 440; *Ball v. Clafin*, 5 Pick. 304; *Wood v. Denny*, 7 Gray, 541; *Seeley v. Brown*, 14 Pick. 177; *Page v. Jewett*, 46 N. H. 443; *Müller v. Clark*, 8 Pick. 413.)

But was plaintiff, under the circumstances shown, guilty of constructive fraud in commencing his action, for more than was due? We quote from the court's opinion: "The commencement of the action in the first place for more than thirty-five per cent. more than was due, with knowledge of an excess, in my opinion, amounted to *constructive fraud*; however innocent, or rather, as I think, thoughtless, the act may have been."

The court also held that, "a mistake in seeking to recover more than plaintiff was legally entitled to was no excuse." In considering this question we must keep constantly in mind the fact that, plaintiff was not guilty of *actual fraud*, for so the court found. In other words, he did not intend to recover more than was legally his own. He did not, in fact, intend to hinder, delay, or defraud any other creditor. We must remember, too, that penalties and forfeitures are visited upon fraud and wrongdoing. We freely concede that, if plaintiff had commenced his action for a sum in excess of the amount that he knew was due, with the intention of obtaining judgment for such sum, and satisfying it



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of defendant's property, thus defrauding other creditors, the attachment would have been void *in toto*, and ought to have been postponed to those of intervenors. Counsel for respondent say: "The rule is that an attachment upon a cause of action not yet due, or for a greater sum than is actually due, is void as against subsequent attaching creditors," and *Taafe v. Josephson*, 7 Cal. 352; *McKenty v. Gladwin*, 10 Id. 227; *Scales v. Scott*, 13 Id. 76; *Wilcoxson v. Burton*, 27 Id. 228; *Fairfield v. Baldwin*, 12 Pick. 388; and *Pierce v. Partridge*, 3 Metc. 44, are relied on in support of the doctrine stated. The first case has been overruled. (See *Strick v. Montader*, 13 Cal. 442, and *Gamble v. Voll*, 15 Id. 510, where it is held that "the mere fact that the judgment is taken for too much is not itself conclusive proof of fraud.")

As to each case cited wherein the sum sued for was greater than the amount actually due, unless *McKenty v. Gladwin* and *Scales v. Scott* are exceptions, judgment was knowingly given for the full amount, after the true indebtedness was ascertained; while in this case, judgment was rendered for more than the court found was due.

In *Wilcoxson v. Burton*, the court found that the actual indebtedness was nine thousand and odd dollars less than the amount for which the note mentioned in the confession of judgment was given, and that said excess was included in the note for the purpose of defrauding creditors. And the court said: "These facts, being given, the judgment is questionably void, citing *McKenty v. Gladwin* and *Scales v. Scott*."

In *Tully v. Harloe*, 35 Cal. 308, the court referred to the former California cases above cited, and said: "They have merely established the doctrine that a note or mortgage given for a greater sum than is due, is void in any event, so far as the excess is concerned, and *in toto* unless satisfactorily explained."

In *McKenty v. Gladwin*, upon the authority of which the court below particularly relied in rendering the judgment appealed from, the intervenors claimed, and so the court held, that the note in suit was void as to creditors of

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the defendant, because a part of its consideration was fraudulent. It was executed on the fifteenth or sixteenth of June, 1867; but antedated to the fourth of June, and by its terms drew interest from date, at the rate of two per cent. per month until paid. The entire consideration for which it was given was composed of eight distinct items, three of which, amounting to twelve thousand dollars, were due July 3, 1857, and the other five were due June 19, 1857, and no portion of those items were drawing interest. The plaintiff testified that he had no other motive for antedating the note than that he should receive interest for the ten days. Upon those facts the court held that the note itself was entirely void as to creditors, under the statute of frauds, which makes every bond or other evidence of indebtedness, given with the intent to hinder, delay, or defraud creditors, void; evidently upon the familiar doctrine that if a part of an entire contract is void under the statute, it is void *in toto*, and the further doctrine that every man is presumed to know the necessary consequences of his act; and if an act necessarily hinders, delays, or defrauds creditors, then the law presumes it is done with a fraudulent intent. Upon the same principles was *Scales v. Scott* decided. Independently of the question of fraud, the court could not have intended, in McKenty's case, to declare the law to be, "that if there was no consideration for a part of the principal sum for which the note was given, the whole note would be void." (Story on Prom. Notes, sec. 187; *Ayres v. Husted*, 15 Conn. 511.) It is evident the court proceeded upon the theory that, the plaintiff *knowingly intended* to accomplish what the law in terms forbade, although he did not know that he could not, legally, take a note bearing interest in substitution for debts that bore none. But in this case, the acknowledgment was given and received with the distinct understanding that all errors should be corrected, and this fact eliminates from the case the element of fraudulent intent in taking it, or of intending to do a forbidden thing, either knowingly or ignorantly. Here, a strict adherence to the entire understanding could defraud no one. There, the result of an enforcement of the com-



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act, according to its terms, must have been to defraud other creditors.

And in the absence of collusion between plaintiff and defendant, the former had good reason to expect, when he commenced his action, that the latter would set up the facts in his answer, and thereby necessitate a fulfillment of the entire agreement, as to correction, or enable him, voluntarily, to do so. Suppose, with the same agreement, without knowing the sum actually due, plaintiff had taken a note for ten thousand dollars, and had brought his action thereon. Would the bringing of such action have been constructive fraud? We think not. *Cushing v. Gore*, 15 Mass. 72, was just such a case. There plaintiff had indorsed sundry notes for the defendants. He took Grafton, one of the defendants, to his counting-room to adjust the accounts between them, and to get security for whatever might be due to him. He took from Grafton a note for three thousand dollars, to enable him, by attachment or otherwise, to indemnify himself as indorser, it being understood that he was to take up and discharge the notes indorsed by him as they should become due, and to hold the note then given, good only for the amount of the others which he should take up. The amount of the notes so indorsed by plaintiff was not then ascertained; and therefore the new note was given for a sum supposed to be fully sufficient to meet the others. It turned out that plaintiff had indorsed notes amounting to one thousand seven hundred and forty-seven dollars and eighteen cents, which sum, with interest, he claimed on the note in suit.

The court instructed the jury that, "an agreement by the plaintiff to take up and discharge, at his own expense, the notes so indorsed by him when due, was a sufficiently legal consideration for the note in suit, to the extent for which he was liable as indorser, and that it was not necessary that such agreement should have been in writing."

Subsequent to plaintiff's attachment other creditors attached the same goods, upon demands which fell due before either of the notes indorsed by plaintiff became due, and the defendants contended that this operated as a fraud upon

other creditors. On this point the judge instructed the jury that the defendants, when they were unable to pay all their debts, might give a preference to any one creditor by paying or giving him security; and that, as they might do this by assigning to plaintiff any of their goods, so they might do it by giving a note, to anticipate the day of payment, and so enable him to attach their goods. The instructions were sustained by the supreme court. We quote from the opinion: "We think when an indorser has, either expressly or impliedly, undertaken to pay the note by him indorsed, there can be no question that such undertaking is a good and valuable consideration for a promissory note. The case finds that, it was understood between Grafton and the plaintiff, that the latter was to pay the notes he had indorsed. There was no direct evidence of this, but the jury have inferred the fact, and they had a lawful right to do so. It might be inferred, we think, from the mere fact of a note having been given with a view to cover those indorsements; and had the plaintiff failed to pay the notes as they came due, so that the defendants had been troubled or put to expense, we see no reason to doubt that they might have maintained an action against them upon an implied promise. \* \* \* Nothing is more common than for debtors, on the eve of failing, to assign property for the security of indorsers \* \* \* and others who are thought to be entitled to favor. Such assignments are held valid here; nor is it an objection that the value of the property assigned exceeds the sum for which the assignee is liable, unless the transaction should appear to be fraudulent. \* \* \* He (plaintiff) has recovered for no more than the amount of the notes indorsed by him, and which he has actually paid. If he had recovered more he might have been charged as trustee for the surplus; or, perhaps, if he had taken judgment knowingly for more than was due to him, and had levied his execution for the amount, this might have been evidence of collusion which might avoid his judgment in favor of other creditors." We think the mere bringing of suit upon an account stated for more than is actually due is no more evidence of fraud, actual or constructive, than is the

commencement of an action upon a promissory note when a portion of the consideration has failed, or when there was, at the beginning, a partial want of consideration. We are unable to find a case that holds an attachment void, in the absence of actual fraud, because the action was brought for more than was due, but judgment was taken for no more than the true amount.

There are cases like *Pierce v. Jackson*, 6 Mass. 244, where the plaintiff had no cause of action when the suit was commenced, which hold that an attempt to thus gain preference is fraud upon other creditors; and like *Hale v. Chandler*, 3 Ch. 532, where plaintiff brought suit upon a note not due, as well as upon an account which was due, for the purpose of making the amount claimed sufficient to give the court jurisdiction, which arrive at the same conclusion. Undoubtedly the plaintiff must have a present cause of action before he can sue. But it would be a startling doctrine to hold, that the court must decide at his peril just the amount that the law will give him upon a disputed claim. Neither *Fairfield v. Baldwin* nor *Pierce v. Partridge*, *supra*, supports the position of the defendants' counsel.

As to the first, says the court in *Felton v. Wadsworth*, 7 Ch. 589; "That was a case where a judgment was knowingly, deliberately, intentionally, and fraudulently obtained for more than was due, for the purpose of preventing the best creditors from obtaining their debts out of the effects of their debtors. This fraudulent purpose was followed up by taking out execution and applying the goods or moneys of the debtor to pay this fraudulent execution. \* \* \* The actual fraud is the essential element in the case. \* \* Nor does it appear that in *Pierce v. Partridge* the court intended to extend the principle of the case of *Fairfield v. Baldwin*, but, on the contrary, the case of *Pierce v. Partridge* is expressly declared to be within the principle of the case of *Fairfield v. Baldwin*. Both of these cases, therefore, were decided on the ground of fraud, and it is difficult to see on what other ground a party could be decreed of a just debt."

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The whole opinion is instructive in this connection, and in our judgment enunciates the true doctrine.

But it is said by counsel for respondent that a lien by attachment is either good or bad as a whole, while for appellant, it is urged, that his attachment was valid, at least to the amount actually due from defendant to him. We think, in the absence of actual fraud, that appellant's claim is sustained by reason and authority. None of the cases cited by respondent upon this point are opposed to this conclusion, while those in its favor are numerous.

In *Coghill v. Marks*, 29 Cal. 677, defendant having failed to answer, plaintiff took judgment for nine hundred and eleven dollars and sixty-four cents. Under the issue taken on intervention, the court found that as to four hundred and sixty-five dollars and eighty-five cents, parcel thereof, the action had been prematurely brought. There was no actual fraud in that particular. Upon those facts the supreme court said: "But the court, instead of reducing the prior lien of the plaintiff to the amount which was due at the date of the attachment, postponed it altogether to the subsequent lien of the intervenor, directing the judgment of the latter to be first paid out of the proceeds of the property, which was erroneous." (See also *Patrick v. Montader*, *Tully v. Harloe*, and *Felton v. Wadsworth*, *supra*.)

*Ayres v. Husted*, 15 Conn. 519, was a contest between attaching creditors of one Crissey. Husted's judgment was rendered upon a note executed by Crissey for one thousand one hundred and twenty-five dollars. The note was given for the purpose of enabling Husted to secure himself by attachment for certain indebtedness due from Crissey and for the indorsement of a note on behalf of Crissey, which was not due. There was no express agreement by Husted to pay the note, or to indemnify Crissey against it. The arrangement between them was made without fraudulent intent.

Said the court: "We think that the judgment is clearly valid, so far as it respects the amount of such indebtedness. The consideration of the judgment is divisible, and that part of it which consists of the debt is easily capable of

ertainment. The parties to the note are exonerated from fraudulent intent in the arrangement which led to its execution. That part of the consideration which consists of such debt is sound; and we see no reason why, for that, the note should not be sustained. There is no principle which a note, the consideration of which consists of debts, some of which are valid and others are invalid, can be held, in the absence of fraud, to be wholly void."

And in *Sanford v. Wheeler*, 13 Conn. 165, the same court held that a mortgage executed by the maker to secure an conditional note, payable on demand, made up of a debt from the mortgagor, and also of a liability of the mortgagee, as surety, was valid as against the creditors of the mortgagor; for the amount of the debt, although it was set aside for the remainder. (And see *Weeden v. Hawes*, 10 Conn. 50; *North v. Belden*, 13 Id. 382.)

In *Sanford v. Wheeler*, it is said: "The superior court found that there was no actual fraud in this transaction. The consideration of this note is very distinctly divisible; in part, and to an ascertained amount, it consists of a bona fide debt, and in part of mere liabilities. The present appellant appeals to a court of equity against this mortgage. He must come, then, as one disposed to do that justice to his adversary which he demands from him, and this he can do while he seeks to deprive him of a security for an existing debt; and this court, in the exercise of equitable powers, can give aid to no such attempt. If the facts found in the present case are only such as have a probable tendency to deceive or mislead, without the *malo animo* necessary to constitute actual fraud, they may constitute what is sometimes termed constructive fraud; and then, a court of equity will, if it be practicable, give effect to the security, so far as to permit it to stand in favor of such part, intended to be secured by it, as is unaffected by fraud or other legal infirmity."

Our opinion is, that the court erred in postponing the sale of plaintiff's lien to the liens of intervenors, and in dividing the proceeds of a sale of the property attached accordingly. For the amount actually due to plaintiff, he

## Points decided.

ought, in the absence of actual fraud, to receive the preference which the law gives to the first attaching creditor who acts in good faith. Whether or not his lien should have been postponed as to any amount for which he was liable as surety, and which had not been paid, we shall not decide, because it has not been fully discussed; and a decision upon it is not necessary upon this appeal.

In addition to the authorities cited by counsel for respondents, the following may be consulted: *Ayres v. Husted*, Conn. 512; *North v. Belden*, 13 Id. 376; *Sanford v. Wheeler*, Id. 167; *Cushing v. Gore*, 15 Mass. 72; *Swift v. Crockett*, 21 Pick. 243; *Little v. Little*, 13 Id. 426; *Baird v. Williams*, 19 Id. 384.

The judgment and order appealed from are reversed.

[No. 1,094.]

THOMAS NASH AND MARY A. KENNEDY, APPELLANTS, v. JOHN MULDOON, DEFENDANT, LLOYD H. BARTON ET AL. RESPONDENTS.

TRANSFER OF BIDS—EXECUTION SALE—MONEY RECEIVED BY SHERIFF IN HIS OFFICIAL CAPACITY.—N. and K., as judgment creditors, purchased at sheriff's sale under execution certain cord-wood. No money was paid, each creditor intending that his bid should be credited upon execution. The sheriff demanded money for his fees, and also for the purpose of paying preferred labor liens upon the property. The creditors, at his suggestion, disposed of their interests to M., and M. then, after paid the money to the sheriff, who neglected and refused to pay the same, or any part thereof, to the judgment creditors. Evidence relating to this transaction reviewed: *Held*, that the disposal of the interests of the judgment creditors to M. was a transfer of the property instead of a sale of the property, and that the sheriff received the money in his official capacity.

LABOR LIENS—COMMENCEMENT OF ACTION—NOTICE.—The sheriff is not justified in paying labor liens before the commencement of an action to enforce them, after notice that the liens are disputed, or when the party in interest had no notice of the claim of the laborers.

SHERIFF'S EXPENSES IN TAKING CHARGE OF PERSONAL PROPERTY—CERTIFICATE OF DISTRICT JUDGE.—The sheriff is not authorized to withhold money for his expenses incurred in preserving personal property, levied upon, unless his charges have been certified to by the district judge as just and reasonable.



## Argument for Appellants.

USAL OF SHERIFF TO PAY MONEY—SECTION 10 OF "ACT RELATING TO SHERIFFS" (STAT. 1861, 104) CONSTRUED—PENALTIES.—The penalties imposed by section 10 of the "act relating to sheriffs" was intended as a punishment for intentional wrongdoing, and are not to be enforced in cases of mistakes, or errors, of judgment, made by the officer in good faith.

LIABILITY OF SHERIFF AND HIS SURETIES.—The sheriff and his sureties are liable for all moneys received by him in his official capacity, which he neglects or refuses to pay over, on demand, and for the penalties imposed by the statute when he does not act in good faith.

PAYMENT OF MONEY AFTER RETURN DAY OF EXECUTION.—The sheriff and his sureties are liable for all moneys collected by him from the sale of property levied upon before the return day of the writ of execution, notwithstanding intermediate the levy and sale, or payment of the money, the writ may have become *functus officio*.

RETURN TO WRIT—NOT NECESSARY TO AUTHORIZE PROCEEDINGS UNDER THE STATUTE.—The return of the sheriff, admitting the receipt of the money is not a condition precedent to the institution of proceedings under the provisions of the statute. The receipt of the money may be established by other evidence.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts appear in the opinion.

A. C. Ellis and W. H. Dickson, for appellants:

I. The "act relating to sheriffs" (Stat. 1861, 104, sec. 10), is constitutional. It is clearly within the scope of the powers of the legislature to prescribe this practice and proceeding, both as to sheriff and sureties. (*Buckmaster v. Lake*, 5 Gil. 321; *Lewis v. Garrett*, 5 How. (Miss.) 434; *Lewis v. Fellows*, 6 Id. 261; *Earl v. Smith*, 26 Tex. 522; *Wright v. Thorpe*, 44 Ga. 509; *Milor v. Farrelly*, 25 Ark. 358; *Little v. Guest*, 30 Tex. 1; *Halt v. Commonwealth*, 8 Bush, 18; *Wright v. McKenney*, 34 Tex. 568; *Russell v. Rolfe*, 50 Tex. 56; *Supervisors v. Dunn*, 27 Gratt. 608; *Scogins v. Perry*, 46 Tex. 111; *Brown v. Commonwealth*, 6 J. J. Marsh. 636; *Koppikus v. Cap. Com.*, 16 Cal. 243; *Proffat on Jury Trial*, sec. 8; *Lake v. Tolles*, 8 Nev. 285.)

II. There was no proof which established or tended to establish the validity of any of the so-called labor liens. (*Woscia v. Kyle*, 15 Nev. 395.)

III. We deny the validity of the disbursement for alleged advertising, keeper's fees, feeding team, and provisions for

## Argument for Appellants.

keeper, because the court from which the several writs of attachment and executions were issued did not certify that the same was just and reasonable, as required by law. (*v. Stevens*, 48 Cal. 590; *Lane v. McElhany*, 49 Id. 4.)

IV. The pleadings and all the testimony show that prior to the levy of the executions was made, and a sale of the property had before the return day. This shows that the sheriff received the money officially. Even if the levy were made before the actual sale, and the return day intervenes, still the sheriff must sell, and the money received from such sale is received officially, and the sureties are liable. (*Evans v. Governor*, 18 Ala. 659; *Dennis v. Chapman*, 19 Id. 29.)

V. If the money came into the hands of Hill by color of his office, he received it by virtue of his office. And if the parties understood he received it officially it binds the sureties, whether it was received before or after the return day. As to any distinction between *colore officii* and *virtute officii*. (*Van Pelt v. Littler*, 14 Cal. 194; *N. H. S. v. Varnum*, 1 Metc. 34; *Evans v. Governor*, 18 Ala. 659; *Dennis v. Chapman*, 19 Id. 29; *Lucas v. Locke*, 11 West Va. 300; *Knowlton v. Bartlett*, 1 Pick. 271; *McNeary v. Marshall*, 1 Humph. 229; *Beale v. Commonwealth*, 7 Watts, 183; *v. Sureties Alden*, 12 Ohio, 59; *State Bank v. Twiss*, 1 Hawks, N. C., 5.) There can not be any dispute that the parties understood and treated this money as received officially.

VI. The transfer of the bids of Kennedy and Nash, and the acceptance and recognition of such transfer, binds the sheriff and sureties, and this is a proper proceeding. (*C. v. Spencer*, 7 Fred. 14.)

VII. The sheriff, wrongfully and willfully withheld the money. He paid the claims of McRae and McLellan aggregating three hundred and thirty-six dollars, against the protest of petitioners, for which there can be no excuse in fact or in law. We are, therefore, entitled to recover one thousand nine hundred and eleven dollars, and also the penalties of the statute, and in addition five hundred eighty-nine dollars and forty cents which he has paid for illegal labor claims and unauthenticated charges, and the respective penalties of ten per cent. per month interest



## Argument for Respondents.

mence after the established dates of the demands, and the receipt of the money.

III. The law is not construed as strictly in favor of ties on official bonds as ordinary sureties. (12 Ohio, 7 Watts, 183.)

*renmor Coffin, T. D. Edwards, and C. N. Harris, for Respondents:*

There was no transfer of bids by petitioners, but simply a sale by them of the wood sold at sheriff's sale.

If the transactions can be construed into anything other than a sale of the wood, then it must be an attempt on part of petitioners to control the official action of the sheriff, and having been acted upon by the sheriff, was such interference and such an unauthorized dealing between execution creditors and the sheriff as will release the sheriff's bondsmen of all liability as to the results of such unauthorized dealing. (Brandt on Suretyship, Secs. 451, 452; *Wells v. Galt*, 4 Yerg. 491; *Waters v. Carroll*, 9 Id. 491; *Webb v. Amsbach*, 3 Ohio St. 522; *People v. Pennock*, 10 N. Y. 421; *State v. White*, 10 Rich. S. C. 442; *Nolley v. Lumber Co.*, 11 Mo. 447; *Carey v. State*, 34 Ind. 105; *State v. State*, 46 Id. 203; *Wilson v. Broder*, 10 Cal. 486.)

II. There is nothing in the transcript to show that the two thousand and nine dollars ever came into the sheriff's hands either under color of his office or by virtue of his office.

Whatever acts he performed were simply in the capacity of agent for petitioners. It is an admitted fact that the two hundred and nine dollars of the two thousand and nine dollars came into the hands of Lloyd Hill, the sheriff, long before the return day of the execution. For this amount the sheriff's bondsmen can not be held liable upon any theory of law, as he had no authority to receive the money, and did not receive it officially. (*Thomas v. Brawder*, 38 Tex. 447; *Forward v. Marsh*, 18 Ala. 645; *Hill v. Kemble*, 9 Cal. 486; *Barton v. Lockhart*, 2 S. & P. Ala. 109.)

V. The petitioners in this proceeding have mistaken their remedy; the action should have been for a failure to return. The statute penalties against sheriffs for non-pay-

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ment of moneys collected on execution, are only recovered when the sheriff by his return admits the collection of money but refuses to pay it over. (Authorities cited in opinion.)

V. It does not appear from the record that any portion of the money received by the sheriff, officially or otherwise before the return day of the execution, remains in the hands of the sheriff. The utmost that can be claimed is that it has been misapplied. To such a case the statute upon which this proceeding is had, does not apply. (*Gifford v. Smith*, 2 Nev. 374.)

By the Court, BELKNAP, J.

The plaintiffs having severally obtained judgments against the defendant, thereafter moved in the court below to compel the sheriff and his sureties to pay the moneys collected under executions issued upon said judgments, together with the penalties imposed by the law for delinquency in such cases. The statute upon the subject reads as follows: "If a sheriff shall neglect or refuse to pay over on demand to the person entitled, any money which may come into his hands by virtue of his office, after deducting his legal fees, the amount thereof, with twenty-five per cent. damages, and interest at the rate of ten per cent. per month from the time of the demand, may be recovered by such person from him and the sureties on his official bond, on application upon five days' notice to the court in which the action is brought, or the judge thereof in vacation." (Sec. 2000, Comp. L.) The motions were consolidated for the purpose of trial. Judgments were rendered in favor of the plaintiffs. It was proven that on the twenty-first day of November, 1879, plaintiffs, Nash and Kennedy, recovered judgments against defendant Muldoon, aggregating the sum of five thousand six hundred and fifty-three dollars and fifty cents. On the fourth day of December following the sheriff sold certain wagons, animals, and hay, under writs of execution issued upon these judgments, and upon said sale received the sum of five hundred and twenty-seven dollars. A writ of garnishment was issued on the first day of January, 1880, and on the twelfth day of June, 1880, under alias

utions issued in each case on the second day of June, the sheriff sold a quantity of cordwood, and received therefor the sum of two thousand and nine dollars. Thus, upon the sales the sheriff received the sum of two thousand five hundred and thirty-six dollars.

It was proven that he had discharged preferred labor liens upon the property to the amount of two hundred and eighty-six dollars and ninety cents, for which he was entitled to credit, and that he was entitled to retain the sum of four hundred and twelve dollars and fifty-five cents, for fees, commissions, and other expenses. Deducting the aggregate of these amounts, to wit, six hundred and ninety-nine dollars and forty-five cents, from the total amount received, the balance, one thousand eight hundred and thirty-six dollars and fifty-five cents, is the principal sum the plaintiffs were entitled to recover.

The sheriff has offered sufficient reasons for failing to pay the hundred and thirty-six dollars and eighty-eight cents of this sum to excuse himself and surties to this extent from the penalties imposed by the statute; forty-eight dollars and fifty cents of the five hundred and thirty-six dollars and eighty-eight cents is charged by the sheriff as expenses attending the keeping and sale of the property. These items are objected to for the reason that they were not approved by the certificate of the district judge as required by the statute. The law fixes the fees of the sheriff, and also allows him "such further compensation for his trouble and expense in taking possession of property under attachment or execution, or other process, and of preserving the same, as the court from which the writ or order of sale issue shall certify to be just and reasonable." (Stats. 1875, 148.)

The sheriff also paid the preferred labor liens of McRae for one hundred and fifty-six dollars, of McLennan for one hundred and eighty dollars, of Armstrong for forty-one dollars, and of Burgeoin for one hundred and eleven dollars and thirty-eight cents. The plaintiffs disputed the liens of McRae and McLennan, and notified the sheriff not to pay either of them. Nevertheless he did pay them,

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withstanding no action was commenced to enforce the lien. Neither of the plaintiffs nor their attorney had any notice of the lien claims of Armstrong or Burgeoin, nor was any action brought to establish either of them. The sheriff clearly erred in paying the liens of McRae and McLennan, nor was he warranted in paying those of Armstrong or Burgeoin. (*Coscia v. Kyle*, 15 Nev. 395.) Nor was he entitled to deduct from the moneys due the judgment creditors the expenses incurred in preserving the property levied upon, except such matters as may have been certified by the district judge as having been just and reasonable. (*Geary v. Stevens*, 48 Cal. 590; *Lane v. McElhany*, 49 Id. 421).

The payment of the lien claims and the withholding of the charge of forty-eight dollars and fifty cents apparently have been errors of judgment rather than willful or corrupt acts upon the part of the officer, and as the penalties provided by the statute were intended as punishment for intentional wrongdoing, and not for mistakes made in good faith, we are of opinion that whilst plaintiffs are entitled to recover these items no penalty should be imposed for the delinquency. At the sale which took place on the twelfth day of June, the judgment creditors severally purchased the wood. No money was paid by either of them on account of such purchase, each creditor apparently intending that his bid should be credited upon his execution. The sheriff, however, needed money, not only for his own fees and disbursements, but to discharge labor liens upon the property.

Accordingly he and his deputy demanded payment of money for these purposes, and they suggested that plaintiffs transfer their bids. Negotiations were entered into between the plaintiffs and one Freeman McComber, in which the sheriff and his deputy took an active part. The result of their negotiations is claimed by respondents to have been the sale of the wood by plaintiffs to McComber, whilst plaintiffs claim that it was simply a transfer of their respective bids made at the execution sale.

The distinction to be made is important in view of the payments made by McComber to the sheriff. If it was a sale, respondents claim that the sheriff received the money



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the agent of plaintiffs and not in his official capacity, and the sureties on his official bond are not liable. But we are of the opinion that the view of the appellants upon this question is correct, and that the transaction was a transfer of bids. The testimony of every witness who was interrogated relative to this transaction goes to establish the fact that it was a transfer of bids rather than a sale from plaintiffs to McComber.

Elstner, the deputy sheriff, who had previously told plaintiffs that they must "either pay, sell the wood, or transfer the bids," testified that afterwards McComber came to the sheriff's office and said that the bids had been transferred, and requested him to do the writing, and thereupon he drew the writings which it is claimed show the transaction to have been a sale. The following day McComber paid the sheriff the sum of one thousand one hundred dollars, and the sheriff requested Elstner to write a receipt for the full amount on the "Kennedy and Nash executions." The writing is as follows:

"I have this fifteenth day of June, 1880, by the order of Thomas Nash and Mary A. Kennedy, given the possession of the wood at the ranch known as John Muldoon's wood to Freeman McComber, and they, the said Kennedy and Nash, transferring their bid and all rights thereto, and directing me as above to do. LLOYD HILL, Sheriff.

"Per M. R. ELSTNER, Deputy Sheriff."

"Received June 16, 1880, of Freeman McComber, on the above wood, one thousand one hundred dollars. The number of cords estimated in the wood in question above is seven hundred and seventy-seven cords. The remainder of money to be paid to me as soon as the correct number of cords is ascertained. LLOYD HILL, Sheriff.

"Per M. R. ELSTNER, Deputy Sheriff."

Further on Elstner says: "I always understood that the money paid by McComber was paid on these Nash and Kennedy executions, and I so treated it." McComber paid Hill, sheriff, on wood sold on these executions, two thousand and nine dollars in all, and it so appears in the sheriff's pocket which I have before me."

The testimony of Nash, Kennedy, and McComber is to the effect that the transaction was a transfer of bids. McComber says: "The sheriff and the parties interested thought it would save expense if I would step into the shoes and take their bids," instead of having the property resold by the sheriff.

Not only does the testimony of all the witnesses show the transaction to have been intended as a transfer of bids, but the parties so treated it. If the sheriff had considered the transaction a sale he would naturally have credited the executions with the bids made by the plaintiffs; but instead of this, he credited the executions with the payments made by McComber, and so made the entry in his docket.

Until the agreement between McComber and the plaintiffs was reached the sheriff was constantly and earnestly urging a transfer of the bids to some person with funds at the end that by such an arrangement money would be put into his hands, to be by him applied to the settlement of the liens, fees, and costs. With this end in view he would naturally not have permitted any sale and delivery of the property by the plaintiffs, for such a proceeding would have defeated his purpose to raise money for the payment of the liens. It is improbable that he would have surrendered the possession of property sold under execution, which he had received no money, and the proceeds of whose sale were subject to the payment of these claims.

Every act of the sheriff is inconsistent with respondent's theory. He received the money paid in by McComber officially, and applied it in part to the payment of the liens against the property. If he had received this money unofficially and as plaintiffs' agent, he would not have treated it.

The writing heretofore mentioned as having been drawn by Mr. Elstner, at the instance of McComber, is as follows: "Lloyd Hill, sheriff: I have, this fifteenth day of June, 1880, sold and transferred all our right, title, and interest in the wood purchased of you at sheriff's sale by me on the twelfth day of June, 1880, at the ranch on the road leading from Carson City to Lake Bigler, and said ranch is known

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the ranch of John Muldoon, to Freeman McComber, who will pay for the same; and the possession of the wood upon our bid is hereby ordered to be given to the said Freeman McComber.

THOMAS NASH.

"Witness: E. R. Elrod."

The same notice *mutatis mutandis* was given in the Kennedy case.

These instruments simply recite that the right, title, and interest of the judgment creditors had been sold and transferred. Their "right, title, and interest" was nothing more than an accepted bid. Neither was the owner of the wood, nor could become such until the payment of his bid to the sheriff, nor does the writing purport to recite that the wood itself had been sold. The remaining portion of the document is somewhat ambiguous, but we think it makes the delivery of the wood subject to the payment of the bids to the sheriff. This is the construction it should have received in the light of the oral testimony, and this is the construction the sheriff placed upon it in acting thereunder. Having so treated it he can not now be allowed to justify his delinquency upon the ground that it was an unconditional order.

It is also urged in support of the ruling of the court that of the two thousand and nine dollars paid by McComber, nine hundred and nine dollars came into the hands of the sheriff after the return day of the execution, and that at least for this last named sum the bondsmen can not be held.

Upon this point the general doctrine is invoked, that the sureties upon the official bond of a sheriff are not liable for money paid to him upon an execution after the day upon which it should have been returned. The reason of this doctrine is said to be that since the sheriff has received the money unofficially he must be proceeded against as any other individual who has received money for the use of another.

But whilst it has been held that sheriff *eo nomine* is liable for moneys collected by him during the existence of the writ only, it is settled law that he and his sureties are chargeable with moneys collected from the sale of property

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levied upon before the return day of the writ, notwithstanding intermediate the levy and sale or payment of the money, the writ may have become *functus officio*.

In *Evans et al. v. The Governor*, 18 Ala. 663, the court said: "It is well settled that if a sheriff levy on personal property, while the execution is in full force, he may proceed and sell it after the return day of said writ. He acquires by his levy a special property in it, of which he is authorized by law to divest himself by sale. \* \* \* In exercising the right to sell the property, it would be absurd to say he had no right to receive the money. \* \* \* But in making the levy, it is very clear the plaintiff had no right to receive the money after the return day of the execution, and the sureties in such case would not be chargeable for it." (*Reed et al v. Johnson*, 5 Litt., Ky., 20; *Dennis v. Chapman*, 1 Ala. 29; *Beale v. Commonwealth*, 7 Watts, 183; *Hamilton v. Ward*, 4 Tex. 356.)

The cord-wood having been levied upon and sold prior to the return day of the execution, the respondents are liable for the money collected, upon the authorities cited, and the doctrine invoked in their behalf is inapplicable to the facts of this case. No return was made by the sheriff of the executions upon which the money was collected. It is contended that the penalties provided by the statute are recoverable only when the sheriff by his return admits the collection of the money and refuses to pay it over. To sustain this view the following authorities are cited: *Egery v. Buchanan*, 5 Cal. 53; *Johnson v. Gorham*, 6 Id. 195; *Wilson v. Broder*, 10 Id. 486.

The case of *Wilson v. Broder* has no bearing upon the point. In the other cases language supporting respondent's view is employed, but an examination of these cases will show that the point in question was in nowise involved in the decision of either of them. In *Egery v. Buchanan* the writ had been returned by the officer, and the decision turned upon the question whether his return was traversable in the proceeding by motion under the statute.

The report of the case of *Johnson v. Gorham* does not state whether a return to the execution was made, but



motion was defended upon the ground that the sheriff was unable to determine the conflicting claims to the proceeds of the sale, and he, therefore, asked the advice of the court upon the subject.

No reason has been given, and we think it may confidently be said none exists, for requiring the return of the officer admitting the receipt of the money a condition precedent to the institution of proceedings of this nature. The suggestion is pertinently answered by counsel for appellants, in saying: "Such a construction does violence to the plain letter of the statute, and simply enables a corrupt officer to embezzle moneys or to refuse to pay them over upon request, and to escape all penalty by simply supplementing one offense by another, of failing, as in this case, to make any return."

The evidence adduced at the hearing established the receipt of the money by the sheriff quite as satisfactorily as a return to the execution could have done. Having reached the conclusion that the several positions taken in support of the ruling of the district court are untenable and that the judgment must be reversed, it remains to inquire whether the record discloses error as to defendants Kitzmeyer, Circe, and Rosser. These defendants, who were sureties upon the sheriff's bonds, were released therefrom during the month of March, 1880, and before the issuance of the execution under which the two thousand and nine dollars were collected.

Whilst they were sureties only five hundred and twenty-seven dollars were collected, and of this amount four hundred and thirty-nine dollars and fifteen cents were accounted for, leaving a balance unaccounted for of eighty-seven dollars and eighty-eight cents, as appears from the testimony in chief of Mr. Elstner, the deputy sheriff. But the sum of four hundred and thirty-nine dollars and fifteen cents does not embrace all of the charges which the sheriff was entitled to deduct from the total amount collected. It was subsequently proven that the fees, commissions, expenses, etc., of the sheriff in these cases, exclusive of the four hundred and thirty-nine dollars and fifteen cents, amounted

## Points decided.

to the sum of four hundred and twelve dollars and fifty cents, and of this sum it was not shown how much was incurred whilst the defendants last named were holders of the bond. *Non constat* that eighty-seven dollars and eight cents of these costs were not incurred prior to the charge of these three defendants as sureties. At all events as the sum of four hundred and twelve dollars and fifty cents could have been deducted from the amount collected by the sheriff, appellants should have affirmed, if shown the amount chargeable whilst the defendants named were sureties.

Having failed to show this fact, we can not say that the court erred in rendering judgment in their favor.

It is ordered that the judgment be reversed as to the defendants, except Kitzmeyer, Circe, and Rosser, that, as to these defendants, the judgment be affirmed.

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[No. 1,074.]

GEORGE S. ELDER, RESPONDENT, v. J. T. WILLIAMS, APPELLANT.

**PROPERTY EXEMPT FROM EXECUTION—TEAMSTER.**—The court instructed the jury that, "To be a teamster, within the meaning of the law of the state concerning exemptions, a man need not necessarily drive a team. In the sense of the statute one is a teamster who is engaged in his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family—if he has one." *Held*, correct.

**IDEM—SELECTION OF PROPERTY.**—The court instructed the jury that, "If a teamster owns more than one team, that is, if he owns more than two horses or mules, and their necessary harness and equipments, and more than one wagon, it is his right and privilege under the law to select and designate two animals and their harness, etc., and one wagon, suitable for use therewith, or with two animals, as his exempt property, and so selected and pointed out, the law will recognize and protect the value of his exempt property, provided they were actually in use by such teamster in his business of teaming, by which he earned his living at the time of the levy by an officer; and such selection may be made without regard to the value or quality of the property selected." *Held*, correct.

## Argument for Appellant.

ILLEGAL CONCEALMENT OF OTHER PROPERTY—NOT DEPRIVATION OF RIGHTS UNDER EXEMPTION LAWS.—If plaintiff fraudulently concealed other property and refused to surrender the same in execution, equal in amount to the value of the property claimed as exempt, that fact does not deprive him of an otherwise valid claim of exemption.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

M. Clarke, for Appellant.

The statute exempting "two horses and a wagon," is not of general and universal, but special and limited application. It does not apply to all persons, but to teamsters only; not even to all teamsters, but to such teamster as habitually earns his living by using a team, (1 L. 1282, par. 6.)

No person is a teamster within the sense of the law who does not: First, habitually drive a team; and second, by driving a team habitually earn a living. (*Brusie v. H. H. Co.*, 34 Cal. 306; *Abercrombie v. Alderson*, 9 Ala. 985; *McCaulay v. McCaulay*, 4 Pa. St. 472.) By "teamster" is not one who can drive or has driven, but who does drive a team. (Webster's Dict. 1358; 2 Bouv. Law Dict. 1358.) The exemption lies in favor of the individual and his business, not the individual alone, or the business alone.

The statute does not generally or in all cases exempt a teamster but exempts the team by the use of which the teamster habitually earns his living. (*Corp v. Swold*, 27 Iowa, 379.)

It is not two horses and a wagon generally which the statute exempts, but the particular two horses and wagon used by the teamster in teaming, and by the use of which in teaming the teamster habitually earns his living. (*Corp v. Swold*, 27 Iowa, 379, 381.) The property must be suited to teaming. (*Ames v. Martin*, 6 Wisc. 361; *Favers v. Glass*, 22 Mich. 24; *Smith v. Gibbs*, 6 Gray, 298.)

One who fraudulently conceals or refuses to surrender other property can not claim the benefit of the exemption.

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law. (*Strouse's Ex'r v. Becker*, 38 Pa. St. 190; *En Smith*, 51 Id. 90; 21 Wend. 68.)

*Trenmor Coffin*, for Respondent.

I. A fraudulent concealment of property subject to execution is not in prejudice of an otherwise valid claim of exemption. (Thomp. on Homesteads and Ex., secs. 4 and 5; Smythe on Homesteads and Ex., sec. 432, *et seq.*; *O'Neal v. Segar*, 25 Mich. 376.)

II. The instructions given by the court are according to sound reason and are supported by all the authorities. (*Seamon v. Luce*, 23 Barb. 240; *Lockwood v. Young*, 23 Barb. 505; *Finnin v. Malloy*, 33 N. Y. 390; *Boyle v. O'Neal*, 22 Cal. 504; *Brusie v. Griffith*, 34 Cal. 302; Thompson on Homesteads and Ex., secs. 773, 774; Smythe on Homesteads and Ex., sec. 578.)

III. The statute concerning exemptions must be construed liberally and so as to give effect to its spirit and intention in all cases. (*Beavan v. Heyden*, 13 Iowa 100; *Rogers v. Ferguson*, 32 Tex. 534; *Gilman v. Wells*, 7 Wisc. 337; *Stewart v. Brown*, 37 N. Y. 351.)

By the Court, LEONARD, C. J.:

This action is to recover a wagon and two horses of the defendant, as sheriff, seized under various writs of execution and execution against the property of plaintiff, which the latter claims as exempt from levy and sale in execution, for the reason that he is a teamster, and the use of which he habitually earns his living.

Respondent recovered judgment, and appellant moved for a new trial, on the grounds of errors in law occurring at the trial, excepted to by the defendant, and insufficiency of the evidence to justify the verdict. This appeal is from the judgment and from the order denying a new trial. Section 1282 of the compiled laws provides as follows: "The following property shall be exempt from execution except as herein otherwise specially provided: \* \* \* Sixth—Two oxen, two horses, or two mules and their harness, and one cart or wagon, by the use of which a car-



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ster, pedler, teamster or other laborer habitually earning his living." The appellant claims that the verdict and judgment and the order denying a new trial are erroneous for the following reasons:

I. Plaintiff was not a teamster, and, therefore, not entitled to the exemption.

II. Plaintiff did not habitually earn his living by use of the horses and wagon in question.

III. The wagon is not a two-horse wagon, or such as is contemplated by the statute; nor is it adapted to the use which the statute contemplates.

IV. Plaintiff fraudulently concealed his property and refused to surrender the same in execution.

In the statutory sense, is plaintiff a teamster?

It is said that he is not, because he *did not habitually* drive a team, and because he did not earn his living by habitually driving a team.

The court instructed the jury that, "To be a teamster, in the meaning of the law and of the statute concerning exemptions, a man need not necessarily drive his team. In the sense of the statute one is a teamster who is engaged in his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other persons for a consideration, by which he habitually supports himself and family—if he has one." We think the instruction is correct. In commenting upon this instruction the court said: "One need not hold the reins and guide the team to be a teamster. One who makes his living by teaming, giving his personal attention to it, is a teamster. To say otherwise is to say that a successful teamster is not entitled to invest his gains and surplus earnings in that business with which he is best acquainted, and thus increase his facilities, without losing the protection otherwise given to the original plant." *Brusis v. Griffith*, 84 Cal. 306, the court said: "In common speech a teamster is one who drives a team, but in the sense of the statute every one who drives a team is not necessarily a teamster; nor is he necessarily not a teamster,

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unless he drives a team continually. In the sense of the statute one is a teamster who is engaged with his own or teams in the business of teaming—that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive a team in person, yet he must be personally engaged in the business habitually, and for the purpose of making a living by that business.”

The court's definition of a teamster was correct according to that, under the testimony, plaintiff was a teamster.

2. Did plaintiff habitually earn his living by the use of the property in question? It was a part of a large number of horses, harnesses, and wagons which he had for a long time used in teaming, as a teamster, and by which he earned his living and that of his family. The court instructed the jury that, “If a teamster owns more than one team, or if he owns more than two horses, or mules, and their necessary harness and equipments, and more than one wagon, it is his right and privilege under the law to select and appropriate two animals and their harness, etc., and some valuable property for use therewith, or with two animals, as his exempt property, and when so selected and pointed out by the law will recognize and protect them as his exempt property provided they were actually in use by such teamster in the business of teaming, by which he earned his living at the time of the levy by an officer; and such selection may be made without regard to the value or quality of the property selected.”

That instruction is absolutely without fault, and under the facts and the third instruction given for plaintiff, the jury were bound to find, from the evidence, that he was a teamster at the time of the levy, and that the property in question was in actual use by him in the business by which he earned his living. The testimony is ample to sustain the verdict on this point. It was just as necessary that plaintiff should be allowed two horses, with their harness, and one wagon

and one team for his exempt property; and that he should

the support of his family, as it would have been if he had owned only the exempt property.

The statute exempts *all* the farming utensils or implements of husbandry of the judgment debtor; but only *two* horses or *two* oxen or *two* mules and their harness, and *two* carts and one cart or wagon, regardless of the number of horses, oxen, etc., that he may have. So it exempts *two* horses, *two* oxen, or *two* mules, and their harness, and *one* cart or wagon, which he habitually uses in teaming, if by that business he earns his living, regardless of the number of horses that he may have in use. He may select any of the horses owned and any wagon that is suitable for use with them in farming business.

3. Was the wagon in question such as is contemplated by the statute? Under the court's instructions, the jury must have found that it was. They were told that the wagon must be suitable for use with the two animals selected. If we admit that there was no conflict of testimony, that the wagon could not, for the reasons given, be profitably employed with *two* horses in teaming between Carson and Bodie, still, *or* nearly all of the witnesses who testified upon the point, testified that it could be so used in and around Carson; and that by its use, with the two horses, plaintiff could make a living by teaming. We think there is ample testimony to sustain the verdict upon this point.

4. Defendant alleged in his answer that, at the time he was seized on the property in question, plaintiff owned and had, and now owns and has, in his possession and control other property subject to attachment and execution, which he wrongfully and fraudulently failed and fails to produce in satisfaction of the property in dispute; that during all the times mentioned in his complaint, plaintiff has fraudulently concealed and retained, and still conceals and retains, wrongfully and fraudulently, a large amount of property subject to attachment and execution, for the purpose of hindering, delaying, and defrauding *bona fide* creditors; and that defendant knew of said fraudulent conduct when plaintiff demanded the property in question, and when he levied upon

This portion of the answer was demurred to by plain-

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tiff, and the demurrer was sustained on the grounds, first, that the attempted allegations of fraud were entirely insufficient, for the reason that there were no allegations of fraud, and that no description of property so concealed was attempted; and second, that a fraudulent concealment of property subject to execution is not in prejudice of an otherwise valid claim of exemption. At the trial defendant offered to prove that, shortly before his failure, plaintiff gave to a partner in Bodie his promissory note for several thousand dollars in excess of what he owed, for the purpose of defrauding his creditors; and that for the same purpose, shortly after his failure, he sold about four thousand dollars' worth of hay, his own property, in this state; took the money realized from the sale to Bodie, California, buried it in the ground, and never delivered up any part of it to his creditors. Objection to this testimony was sustained on the grounds of incompetency and immateriality. If it is true that a fraudulent concealment of property subject to execution does not prejudice an otherwise valid claim of exemption, the court did not err in sustaining the demurrer, regardless of the question of the sufficiency or insufficiency of defendant's answer, in his attempted charge of fraudulent concealment, and if the demurrer was properly sustained, there was no error in refusing to permit the offered proof, because there were no pleadings upon the subject, and too, because such evidence would have been immaterial.

This question then is presented: If plaintiff fraudulently concealed property and refused to surrender the same to execution, equal in amount to the value of property claimed as exempt, does that fact deprive him of an otherwise valid claim of exemption? The authorities are somewhat conflicting. Those holding in the affirmative are confined mostly to the courts of Pennsylvania; while the opposite view is sustained by the courts of North Carolina, Alabama, Mississippi, Missouri, New York, Michigan, and, if we mistake not, Ohio.

As to the property mentioned in the statute as exempt, only one exception is stated, and that is that no article or species of property mentioned in the section shall be exempt



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an execution issued upon a judgment recovered for its  
e, or upon a mortgage thereon. The constitution pro-  
es that, "the privilege of the debtor to enjoy the neces-  
y comforts of life shall be recognized by wholesome laws,  
mpting a reasonable amount of property from seizure or  
for payment of any debts or liabilities hereafter con-  
ted." (Const. art. I, sec. 14.)

he statute was undoubtedly passed in compliance with  
constitutional requirement. Since the statute declares  
the plaintiff is entitled to hold the property in suit as  
mpt from execution, except in the one case stated, what  
t have the courts to engraft upon the statute another ex-  
ion? It is provided that one sewing-machine not exceed-  
in value one hundred and fifty dollars, in actual use by  
debtor, or his family, shall be exempt. All other sew-  
machines may be sold. He is allowed to retain one that  
n actual use, because it is the policy of the constitution  
law, and the interest of the state, that no citizen shall  
tripped of the implements necessary to enable him to  
y the necessary comforts of life and to carry on his  
l employment; and that, if he has one, his family  
not be made paupers or beggars in consequence of the  
es, the vices, or the crimes of their head. (*Moseley v.*  
*erson*, 40 Miss. 54; *Wilcox v. Hawley et al.*, 31 N. Y.

)  
is true that in New York and Mississippi the exemption  
granted to the "head of a family," while our statute  
s the exemption in most instances regardless of family  
ions. But this difference, we think, does not change  
result. It is still true, under our statute, as was said in  
*ley v. Anderson*, that the exemption is absolute and un-  
ified, and its effect is to remove the property beyond  
reach of legal process, except in the one case mentioned.  
tools and implements of a mechanic, necessary to carry  
is trade; the instruments and chests of a surgeon, phy-  
n, surveyor, and dentist, necessary to the exercise of  
profession; the libraries of an attorney and minister;  
plements and appliances of a miner, necessary for car-  
g on any kind of mining operations, not exceeding five

hundred dollars in value, and two horses, mules, or with their harness, and food for them for one month, necessary to be used for any whim, windlass, derrick, pump, or hoisting apparatus, are all declared absolutely exempt, except upon a judgment for their price. In the case of a miner, the horses, etc., and their food, are not exempt except when the former are *necessary to be used* in mining operations. And in the case of a teamster, the two horses, their harness, and one cart or wagon mentioned, are exempt unless by their use he habitually earns his livelihood. From these different provisions, we think the legislature did not intend to deprive the debtor of his means of obtaining a livelihood for himself, or his family, or both.

In *Megehe v. Draper*, 21 Mo. 511, the defense relied upon the fact that the defendant was that, at the time of the levy, the plaintiff had other property not specially exempt from execution, and was sufficient in value to pay the debt, which he could keep from the officer, so as to keep it out of the reach of the execution. Upon the plaintiff's motion, this part of the answer was stricken out, and the defendant excepted. The court said: "The only matter for our consideration involved in the act of the court below in rejecting the evidence, on the ground that it was insufficient, and in striking out the answer, or that part of the answer setting up the above matters in defense. If the court had properly struck out that part of the answer, then it was proper also to reject the evidence in relation to the same subject-matter."

This court is of opinion that the matter set up in the defendant's answer was well stricken out. It affords no defense to the plaintiff's action. The statutes reserving property from execution, and exempting certain specific property from execution to a certain amount in value, were not made alone for the benefit of the debtor. He must be the head of a family. The legislature had an eye to the family of the debtor, and his household, and determined to prevent as much suffering and misery from entering into such abodes as possible, by saving to them the small allowance mentioned in the statutes. These statutes, so productive of good

classes: which generally, so much need protection, deserve and meet with liberal interpretation from the courts." It will be noticed that the Missouri statutes also limit exemptions to "heads of families," and that fact is referred to by the court, as evidence to sustain the proposition that one of the objects of the law was to protect the family, and so it is. But is it any proof that our legislature did intend to protect the families of debtors, because the statute includes single persons as well as those with families? The latter class is certainly included, and as to them, it is reasonable to presume, under the statute as it is written, that one of the objects of exemption was to protect their families, as it would have been, if persons without families had not been included among the beneficiaries. But in North Carolina, the exemption is general, as it is in this state. The constitution of that state declares that "the personal property of any resident of this state, to the value of five hundred dollars, to be selected by such resident, shall be, and is hereby exempted from sale under execution, or other final process of any court, issued for the collection of any debt." There is also a general constitutional provision exempting a homestead of the value of one thousand dollars, owned and occupied by any resident of the state. The case of *Duwall v. Rollins*, 68 N. C. 220, involved the question of personal property exemption. The case again came before the court on petition for a hearing. (71 N. C. 221), and the court says: "The personal property exemption can not be reached by execution at all, for as to that, under the constitution, there can be no creditor and no forfeiture by any attempt to make a fraudulent conveyance."

"Our laws have long been so framed as to make fraudulent conveyances void as to creditors, and our habits of thinking run in the same direction, so that it is difficult to visualize that another and a new right has been interposed between the creditor and debtor which secures certain of his property, even from his own fraud upon creditors."

And in *Crummen v. Bennet*, 68 N. C., 495, this language is used: "A. makes a conveyance of his land to B., which

## Points decided.

conveyance is fraudulent and void as to the creditors. A creditor takes judgment and issues execution, treating conveyance of B. as void; can the homestead of A. be reached? The creditor treats the conveyance to B. as void and of no effect. Take that to be so; how can the creditor have more right against A. than he would have had if the conveyance had not been made? We can see no ground to support the position that an attempt to commit a fraud by forfeiture of the debtor's homestead; there is no provision of the kind either in the constitution or the statutes. The only legal consequence of a deed with an intent to defraud creditors is, that although valid as between the parties, it is void as to creditors.

"In this case, the fraud did not consist in conveying the homestead; for the creditor could not have reached the land by his execution, had the debtor retained his homestead. The fraud was in conveying the other part of the land. As to the homestead, the creditor can reach by his execution. As to the homestead, he has no concern; that matter will rest between the fraudulent donor and donee." (See, also, *O'Donnell v. Segal*, 10 Mich. 376; *Callaway v. Carpenter*, 10 Ala. 503; *Locke v. Younglove*, 27 Barb. 508.) *Bracket v. Watkins*, 21 Wend. 69, cited by counsel for appellant, has been overruled by *Wilcox v. Hawley*, 31 Wend. 657. We do not think the court erred in sustaining the demurrer or in rejecting the offered evidence.

The judgment and order appealed from are affirmed.

[No. 1,083.]

WILLIAM CAIN, ADM'ER, ETC., RESPONDENT, v. JOSEPH WILLIAMS, ADM'ER, ETC., APPELLANT.

PENDENCY OF APPEAL.—WHEN DOES NOT SUSPEND OPERATION OF JUDGMENT.

The pendency of an appeal, when the appellate court has no other business than to affirm, reverse, or modify the judgment appealed from, does not suspend the operation of the judgment. The judgment is good until set aside.

REFLEVIN BOND.—COMPROMISE WITH PORTION OF SURETIES.—ACTION BY

OTHERS.—Plaintiff compromised with four sureties for less than



## Argument for Appellant.

liability, and deducted from the amount of his damages the amount paid by them: *Held*, that the remainder is recoverable from one of the other sureties to the extent of his liability.

DEB—EFFECT OF RELEASE OF SURETIES NOT RAISED IN COURT BELOW.

*Held*, that the question whether the release of the four sureties operated as a release of the defendant, could not be considered, because not raised in the court below.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The sureties, upon the bond sued upon, in general terms undertook and acknowledged themselves jointly and severally bound in the full amount of the undertaking. Thereafter the following clause appears in the bond, viz.: "And each of the sureties hereto binds himself with his co-sureties jointly and severally that he will pay the sum as herein agreed to be paid by him, to wit." Then follows the name of each surety and the amount for which he becomes bound. There is no principal to the bond.

Wm. Webster, for Appellant:

I. The intention of the parties who make the agreement should be arrived at without reference to the form made use of by the parties thereto. (Chitty on Cont. 83.)

II. It was the intention of the sureties, while they bound themselves in a joint and several contract to limit their several liabilities in a sum certain, and upon this form of contract a joint action could be maintained and several judgments entered according to the liability of the several sureties to the undertaking or several actions could be maintained against the sureties.

III. The undertaking is a joint and several contract on the part of the sureties wholly independent of the plaintiff's replevin in the suit of *Buckley v. Buckley*. (*City of Sacramento v. Dunlap*, 14 Cal. 421.) All the parties to the contract are equally bound according to their several liabilities as stated in the undertaking. To permit a recovery against parties not released to the full amount of their original liability, would be a fraud upon them, unless a right of action over for contribution is allowed them against those who

## Argument for Appellant.

have been released without paying their *pro rata* share of damages; and to permit a recovery *pro rata* in favor of those who have paid more than their share of the damages against those released, would be a fraud upon them. (Story on Promissory Notes, secs. 428 and 427.) The releases by the respondent are under seal, technical releases; and they release all the parties to the undertaking, unless the statute applies. (1 Comp. L. 465; Story on Promissory Notes, sec. 425; *Armstrong v. Haywood*, 6 Cal. 184; *Griffin v. Grogan*, 12 Id. 317; *French v. Price*, 24 Pick. 13; *Hamilton v. Wyman*, 9 Mass. 138.) A covenant not to sue and a covenant of release are different in effect. (*Brown v. Willard*, 4 Wend. 360.)

IV. The law of 1866 concerning the liabilities of joint debtors (Comp. L. 465) does not apply to this case. The liabilities of the parties are not such as the law was intended to meet. The parties to the undertaking have fixed their several liabilities, in sums differing one from the other, such being the case, how could any release be made of the principal of number as provided in the act? If several sureties have chosen to fix and limit their several liabilities by several contract, can the contract of each or all in particular be disregarded, and the liability of each be rearranged according to number, as provided by statute concerning joint debtors?

V. The respondent should not have maintained the action pending the appeal to the supreme court in the case of *Buckley v. Buckley*. (*Sherman v. Dilley*, 3 Nev. 159; *Woodbury v. Bowman*, 13 Cal. 634.) For the purpose of showing the general law on matters of appeal preceding the enactment of statutes requiring a special supersedeas, the following authorities are cited. (*Cobb v. Bell v. Howard*, 5 Mass. 376; *Thompson v. Thompson*, 159; *Atkins v. Wyman*, 45 Me. 399; *Dubois v. Dubois*, 449; *Post v. Neafie*, 3 Cal. 28; *Gale v. Butler*, 3 Cal. 449; *Levi v. Karrick*, 15 Iowa, 444; *Byrne v. Prather*, 15 An. 663; *Thornton v. Mahoney*, 24 Cal. 583; *Penhalligon v. Doane*, 3 Dall. 87, 118; *Keen v. Turner*, 13 Mass. 449; *Paine v. Cowdin*, 17 Pick. 142; *Davis v. Cowdin*, 20

0; *Robbins v. Appleby*, 2 N. H. 223; *Tarbox v. Fisher*, Me. 236; *Stalbird v. Beattie*, 36 N. H. 455; *Stone v. Willman*, 16 Tex. 432.)

William Cain, for Respondent:

I. The undertaking on claim and delivery is either on the part of the sureties a joint and several bond for the full sum of fourteen thousand two hundred and twenty dollars, or a several bond of each for the amount severally stated. If joint and several for the full sum, then the statute "concerning the liabilities of joint debtors" (Stat. 66-67) applies. If the obligation of the sureties is several, then the release of one will not release any others. (Frederick on Suretyship, sec. 383; *Collins v. Prosser*, 1 Barn. Cress. 682; *People v. Breyfogle*, 17 Cal. 504; *Pacific Coast Law Journal*, Dec. 31, 1881.)

II. No undertaking staying proceedings upon the judgment was filed, and plaintiff's right of action upon his judgment was not suspended. (Freeman on Judgments, 2. 433; *Taylor v. Shew*, 39 Cal. 536; *Rogers v. Hatch*, 8 v. 37.)

By the Court, BELKNAP, J.:

In the year 1873 one Sylvanus Buckley brought an action for claim and delivery of personal property against Armenia Buckley as administratrix of the estate of Henry A. Buckley, deceased. He afterwards obtained the possession of the property by complying with the provisions of chapter 1 of the civil practice act.

Defendant's intestate, Frank Covington, is a surety upon the undertaking given to the sheriff for the return of the property to the defendant, in case such a return should be adjudged.

Judgment passed against the plaintiff in the suit of *Buckley v. Buckley*, and the judgment being unsatisfied, the plaintiff in this action, who has succeeded Armenia Buckley in the administration of the estate of Henry A. Buckley, has sued to recover the amount for which Covington, in his lifetime, became liable on the undertaking.

Plaintiff recovered judgment. Defendant appeals.

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From the time of the commencement of this action down to the entry of judgment the case of *Buckley v. Buckley* pending upon appeal in the supreme court. No undertaking to stay execution had been filed.

Defendant contends that the pendency of the appeal suspended the operation of that judgment, and that the error in permitting it to be used as the basis of the judgment in this case.

The effect of an appeal under analogous facts was considered by this court in the case of *Rogers v. Hatch*, 8 Nev. In deciding the question we will adopt, as our predecessors did in that case, the language employed in *Bank of North America v. Wheeler*, 28 Ct. 433: "If the appeal is in the nature of a writ of error, and only carries up the case to the court of appeals as an appellate court for the correction of errors which may have intervened in the trial of the case in the court below, and for its adjudication upon the question whether the judgment appealed from should be affirmed, reversed, or modified, and that court has no other powers or duties than to affirm, reverse, or modify the judgment, or remit the case to the inferior tribunal, it may conform its judgment to that of the appellate tribunal, then such appeal \* \* \* does not vacate or suspend the judgment appealed from; and the removal of the case to the appellate court would no more bar an action upon the judgment than the pendency of a writ of error at common law, when that was the proper mode of correcting errors which may have occurred in the inferior tribunal. That such an action would not be bound by the pendency of such a proceeding is well settled. The judgment below is only voidable, and stands good unless set aside." (See, also, *Taylor v. Shew*, 39 Cal. 536; *Shaw v. Pilkington*, 110 Eng. Com. Law, 11; *Freeman on Judgments*, sec. 328.)

The other objection is to the amount of the judgment rendered against defendant. The court found that the defendant in the suit of *Buckley v. Buckley*, plaintiff here, was damaged by the failure of the plaintiff in that suit to return

discharge submitted



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the property, in the sum of eleven thousand and thirty-four dollars and forty-four cents.

Four of the sureties upon the undertaking, who were liable thereon in the aggregate amount of ten thousand two hundred and fifty dollars, were compromised with and released upon the payment of three thousand four hundred and sixteen dollars, and satisfaction as against them acknowledged. Because the plaintiff has made this acknowledgment of satisfaction, it is claimed that the amount now recoverable upon the undertaking is the difference between the amount of damages sustained by plaintiff and the aggregate amount for which the four sureties were liable, to wit, the sum of seven hundred and eighty-four dollars and forty-four cents.

But the position is untenable. Plaintiff properly deducted from the amount of his damages the amount paid by the four sureties. The remainder is recoverable from the defendant to the extent of his liability.

The question whether the release of the four sureties operated as a release of the defendant can not be considered upon this appeal, because not made in the court below. Judgment affirmed.

Petition for rehearing denied.

[No. 1,082.]

WILLIAM CAIN, ADM'R, ETC., RESPONDENT, v. E. C. SESSIONS ET AL., APPELLANTS.

PLEVIN BOND—LIABILITY OF SURETIES.

*William Webster*, for Appellants.

*William Cain*, for Respondent.

By the Court, BELKNAP, J.:

Substantially the same questions are presented by this case as by the case of *Cain v. Williams*, ante. Upon the authority of that case the judgment herein appealed from is affirmed.

THE STATE OF NEVADA, RESPONDENT, v. THE CONSOLIDATED VIRGINIA MINING COMPANY, APPELLANT.

**SPECIAL LAW—SECTIONS 2 AND 4 OF "ACT TO DISCONTINUE LITIGATION OF CERTAIN TAX SUITS, UNCONSTITUTIONAL.**—Sections 2 and 4 of the "act to discontinue litigation touching inequitable claims for tax penalties" (Stat. 1879, 143), are unconstitutional, being a special law for the "collection of taxes for state, county, and township purposes," in violation of section 20, art. IV., of the constitution.

**GENERAL LAW—ACT PRESCRIBING ADDITIONAL PENALTY IN TAX SUITS, UNCONSTITUTIONAL.**—The "act prescribing an additional penalty for non-payment of taxes in certain cases after suit" (Stat. 1873, 143), is unconstitutional, it being a general law imposing the same burden on all persons similarly situated and belonging to the same class.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

*C. J. Hillyer* and *B. C. Whitman*, for Appellant:

I. There is nothing conclusive or even applicable to the present appeal in the former decision; as this proceeds upon a different state of facts, and is to be governed by different provisions of the statute. There may be *dicta* in such opinion applicable to the entire statute, but they do not control any portion of the law of the case. (*Mulford v. Estu*, 32 Cal. 138.) The same questions are not presented in the present appeal, as will appear by the record in the former case, so the opinion can not govern this case. (*McKinstry v. Tuttle*, 42 Cal. 576; *Russell v. Harris*, 44 Id. 489.)

II. The rule of law laid down in the former decision as to special and general statutes is all that is claimed by appellants; the application thereof in the decision is claimed to be illogical; and, as to the other portions, is every reason why they should be discarded, and that the court will return to the line of decision previously held, laid down in *Youngs v. Hall*, 9 Nev. 212; and *Odd Fellows Bank v. Quillen*, 11 Id. 109.

## Argument for Respondent.

The authorities cited by counsel are reviewed in the opinion.

*Lewis & Deal*, for Respondent, argued that the reasoning of the former decision was applicable to and conclusive upon all questions presented in this case.

*M. A. Murphy*, Attorney General, also for Respondent:

I. The act under consideration is unconstitutional for the following reasons:

1. Because it embraces more than one subject, and the subjects are not expressed in the title. (Sec. 17, art. V, Const. of Nev.) The acts to be done by section 4 are in nowise suggested, much less stated, in the title to the bill. There is nothing in the title that would operate to warn the mind of a legislator or any one else, that the bill would operate not only to discontinue suits between certain parties in some cases, but would satisfy judgments in other cases and between other parties for less sums than what the judgments call for. Each and every act therein set forth is in direct violation of our unrepealed revenue laws. *Cooley on Const. Lim.* 81, 83, 141, 144; *Sedgwick, Stat. and Const. L.* 517-530; *Potter's Dwarrris on Stat.* 103-107; *People v. Mahoney*, 13 Mich. 481; *State v. Silver*, 9 Nev. 27; *City of St. Louis v. Tiefel*, 42 Mo. 578.)

2. Because the whole act of which section 2 it but a part is invalid, for the reason that it is a special law for the collection of taxes, which is prohibited by section 20 of article V of our constitution. It is special, because it relates to particular suits only. It has no general application; it is not a rule of conduct or principle for the government of the people; it has no prospective operation; it seeks to affirm certain illegal acts and to take from the court the control of certain suits therein pending. It must be pleaded, and requires evidence to give it application and effect. (*Lewis v. Webb*, 3 Greenl. 326; *Picquet, Appellant*, 5 Pick. 64; *Town of Lancaster v. Barr*, 25 Wisc. 560; *Griffin v. Cunningham*, 10 Gratt. 31.) Taxes are debts recoverable like any similar obligations, and subject to the same conditions, and a law

## Argument for Respondent.

releasing a person or company from the payment of debts is unconstitutional and void. (*City of Burlington v. B. & M. R. R. Co.*, 41 Iowa, 134; *City of Dubuque v. Central R. R. Co.*, 39 Id. 56; *Wilson v. Supervisors*, 47 91.)

3. Because it is an attempted interference with the functions of the judiciary, and is therefore in conflict with section 1 of article III of our constitution. (*Guy v. Lomance*, 5 Cal. 73; *McClain v. Easley*, 4 Baxter, 520; *Wahlers v. Kennedy*, 2 Yerger, 554; *Governor v. Porter*, 1 Humph. 165; *Merrill v. Sherburne*, 1 N. H. 199; *Davis v. Trustees*, 21 Wisc. 491; *Staniford v. Barry*, 1 Aiken, 307.) The legislature is not authorized to exercise any portion of the judicial power; it can not set aside a judgment or decree, nor can it require the judiciary to give a new hearing once passed upon. (*People v. Supervisors*, 26 Mich. 15; *Trustees v. Bailey*, 10 Fla. 238; *De Chastellux v. Fairchild*, 15 Penn. 18; *Taylor v. Place*, 4 R. I. 324; *Denny v. Matteson*, 2 Allen, 361; *State v. Fleming*, 7 Humph. 152; *Moseley v. White*, 29 Mich. 59; *Lewis v. Webb*, 3 Greenl. 326; *Latter v. Barr*, 25 Wisc. 560; *Griffins v. Cunningham*, 20 G. 31; *Assessment Board v. A. C. R. R. Co.*, 59 Ala. 551; *Harball v. Rosendale*, 42 Wisc. 407; *L. B. & S. A. v. Graham*, 7 Neb. 173; *Oliver v. McClure*, 28 Ark. 555; *Pryor v. Downey*, 50 Cal. 388; *Sedgwick on Stat. and Const.* 166-170.)

II. Sections 3172 and 3238 of compiled laws are constitutional. The constitutionality of acts imposing penalties have been affirmed by the following decisions: *Scott v. Watkins*, 22 Ark. 556; *Craig v. Flannagin*, 21 Id. 319; *Popple v. Macon*, 23 Id. 644; *Kansas Pacific Railway Co. v. Amos*, 10 Kan. 318; *The C. R. & M. R. R. Co. v. Carroll Co.*, 1 Iowa, 189; *Lacey v. Davis*, 4 Mich. 157; *Durant v. Marshall*, 37 N. J. 271; *Mulligan v. Hintrager*, 18 Iowa, 171; *Burton v. Bailey*, 2 Bay. 244; *People v. Seymour*, 16 Cal. 30; *Drexel & Co. v. Commonwealth*, 46 Pa. 31; *Commonwealth v. Wyoming Valley C. Co.*, 50 Pa. 410; *Delaware Div. C. v. Commonwealth*, 50 Id. 399; *State v. Welch*, 28 Mo. 60; *Olds v. Commonwealth*, 3 A. K. Marsh. 465.

Argument for Appellant in reply.

Neither sections 3172 nor 3238 are retroactive or special; they do not exempt any class of persons or property, but treat all alike.

C. J. Hillyer and B. C. Whitman, for Appellant in reply.

I. Nothing can become "the law of a case" except that which has been adjudicated. The question is not as to the force of a decision as authority, nor as to the force of a series of decisions under the doctrine of *stare decisis*. It is simply a question of *res judicata*. The doctrine of the law of the case is nothing else than an application to a second appeal of the doctrine of *res judicata*. (*Stibald v. The United States*, 12 Pet. 488; *Washington Bridge Co. v. Stewart*, 3 How. 424; *Phelan v. San Francisco*, 20 Cal. 40; *Leese v. Clark*, Id. 388.)

II. A decision is the application of a legal principle to a certain state of facts. Under similar but different facts it may be persuasive by analogy, but unless the facts are the same it is no adjudication. (*Nieto v. Carpenter*, 21 Cal. 488; *Mulford v. Deadihl*, 32 Id. 185; *Lucas v. San Francisco*, 38 Id. 491; *McKinley v. Tuttle*, 42 Id. 576; *Russell v. Harris*, 44 Id. 489.)

III. The sections under consideration are constitutional. They are a release by the state of a class or classes of demands over which the legislature has full control. The fact that they are retroactive does not affect their validity. (*Sedgwick on Const. & Stat. Const.*, 406-414; *Guildford v. Supervisors*, 8 Ker. 142.)

IV. It is not a violation of article IV, section 20 of the constitution, because it is not legislation "for the assessment or collection of a tax." A penalty is not a tax nor portion hereof; it is a legislative imposition.

V. All that portion of the brief of the attorney general which treats of the inability of the legislature to exercise judicial functions, or control judicial proceedings, is based upon a misconception of the real force and character of the legislation in question. If this were a law regulating, or attempting to interfere with the methods of judicial procedure between private litigants, the remarks and citations



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would be applicable. But the provisions here involved have no such purpose, and consequently can have no such effect. The state of Nevada is the party in interest, the party litigant. The obligation sought to be affected and by the sections referred to surrendered, is one due to itself. The law in question deals with the demand, and with any of the methods of enforcing it. It is an act of grace on the part of the sovereign, announced by its legitimate agent therefor. Neither the existence nor non-existence of litigation, nor the condition of existing litigation, in any way limits or affects the power of the party thereto to deal with its subject-matter. A release is effectual after judgment obtained as before suit begun. The legislature is the sole constitutional agency for creating or discharging state obligations.

VI. A penalty is not a tax, nor any part of a tax. because it is collected in the same suit it is a tax, then costs are taxes. Over the matter of penalties and costs the legislature has utter control within constitutional restrictions as to form of legislation. A legislative release of a tax may violate article X of the constitution, but a release of a penalty or costs, the legislation being otherwise formed, violates neither this nor any other constitutional inhibition of legislative power.

By the Court, LEONARD, C. J.:

On the twenty-seventh of April, 1878, judgment here was modified in the court below according to a previous order of this court. (13 Nev. 229.)

September 1, 1880, appellants moved the court for an order directing the satisfaction of said judgment on payment of the amount of all taxes and costs included in the same, exclusive of the penalties and percentage, in pursuance of the fourth section of a statute of this state, approved March 17, 1879, entitled, "An act to discontinue litigation touching inequitable claims for taxes and penalties." (Stat. 1879, 144.)

The court denied the motion, and this appeal is taken from an order denying the same.

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The statement on appeal shows that, on the hearing of said motion, it was made to appear to the court that, after the rendition of the original judgment, and in the month of May, 1877, the defendants paid all taxes and costs included therein, but not the penalties for non-payment at the time required by law; and that the amount so paid was duly credited upon the judgment.

It was also shown that no execution was issued upon either the original or modified judgment prior to August 30, 1880. In support of the motion defendants relied upon the fourth section of the statute above referred to, with the conditions of which they had fully complied.

Sections 2, 3, and 4 are as follows:

"Sec. 2. All claims by the state, or by any county, for penalties or percentages, which had accrued previous to the first day of July, 1877, on account of non-payment, at the time required by law, of any previously levied tax, when the original tax and costs were in fact paid prior to said date, are remitted and discharged, and the district attorneys of the several counties are directed to dismiss all actions heretofore commenced for the recovery of such penalties and percentages.

"Sec. 3. Wherein suits commenced for the recovery of taxes delinquent prior to the first day of July, 1877, a judgment has, by the consent of the district attorney, been entered for the amount of the original tax and costs, exclusive of any penalty or percentage due, or claimed by reason of default in payment at the time prescribed by law, the action of the district attorney in so consenting to said judgment is hereby ratified and approved.

"Sec. 4. Wherein actions of the character specified in the two preceding sections, a judgment has been entered for the taxes and also for the penalties or percentages prescribed by law for default in payment, such judgment, if no execution was issued thereon prior to the first day of February, 1877, shall be satisfied and discharged upon payment of the original tax and other costs, exclusive of the amount of the penalties and percentages included therein and still unpaid."

Section 3 has been declared by this court to be in part and palpable violation of sections 20 and 21 of article 1 of the constitution, which declare that "the legislature shall not pass local or special laws in any of the following enumerated cases, that is to say \* \* \* for the assessment and collection of taxes for state, county, and township purposes." (*State v. Cal. Mining Company and Consolidated Virginia M. Co.*, 15 Nev. 240, 259).

The validity of sections 2 and 4 was not passed upon directly, in those cases, and it is urged, therefore, that the decisions therein do not become "the law of the case." We shall consider this case upon its merits, and refer to the cases cited as authorities so far as they may be found applicable.

In those cases this court decided that the legislature had no power, under the constitution, to ratify the action of a district attorney in suits commenced for the recovery of taxes delinquent prior to the first day of July, 1877, when, in, by the consent of the district attorney, judgment had been entered for the amount of the original tax and interest exclusive of any penalty or percentage due or claimed on reason of default in payment at the time prescribed by law, and as before stated, those decisions were made upon the ground that such action by the legislature was in violation of the sections of the constitution before referred to.

In my opinion, if section 3 is unconstitutional for the reason stated, sections 2 and 4 are so, for the same reason. If the legislature in 1879 could not ratify the prior action of a district attorney to remit any penalties due prior to July 1, 1877, in consideration of the entry of judgment without objection for the original tax and costs, it certainly could not remit or discharge such penalties in cases where no judgment had been taken, or where judgment had been entered for the tax costs, and penalties, that is to say, if section 3 encounters the constitution on the reason that it is special legislation for the collection of taxes for state, county, or township purposes, then sections 2 and 4 must be held invalid for the same reason. The legislative intent was the same in each section, which was to re-



certain persons from the payment of penalties resulting under the general law, from the non-payment of taxes at the time required, and that was what was done, if they are constitutional. No reason is given by counsel for appellants for holding that the legislature had power, under the constitution, to release and discharge penalties under the circumstances stated in sections 2 and 4, if the same result could not be attained by section 3, and we think none can be given. It follows that, to hold with appellants on this appeal, would involve the necessity of admitting that, upon the former appeal, the court erred in its controlling theory of constitutional construction and in its conclusion.

That case was argued with signal ability, and it received the studious, conscientious consideration of every member of the court. The result was, my brother Hawley concluded that the decision in *Youngs v. Hall*, 9 Nev. 212, was applicable to the case then in hand, and considered it to be his duty to follow it, although he dissented when that case was decided, and although he still thought that the conclusion reached in *Youngs v. Hall* was wrong; while the other members of the court came to the conclusion announced, and upon the facts presented, did not consider the former case applicable or decisive, even though upon the facts existing in that case, the decision was correct.

*Youngs v. Hall* decided that the acts of 1867-69, to provide for the payment of Esmeralda county indebtedness, were not special laws, for the reason that they operated like upon all persons similarly situated, whether residing in the county or out of it; that is to say, upon all creditors of the county, and that a law so operating need not apply to all the counties of the state in order to be general. In my opinion, the gist of that decision, instead of being favorable, is fatal to appellant's theory of sections 2 and 4, under consideration. There, all persons similarly situated, that is, all creditors, were treated alike; while here, sections 2 and 4 were so framed that it was not possible for all who might be delinquent at that time, or in the future, to avail themselves of the favor granted to a few. The taxes of a thousand taxpayers of the state might have become

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delinquent subsequent to the first of July, 1877, and as well as the penalties, might have been unpaid when the statute was passed, still, not one of them could derive benefit. And even though the same delinquents had paid their taxes, without the penalties, before the law was passed, yet every one was excluded. It is necessary, in the consideration of this case, first, to determine the nature of sections 2 and 4. Are they general or special legislation? Second, Are they legislation for the collection of state, county, or township taxes? What kind of a law was then, did the legislature intend to pass, and what did it succeed in passing? Its title is "An act to discontinue litigation touching *inequitable* claims for taxes and penalties." To say the least, it is hardly probable that the legislature thought *all* claims for penalties were "*inequitable*." If that had been the legislative idea, the general law imposing them would have been repealed in terms, or the statute would have embraced all, instead of those claims that had accrued prior to July, 1877. There could have been no intention of affecting any claims for penalties that had accrued, or might accrue, after the date just mentioned, because the benefits granted were, *ex industria*, limited to claims that had accrued prior to that time; and of course none were included unless the original tax and costs had been in fact paid prior to said date. Out of the whole body of delinquents, then, that existed at the date of the law, a fraction only was chosen as objects of favor. The attempt was to remit all claims for penalties prior to a certain date, regardless of the amount, and to leave those that had accrued subsequently, as well as those that might accrue in the future, to be enforced according to the provisions of the existing law. Except in the cases embraced within the statute the general law was undisturbed, and to the exceptional cases the intent was to annul the general law.

Does not this law, then, affect only individuals and not a class? Does it not confer special privileges upon one more persons in nowise distinguished from others of the same category? Who were in the same situation as to cl

penalties under the general law? The answer is, all delinquents, or at least all of the same class. Upon the former appeal in this case the court said, in relation to the general law imposing penalties in cases like this (Comp. L. 238): "If the legislature had attempted, by a proviso or otherwise, to exempt from its operation any individual or individuals in nowise distinguished from others upon whom it was left operative, either the proviso would have been held void, or the whole law would have been declared unconstitutional." And in *Lewis v. Webb*, 3 Greenl. 336, the court said: "Can it be supposed for a moment that if the legislature should pass a general law and add a section by the way of proviso that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon; such a proviso would not receive the sanction or even the countenance of a court of law? And how does the supposed case differ in principle from the present? A resolve passed after the general law can produce only the same effect as such a proviso. The case of *Holden v. James*, 11 Mass. 396, is a direct authority on this point. The court there decided that the legislature have no authority, under the constitution, to suspend the operation of a general law." It is admitted, of course, that in the two cases just referred to the special resolves of the legislature were intended to apply to only one or two persons, and that they were named. But it can not be denied that it makes no difference whether the law is special as to one or one hundred. It is true, also, that if a few among many in the same situation are named as the objects of peculiar privileges, or as persons upon whom special burdens are imposed, the act of naming is strong proof of the special character of the law. But the naming itself does not make the law special. It is only proof that it is so, if only a fraction of many in the same situation are named.

Now, why is not this law as certainly special as it would have been if all who are embraced in sections 2 and 4 had been named? There is no more doubt now than there would have been then, that there was no intention of inter-

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fering with the operation of the general law as to any delinquent subsequent to the date named. Between that time and the passage of the law, in March, 1877, and thereafter, all penalties were to be enforced. Suppose our constitution prohibited, in terms, all special legislation, as to fixing the period of limitation of actions. Then, as now, the legislature could divide different causes of action into classes, and provide, in one class, say promissory notes, that actions should be brought in six years from maturity, and in another class, say book accounts, in two years. Such legislation would be general and would satisfy the constitution. It could be changed by general law affecting all of a class equally, but any subsequent statute extending or abridging the time as to a part of a whole class would be special. Under the circumstances just stated, a statute enlarging or shortening the time for the commencement of actions upon all promissory notes executed on a certain day, or between certain days, in the past, would be special. It could affect only a few persons of the whole class to which they belong. It might as well mention by name the causes of action intended to be embraced in the law. It is claimed that the statute in question is general, because the legislature had the power to separate taxpayers into classes, and that the persons embraced therein form a class who are all treated alike. The mere remission, by retroactive laws, of penalties due from a fraction of delinquents is, in no just sense, a classification, as that word is used by the court, such as will justify the distinction here attempted. The only reason why a law for the collection of taxes, which adopts the same methods for all of a class, but different ones for another class, is, or can be, held general, and therefore constitutional, is, because it treats alike all who are in the same situation. This statute does not attempt to do that; but, on the contrary, it in plain terms makes an arbitrary distinction between persons similarly situated.

Besides *Young v. Hall*, counsel for appellants refers us to several other cases decided by this court, in support of their theory of the nature of this statute.

In *Clarke v. Irwin* the court did not say the statute in

question would not have been in violation of the constitutional provision under consideration, if the legislature had attempted to "regulate the election of county and township officers," as those words were construed by the court. But it was held that, in the act then being considered, there was no such attempt, and consequently that there was no violation of section 20 of article IV. And from the facts before it the court was unable to say that a general law could be made applicable, and therefore that the act violated section 21 of the same article. *Evans v. Job*, 8 Nev. 322, followed *Hess v. Pegg*, 7 Nev. 29, where the only question was whether the statute locating the county seat of Washoe county at Reno was obnoxious to the twenty-first section of the fourth article of the constitution. It was claimed to be so, for the reason that a general law could have been made applicable. And upon that question the court's conclusion was the same, substantially, as in *Clarke v. Irwin*.

In *Ex parte Spinney*, the petitioner's claim of illegal imprisonment was based upon the assertion that the act in question (Stat. 1875, 46), was "a special law in a case where a general law is applicable, contrary to the provisions of section 21 of article IV of the constitution of this state."

It will be seen that in none of the cases above cited, except *Youngs v. Hall*, was the question directly considered, whether the statute assailed was a special law embracing any case enumerated in section 20 of article IV, and consequently invalid.

In nearly all of them general and special laws are defined, as they are in other cases, and the definition given of a special law by this court on the former appeal is fully sustained. Indeed, it is conceded to be correct by counsel for appellants. Such a law, then, is "one which affects only individuals and not a class—one which imposes special burden or confers peculiar privileges upon one or more persons in nowise distinguished from others of the same category." (15 Nev. 249.)

In two cases this court has stated the reasons why section

forfeiture of his land to the state, an obstinate taxpayer might successfully withhold from the state her legitimate revenues." Many reasons may have existed for the imposition of penalties; but, in our opinion, the prominent one was that it would act as a strong incentive to prompt payment of the tax. If a tax is paid within the time allowed, the state is satisfied. It prefers prompt payment without penalty, to an enforced one with penalty; and in order to secure the first it has made provision for the last.

It is true that the statute under consideration was not passed *for the purpose of collecting a tax*, but it is one *with respect to the collection of taxes*, because in certain cases it undertakes to annul the general law, and, if constitutional, does annul the general law by dispensing with one of the principal means adopted thereby, as to all taxpayers, for the collection of taxes.

All laws establishing the means and methods of collection are laws "for the collection of taxes." It follows that such means and methods must be fixed by general law, and they can not be materially changed except by general law, embracing at least an entire class. The legislature can not, by special law, interrupt the operation of a general law providing for the assessment or collection of taxes.

Otherwise the constitutional provision would be useless. If a general law for the collection of taxes can be set aside, annulled, suspended, or repealed by a special law in a given case, all the evils incident to special legislation are liable to result at any time. If it can be done in one case, so it may in many cases, or all, and thus the subject that the constitution declares shall be governed by general laws may be controlled by special statutes. Our statutes imposing penalties for non-payment at the times required, are enactments for the collection of taxes, and they would have been unconstitutional if they had not been made general. A statute remitting penalties in certain cases, but not in all, is legislation with respect to the collection of taxes. It curtails the means and interferes with the methods adopted by the general law. Such a law is, "with respect to the col-

lection of taxes," as surely as one dispensing with suits for their collection would be.

In *Ex parte Pritz*, 9 Iowa, 30, the petitioner was arrested under a warrant issued by the police magistrate of the city of Davenport, for the violation of a city ordinance. The office of police magistrate was created by an act of the general assembly, prior to the adoption of the constitution in force in 1858, which prohibited the passage of local or special laws \* \* \* "for the incorporation of cities and towns." Subsequent to the adoption of the constitution, an act was passed by the legislature amendatory of the original act incorporating the city of Davenport, and by the fourth section thereof the office of police magistrate was abolished.

It was claimed by the prosecution that the amendatory act above mentioned was void, because such legislation was prohibited by the constitution, and, consequently, that the office of police magistrate was not abolished. By the defense it was contended that the prohibition against passing laws for the *incorporation* of cities and towns did not take away the power to *amend* an act of incorporation in existence before the adoption of the constitution.

We quote from the opinion: "It is claimed that the prohibition to pass laws for the *incorporation* of cities and towns does not take away the power to pass laws for the amendment of such laws \* \* \* In the interpretation of the constitution, as in the interpretation of laws, however, we are to ascertain the meaning by getting at the intention of those making the instrument. What thought was in the mind of those making the constitution—what was their intention, is the great leading rule of construction.

Let us see, then, what was the intention in incorporating sec. 30 of art. 3 into the constitution. The ready and obvious answer is, to prevent special or local legislation; to require that the legislature should pass general laws upon all subjects named, and in all other cases where such general laws could be made applicable. There can be no question but that it was designed to confine the legislature to

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Opinion of the Court—Leonard, C. J.

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general legislation, and leave the people in their municipal capacity to organize, and carry on, their government under such general laws. If this be so, then to say that the legislature may not pass a law to *incorporate* a city, but may to amend an act of incorporation in existence before the adoption of the constitution, or charters formed under the general law, would make this provision of the constitution, practically, amount to nothing. For, if they may amend, they may to the extent of passing an entire new law, except as to one section. Or they may, at one session, amend half the law, and at the next, the other half, and thus the plain and positive prohibition of the fundamental law would be evaded. By such a construction the evil sought to be remedied would continue, if possible, in a more objectionable form. \* \* \*

But, again, to say that the prohibition to pass laws for the incorporation of a city does not include a prohibition to *amend*, we think is narrowing the language used to an unwarranted extent. When we speak of an act or law to incorporate a city, it may be conceded that we are understood to refer to a law *creating* the corporation. But if a law is passed that changes or modifies the act creating such law, it is as much for the government of the corporation as was the original act; and it would certainly seem that, if the legislature can not create, neither can they legislate so as to change that which was previously properly created." So we say in this case; if the legislature had not power to pass special laws with respect to the collection of taxes, then it could not, by such laws, legislate so as to change those general laws which were previously properly enacted. In other words, when a general law is passed which provides the ways and means for the collection of taxes, the complete operation of that law can not be materially interrupted, except by the enactment of a general law upon the subject, and until such a law is passed the original act remains in full force and must be carried out, regardless of any special law. (See *Atchison v. Bartholow*, 4 Kan. 124; *Davis v. Woolnough*, 9 Iowa, 106.)

But it is said that if the sections under consideration are unconstitutional, then section 3238, Comp. L., imposing the



Points decided.

penalty here sought, is equally so. We agree with counsel for appellants that the last-named section is constitutional. It is a general law imposing the same burdens upon all persons similarly situated, and belonging to the same class. The legislature had the power, by general law, to impose a heavier penalty upon one class than upon another, if, in their judgment, there was good reason for so doing. The legislature is the judge of the means necessary for an efficient system of collection, and within reasonable limits, at least, its discretion may be exercised by general legislation.

If we correctly interpret the argument of counsel for appellants, it is that section 3238 is constitutional for the reasons given above, and that the sections under consideration are so for the same reasons. That is to say, by these sections the legislature made a new class, consisting of the persons embraced therein. This argument has already been answered. If it could be held that these persons constitute a class, still it would be true that they were made such by special law enacted for the sole purpose, and as a means, of nullifying, in part, the intended operation of the general law. The purpose must fail, because the means, being prohibited, are inadequate.

The order of the court below is affirmed.

BELKNAP, J., having been of counsel at a former trial in the court below, did not participate in the foregoing decision.

[No. 1,053.]

THE STATE OF NEVADA, RESPONDENT, v. THE CALIFORNIA MINING CO. ET AL., APPELLANTS.

SPECIAL LAW.—(See *State v. Con. Virginia M. Co.*, ante, 432.)

C. J. Hillyer & B. C. Whitman, for Appellants.

Lewis & Deal and M. A. Murphy, Attorney General, for Respondent.

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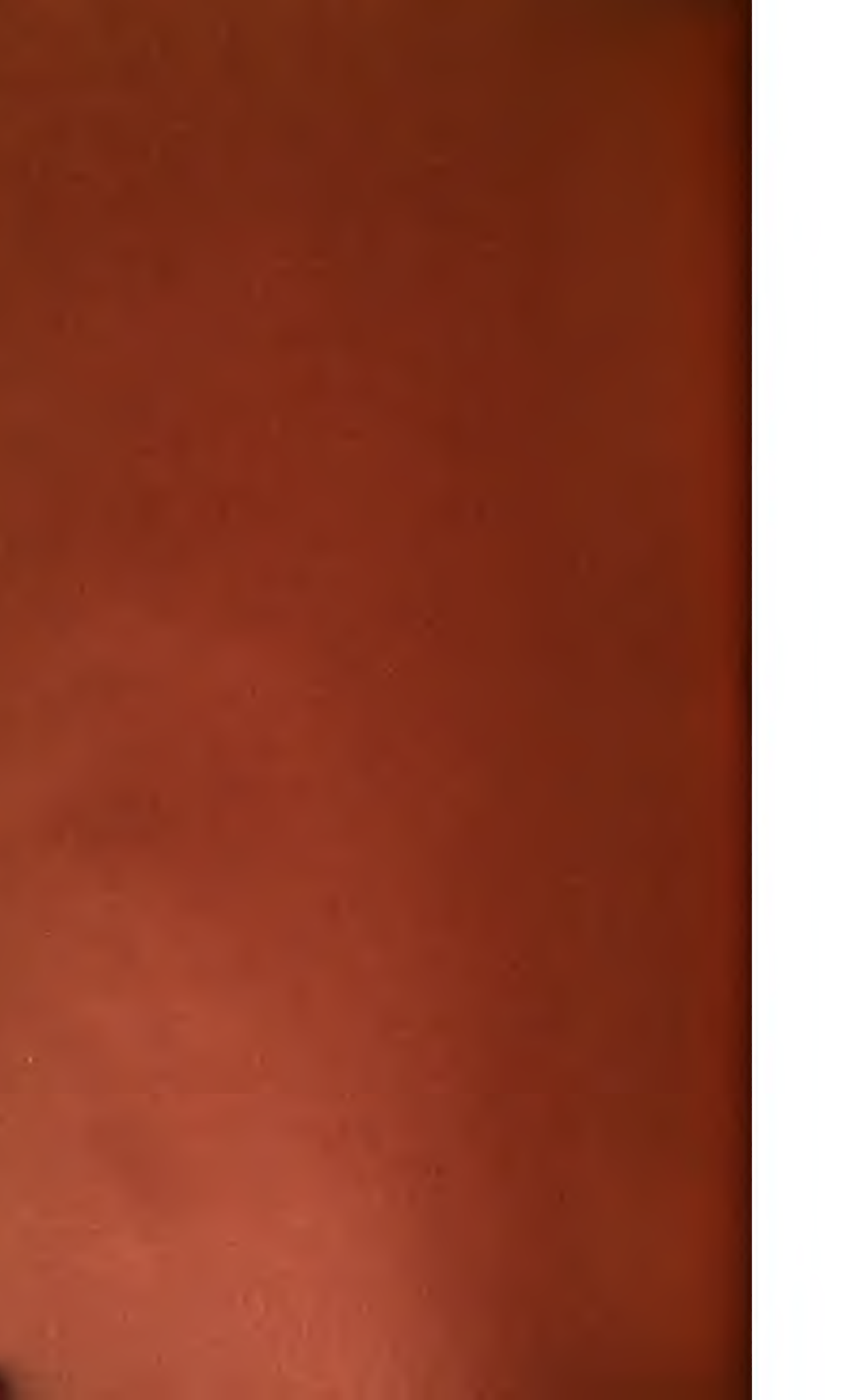
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By the Court, LEONARD, C. J.:

The questions involved in this case are the same, substantially, as those decided in the case of the *State v. The Consolidated Virginia Mining Company et al.* (No. 1052), and upon the authority of that decision, as well as that in the case of the *State v. The California Mining Company et al.*, 15 Nev. 240, the judgment appealed from is affirmed.

BELKNAP, J., having been of counsel in the court below, did not participate in the foregoing decision.

EXTRA ANNOTATION  
TO  
PRECEDING VOLUME



# NOTES

ON THE

## NEVADA REPORTS

### CASES IN 16 NEVADA

16 Nev. 25-35. **ROYCE v. HAMPTON**,  
No citation.

16 Nev. 36-39. **STATE v. JOHNSON**.

Defendant as witness in criminal case — Credibility. — Affirmed in *State v. Vasquez*, 16 Nev. 43, as to degree of credibility of testimony of defendant in criminal action; *Allison v. United States*, 160 U. S. 208, 40 L. ed. 397, 16 Sup. Ct. Rep. 254, holding when person accused of murder offering himself as a witness under provision of Act of March 16, 1878 (Stats. at L., p. 80), policy of an enactment should not be defeated by hostile intimations of trial judge.

— Instruction as to credibility. — Cited in reference notes in 72 Am. Dec. 547, to point that it is erroneous to charge against the credibility of the testimony of a defendant in a criminal case; 19 L.R.A.(N.S.) 805, an instruction that the statute permitting defendants to testify in their own behalf provides that the jury are to be the sole judges of the degree of credit to be given to such testimony, but under the instructions of the court, who thereupon told the jury that he saw no reason why such testimony might not be true, but, at the same time, failed to see any reason why it "must be true" or why it should be entitled to more credit than that of other witnesses, trenches upon the province of the jury, and is erroneous; 19 L.R.A.(N.S.) 819, a charge that "there is, in every criminal case, a greater or less temptation for a defendant to testify falsely in his favor," is erroneous; 19 L.R.A.(N.S.) 820, an instruction that jurors should, in every instance, consider the testimony of a defendant with great caution, invades the province of the jury, and is erroneous and prejudicial.

16 Nev. 39-42. **NESBITT v. CHISHOLM**.

Appeal — Statement on motion for new trial. — Cited in *Robinson v. Benson*, 19 Nev. 332, 10 Pac. 442, and *Poujado v. Ryan*, 21 Nev. 451,

33 Pac. 660, to point that statement prepared exclusively as statement on motion for new trial cannot be considered as statement on appeal from judgment; *Rosina v. Trowbridge*, 20 Nev. 117, 17 Pac. 757, to point that findings and conclusions of law not embodied in statement on motion for new trial cannot be considered on appeal; *Kirman v. Johnson*, 30 Nev. 153, 93 Pac. 502, to point that statement on motion for new trial, in the absence of stipulation of council cannot be considered as statement on appeal.

— Errors not complained of. — Cited in *Dennis v. Caughlin*, 22 Nev. 453, 58 Am. St. Rep. 761, 29 L.R.A. 731, 41 Pac. 768, to point that errors not complained of cannot be considered on appeal.

— Error must be shown. — Followed in *Schwartz v. Stock*, 26 Nev. 143, 65 Pac. 352, on point that presumptions are in favor of regularity of proceeding of trial court and error alleged must be affirmatively shown by record.

— Statement on appeal. — Cited in *Quinn v. Quinn*, 27 Nev. 175, 74 Pac. 6, to point that where there is no statement properly authenticated, only errors appearing on the face of the judgment roll can be considered on the appeal; followed in *Adams v. Rogers*, 102 Pac. (Nev.) 699, on point that where appeal is taken from order denying motion for new trial and record discloses there was no statement on appeal or bill of exceptions settled or filed, appellate court can consider nothing but judgment-roll; cited in *Adams v. Rogers*, 102 Pac. (Nev.) 699, on point that findings of trial court cannot be considered on appeal unless embodied in statement of case.

#### 16 Nev. 42-44. STATE v. VASQUEZ.

Instructions. — Cited in *State v. Addy*, 28 S. C. 14, 4 S. E. 817, in sustaining exceptions to instructions on ground language amounted to charging jury in matters of fact in violation of constitution, Art. IV. § 26.

Cited in reference notes in 72 Am. Dec. 547, to point that it is erroneous to charge against the credibility of the testimony of a defendant in a criminal case; 19 L.R.A. (N.S.) 819, an instruction that the jury should receive the testimony of the accused with great caution, for when one is being tried for a capital offense the temptation to pervert or distort the facts in favor of himself is very great, constitutes reversible error.

#### 16 Nev. 44-49, 40 Am. Rep. 485. FERRIS v. CARSON WATER CO.

Water company — Failure to supply water at fountains. — Cited in *Lowrey v. Bessemer Waterworks Co.* 146 Ala. 379, 41 So. 77, 6 L.R.A. (N.S.) 431, and *Town of Ukiah City v. Ukiah Water etc. Co.* 142 Cal. 178, 100 Am. St. Rep. 107, 75 Pac. 775, 64 L.R.A. 234, as to right to recover damages against water company for losses because of failure

supply water at fire; *Boston Safe-Deposit etc. Co. v. Salem Water* 94 Fed. 240, in discussing right of individual to enforce contract with city for fire protection; *Metropolitan Trust Co. v. Topeka Water* 132 Fed. 704, discussing liability of water company to respond to damages for property destroyed by fire on account of failure of company to sever contract with city to supply water; *Mugge v. Tampa Waterworks Co.* 52 Fla. 377, 120 Am. St. Rep. 211, 42 So. 83, 6 L.R.A. (S.) 1176, and *Bush v. Artesian H. & C. Water Co.* 4 Ida. 623, 10 Am. St. Rep. 164, 43 Pac. 70, in passing on liability of water company for damages caused by fire by reason of failure to furnish water; *Pack v. Sterling Water Co.* 118 Ill. App. 536, in denying liability of water company to citizen whose property was destroyed by fire for failure to supply water under contract with city; *Fitch v. Seymour Water Co.* 139 Ind. 220, 47 Am. St. Rep. 263, 37 N. E. 4, as to right of property owner to recover against water company for failure to furnish water at fire as under its contract with the city; *Trenton v. Larkin*, 36 Kan. 250, 59 Am. Rep. 544, 13 Pac. 400, to point that third person only indirectly benefited by contract, has no right to sue upon it; *Mott v. Cherryvale Water etc. Co.* 48 Kan. 15, 30 Am. St. Rep. 269, 28 Pac. 990, 15 L.R.A. 376; *Allen & Curry Mfg. Co. v. Cheveport Waterworks Co.* 113 La. 1112, 104 Am. St. Rep. 525, 37 So. 2, 68 L.R.A. 660, and *Howsmon v. Trenton Water Co.* 119 Mo. 309, 41 Am. St. Rep. 657, 24 S. W. 786, 23 L.R.A. 149, to point that property owner cannot sue upon contract between city and water company for damages sustained by him through failure of company to furnish water at fire; *Phoenix Ins. Co. v. Trenton Water Co.* 42 Mo. App. 123, in holding that water company is not liable to insurance company insuring property destroyed for failure to supply water to extinguish fire; *Styles v. Long* 67 N. J. L. 421, 51 Atl. 713, in holding that individual who sustains personal injuries by reason of nonperformance of stipulations by public corporation for the construction of public works is not entitled to maintain an action of tort based on mere violation of contractual duty; *Wainwright v. Queens County Water Co.* 78 Hun. 153, 28 N. Y. App. 992, in holding tax-payer of fire district cannot maintain suit on contract entered into by a water company with the fire district; *Case v. Houston Waterworks Co.* 88 Tex. 239, 31 S. W. 180, 28 L.R.A. 1, to point that citizen of municipality cannot recover under contract between municipality and water company for failure of latter to supply water at fire through which he suffered damages; *Nichol v. Washington Water Co.* 53 W. Va. 354, 44 S. E. 292, to point that owner of property destroyed by fire cannot recover damages on contract between city and water company to keep buildings supplied with water for "domestic, sanitary and fire purposes;" *Britton v. Green F. & H. Waterworks Co.* 81 Wis. 58, 29 Am. St. Rep. 862, 51 N. W. 87, to point that citizen cannot recover against water company under contract with municipality for failure of company to furnish water at fire.

Cited in reference notes in 81 Am. St. Rep. 480, to point that where company contracts with a city to furnish an adequate water supply for fire protection, and by reason of a breach of this contract the property of a citizen is burned. The authorities are in conflict as to whether the injured citizen has a right of action against the water company. The great weight of authority denies the right of a citizen to recover for the loss; 81 Am. St. Rep. 481, there must be some privity between him and the promisee, and some obligation or duty owing from the latter to him, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. A legal obligation or duty owing from the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration with the promisee, the obligation of the promisee furnishing an evidence of the interest of the latter to benefit him and creating a privity by substitution with the promisor; 81 Am. St. Rep. 482. a municipality has not such an interest in the property of a citizen by reason of its being taxable property that it can hold a water company liable for its loss by fire which results in a diminution of taxable property; the right of taxation is too remote and uncertain an interest to be foundation for a claim against a water company; 23 L.R.A. 150, the defendant was held not liable to the plaintiff for the insufficiency of the water supply furnished by it under a contract with the city; 25 L.R.A. 259, third person for whose benefit a contract is made, does not in all cases have a right of action; to entitle him thereto there must be some privity between him and the promisee, some obligation or duty owing from the latter to him, giving him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally; 25 L.R.A. 260, in case of an action brought against a water company for the nonsupply of water for the purposes of extinguishing a fire, by reason of which the plaintiff sustained damages, the plaintiff claiming the benefit of the contract between the defendant and the town, the court held the plaintiff could not maintain an action against a water company under its contract with the town, there being no privity of contract between the plaintiff and the defendant company; 61 L.R.A. 94, the right of taxation vested in the authorities of a city by the legislature does not create such an interest in the taxable property therein as to give the municipality or its assigns a right of action against a water company for damages from the diminution of taxable property by the destruction thereof by fire by reason of the insufficiency of water supplied under a contract with the municipality.

Deficiency judgment. — Cited in dis. op. of Bartch, J., in *McKay v. Ward*, 20 Utah, 183; 57 Pac. 1034, 46 L.R.A. 633, to point that deficiency of judgment cannot be rendered against the purchaser of mortgaged premises.

Cited in reference note in 23 L.R.A. 148, to point that no privity or



obligation or duty owing to him giving a legal or equitable claim to the promisee, or an equivalent from him personally being shown.

#### 16 Nev. 49-50. BORDEN v. BENDER.

Cited in *Bailey v. Papina*, 20 Nev. 178, 19 Pac. 33, to point that where no amendments are offered to statement on appeal its correctness assumed.

#### 16 Nev. 50-61, 40 Am. Rep. 488. STATE v. AH CHEW.

Constitutional law. — Followed in *State v. Ah Gonn*, 16 Nev. 62, holding opium act constitutional; cited in *Ex Parte Livingston*, 20 Nev. 284, 19 Pac. 322, holding constitutional act regulating and prohibiting sale of spiritous liquors; *State v. Lee*, 137 Mo. 149, 38 S. W. 585, in holding 1874, Rev. Stats. 1889, making it a misdemeanor to maintain opium den, not unconstitutional as class legislation in restraint of trade; *Luck v. Sears*, 29 Or. 427, 54 Am. St. Rep. 487, 44 Pac. 624, 32 L.R.A. 730, sustaining law prohibiting sale of opium and other like drugs; *Powell v. Commonwealth*, 114 Pa. 278; *Commonwealth v. Powell*, 1 Pa. Co. Ct. 105, and *Powell v. Commonwealth*, 19 W. N. C. 29, holding constitutional act prohibiting manufacture and sale of oleomargarine.

Cited in reference notes in 1 Am. St. Rep. 649, to point that the legislature of a state, in the exercise of the power, may prohibit the selling or giving away of opium by any person except druggists and apothecaries and may provide that druggists and apothecaries shall sell it only on the prescription of legally practising physicians; 54 Am. St. Rep. 407, a statute permitting the sale of opium is constitutional; 78 Am. St. Rep. 258, the selling or giving away of opium may be made a crime by statute, and such an act is constitutional; 6 L.R.A. 581, the legislature may prohibit a dangerous business, as the sale of opium, or may regulate the sale of any commodity, the use of which would be detrimental to the morals of the people.

— Sufficiency of title of act. — Cited in *Ex Parte Yung Jon*, 28 Fed. 112, holding title to act November 21, 1885, "regulating sale of opium and suppressing opium dens" sufficiently covers the act.

Indictment — Negating exceptions. — Cited in *State v. Buckaroo*, 30 Nev. 334, 96 Pac. 497, and *Johnson v. People*, 33 Colo. 283, 108 Am. St. Rep. 90, 80 Pac. 136, holding that where there are exceptions it is not necessary for the indictment to negative the exception; *Shelp v. United States*, 81 Fed. 696, 26 C. C. A. 570, to point that indictment for statutory offense should negative an exception to the statute where that exception is such as to render the negative of it an essential part of the definition or description of the offense charged, only.

Cited in reference note in 94 Am. Dec. 256, to point that if the exception is so incorporated with the clause describing the offense that in fact becomes a part of the description, then it cannot be omitted in the pleadings; but if it is not so incorporated with the clause defining

the offense as to become a material part of the definition, then it is matter of defense, and must be shown by the other party, though it be in the same section, or even in the succeeding sentence.

— **Essential averments.** — Cited in *Territory v. Burns*, 6 Mont. 75, 9 Pac. 434, in discussing essential averments in an indictment.

· **Citizenship of child of Chinese parents.** — Cited in *United States v. Wong Kim Ark*, 169 U. S. 697, 42 L. ed. 907, 18 Sup. Ct. Rep. 475, in discussing citizenship of child born in this country of Chinese parents.

**16 Nev. 61-62. STATE v. AH GONN.**

No citation.

**16 Nev. 62-63. STATE v. CHING GANG.**

No citation.

**16 Nev. 63-64. EX PARTE LORRAINE.**

**Extradition — "Charged."** — Cited in *State v. White*, 40 Wash. 565, 82 Pac. 909, 2 L.R.A.(N.S.) 567, to point that the word "charged" in the statute contemplates the person arrested and delivered up, committed the offense in another state and is in such state charged, either by indictment, information, or accusation known to the law of such state.

Cited in reference notes in 57 Am. Dec. 399 to point that the person must be charged with crime in another state is in some instances required by statute; 46 Am. St. Rep. 417, statutes for the surrender of fugitive from justice must be strictly complied with and in order to hold a fugitive to await the requisition of the executive of another state, it must affirmatively appear from the complaint on file before the committing magistrate of the state to which such party has fled that a crime has been committed in such other state, that the accused has been charged in that state with that crime, and that he has fled from justice and is within the state where the arrest is made; these are essential jurisdictional facts and must appear to authorize the arrest and detention, they cannot be inferred; 112 Am. St. Rep. 111, in order to hold a fugitive from justice to await the requisition of the governor of another state, it must affirmatively appear from the complaint filed before the committing magistrate in Nevada that a crime has been committed in the other state, that the accused has been charged in that state with its commission, and that he has fled from justice and is within the state of Nevada; 112 Am. St. Rep. 121, in order to give the governor of the asylum state jurisdiction to issue his warrant of extradition, it must be shown that the accused is a fugitive from the justice of the demanding state; 112 Am. St. Rep. 124, in order for the person to be extradited there must be some charge in the demanding state against the accused in the form of an

ment, information, affidavit or other form of accusation known to the laws of the demanding state; 26 L.R.A. 34, the statute authorizing the preliminary arrest must be strictly complied with; 28 L.R.A. 101, statutes providing for the arrest of one accused of being a fugitive from justice before the requisition arrives for his rendition may impose a condition which the legislature may think necessary.

#### 16 Nev. 64-76. IOWA MINING CO. v. BONANZA MIN. CO.

**Summons — Waiver of by pleading.** — Cited in *Rose v. Richmond Min. Co.* 17 Nev. 54, 27 Pac. 1110, and *Harria v. Helena M. Co.* 29 Nev. 515, to point that defendant by demurring and answering waives the right to a summons.

**Gold and mining — Jurisdiction of court.** — Cited in *Rose v. Richmond Min. Co.* 17 Nev. 54, 27 Pac. 1112, construing § 2326 of Fed. Rev. Stat. and holding court had jurisdiction to decide every question occurring in the case.

#### 16 Nev. 76-78. STATE EX REL. QUINN v. DISTRICT COURT.

**Imprisonment until fine paid.** — Cited in *Ex Parte Bergman*, 13 Nev. 44, 14 Pac. 217, to point that person fined may be imprisoned until paid.

**Constitutional law.** — Cited in *State v. Donovan*, 20 Nev. 80, 15 Pac. 488, sustaining as constitutional, gaming law, Stats. 1897, p. 114.

**Certiorari.** — Cited in *State ex rel. Thompson v. Second Judicial District Court*, 23 Nev. 246, 45 Pac. 468, to point that if trial court tax that were not taxable against relator, it was not an excess of jurisdiction and its action cannot be reviewed upon certiorari; followed in *App v. District Court*, 103 Pac. (Nev.) 236, and *State v. Second Judicial Dist. Court*, 105 Pac. (Nev.) 1024, on point that inquiry upon writ of certiorari will not extend further than to determine whether the court or tribunal has jurisdiction to make order complained of.

#### 16 Nev. 79-85. STATE v. PARKER.

**Punishment for burglary.** — Laying ownership. — Cited in *State v. Parker*, 25 Nev. 443, 62 Pac. 243, to point that ownership is properly laid in persons having possession at time of burglary; disapproved in *State v. Webber*, 138 Cal. 150, 70 Pac. 1091, and *Nichols v. State*, 68 Cal. 424, 32 N. W. 547, discussing burglary upon railroad car.

#### 16 Nev. 85-88. MANNING v. SMITH.

**Allegation by surviving partner as usual in ordinary complaint.** — Cited in *Reese v. Kinkad*, 17 Nev. 449, 30 Pac. 1088, to point that allegation by surviving partner as usual in ordinary complaint, is sufficient.

**16 Nev. 89-91. STATE v. QUINN.**

No citation.

**16 Nev. 91-92. BAUM v. MEYER.**

No citation.

**16 Nev. 92-94. STATE EX REL. FLANNINGHAM v. BOARD OF COM'RS OF STOREY CO.**

**Classification of counties — Intention.** — Cited in *State v. Woodbury*, 17 Nev. 343, 30 Pac. 1008, to point that intention of the legislature in classifying counties must control courts.

**"Last general election" — Meaning of term.** — Cited in *State v. Woodbury*, 17 Nev. 344, 30 Pac. 1008, in construing words "last general election;" *State v. Woodbury*, 17 Nev. 353, 30 Pac. 1011, adhering to construction given to words "last general election" in statute of 1879.

**16 Nev. 94-98. LAKE v. LEWIS.**

Cited in *Brandon v. West*, 28 Nev. 507, 33 Pac. 328, to point that legal title having passed to successor by operation of law, it is incumbent upon them to convey to plaintiff.

**16 Nev. 98-101, 40 Am. Rep. 495. EX PARTE DARLING.**

**Constitutional law.** — Cited in *State v. Overton*, 16 Nev. 151, in construing Stats. 1881, p. 166, as to licensing benevolent lottery; followed in *Ex Parte Woodburn*, 104 Pac. (Nev.) 245, on point that legislature has no power to pass act which would have effect to "commute" any portion of sentence imposed by court; in dis. op. of Davidson, J., in *Barnett v. State*, 42 Tex. Cr. 324, 62 S. W. 777, in discussing validity of art. 723, Code Crim. Proc.; *Ex Parte Clawson*, 6 Utah, 360, 15 Pac. 329, to point that commutation statute encroaches upon authority of executive and further that prisoner's right to discharge was controlled by statute in force at time of his sentence.

Cited in reference note in 1 L.R.A.(N.S.) 522, to point that as to cases distinguished from principle case in which it was held that Nevada Stats. 1881, p. 109, establishing certain credits for good behavior, in so far as it attempts to commute any portion of the sentence imposed by the courts prior to the time the act took effect, is inoperative and void, as interfering with the judiciary.

**16 Nev. 101-120. STATE v. PRITCHARD.**

**Jury — Challenges to.** — Cited in *State v. Hartley*, 22 Nev. 356, 40 Pac. 374, 28 L.R.A. 38, as to the necessity of interposing challenges by both the state and the defendant before jury is completed; distinguished in *State v. Vaughan*, 23 Nev. 119, 43 Pac. 198, on the ground that no testimony had been taken in the principal case, which was one of the grounds upon which decision was placed.

— **Excusing juror after admission of evidence.** — Cited in *State v. Laughan*, 23 Nev. 113, 43 Pac. 196, as to excusing juror after admission of evidence.

— **Discharging juror after sworn.** — Cited in *Ochs v. People*, 124 Cal. 410, 16 N. E. 665, and *State v. Nash*, 46 La. Ann. 204, 14 So. 611, to point that trial court has discretionary power to discharge juror after he has been sworn.

Cited in reference notes in 1 Am. St. Rep. 123, 524, to point that a juror may be discharged after he has sworn, and before evidence is given because it is discovered as opposed to capital punishment, or because it is then ascertained he will not convict on circumstantial evidence; and in such a case the court need not discharge the remaining juror but may impanel another juror in place of the one discharged.

**Instruction.** — Cited in *People v. Ammerman*, 118 Cal. 29, 50 Pac. 17, to sustain charge of court to find for people upon plea of jeopardy after former acquittal.

Cited in reference note in 58 Am. Dec. 547, to point that where the facts are agreed upon, the court may instruct the jury that they constitute no former jeopardy.

### 16 Nev. 120-131. STATE v. CARRICK.

**Indictment — Sufficiency.** — Cited in *Adams v. People*, 25 Colo. 536, 5 Pac. 808, in sustaining indictment under Gen. Stats. 1883, § 769 (Mills' Ann. Stats., § 1246) charging official with failure to pay over money; *United States v. Bornemann*, 36 Fed. 257, and *Sigsbee v. State*, 3 Fla. 534, 30 So. 818, holding indictment against public officer for embezzlement of public funds need not state kind of money; *Moore v. United States*, 160 U. S. 275, 40 L. ed. 425, 16 Sup. Ct. Rep. 297, holding that indictment against a public officer for conversion of public moneys defective in that it did not allege the money came into his possession in his official capacity.

Cited in reference note in 98 Am. Dec. 172, to point that in the indictment it is sufficient to allege and prove the felonious conversion of his own use of any money that came into his possession, or was under his control, by virtue of his office, without specifying with certainty the particular kind of funds embezzled, or the particular time when the money was received.

**Evidence.** — Cited in *State v. Crowder*, 41 Kan. 111, 21 Pac. 211, to point that admissions by persons accused of crime suggesting the inference that such crime was committed as alleged, are admissible against the person making them; *State v. Neilon*, 43 Or. 175, 73 Pac. 24, in discussing proposition of necessity of proving kind of money where information alleges defendant converted "lawful money of the United States."

— **Confessions.** — Cited in reference notes in 18 L.R.A.(N.S.) 776, to point that the law excluding confessions was based in a spirit of

charity for the weakness of human nature; and rested upon the theory that a man, when charged with a crime and threatened with the punishment of the law, or promises of immunity therefrom, might be induced, while in an excited and alarmed condition of mind, to make statements that were not true; such statements, when so made, were and should be excluded by the courts; 18 L.R.A.(N.S.) 805, it is only where the confession was obtained by mob violence, or by threats of harm or promises of favor or worldly advantage held out by some person in authority or standing in such intimate relation, from which the law would presume that his promises would be likely to exert such an influence over the mind of the accused as to induce him to state things that were not true, that the court would be authorized to exclude the confession or admission; 18 L.R.A.(N.S.) 814, a statement to a county treasurer suspected of being a defaulter, made by one of his bondsmen, "there is no use of putting this thing off any longer. If you are short come out and say so and we will try to fix it up,"—was held not to be a promise or representation which could reasonably have induced the accused to state what was not true; and therefore it was not such inducement as would render involuntary a confession thereafter made; 18 L.R.A.(N.S.) 847, the bondsman of a county treasurer was held not to stand in such relation to him as to exercise any undue influence or control over his mind, so as to make him a person of authority within the rule.

Challenge for implied bias.—Cited in *State v. Haworth*, 24 Utah, 408, 68 Pac. 158, in upholding challenge for implied bias where juror had opinions that deceased had been unlawfully killed but no opinion as to who did the killing.

#### 16 Nev. 131-136. WALL v. TRAINOR.

Evidence.—*Brown v. Wheeler*, 62 Kan. 682, 64 Pac. 596, in discussing cumulative evidence on application for new trial on ground of newly-discovered evidence.

Cited in reference note in 14 L.R.A. 611, to point that if admissions have been proved no trial testimony of other admission is accumulative.

#### 16 Nev. 136-152. STATE EX REL. MURPHY v. OVERTON.

Lotteries—"Prize concerts" are.—Cited in *State v. Kansas Mercantile Ass'n*, 45 Kan. 353, 23 Am. St. Rep. 727, 25 Pac. 985, 11 L.R.A. 431, to point that "prize concerts" are lotteries.

Cited in reference notes in 7 L.R.A. 600, to point that a scheme of a benevolent association to provide for the care and maintenance of the state insane, to distribute among ticket-holders to a public entertainment prizes by raffle or other similar schemes, is a "lottery;" 12 L.R.A. 39, "prize concerts" are lotteries.

**16 Nev. 152-154. STATE EX REL. KING v. HALLOCK.**

ited in *State v. Hallock*, 16 Nev. 378, to point that constitutional  
ndment passed since statute is controlling.

**16 Nev. 154-155. LACHMAN v. BARNETT.**

ited in *Lachman v. Barnett*, 18 Nev. 269, 3 Pac. 38, same case on  
nd appeal.

ectment — Holder of easement may not maintain. — Cited in *Moye*  
hurber, 146 Ala. 183, 40 So. 824, to point that person in enjoy-  
t and use of an easement has no such title as will enable him to  
tain ejectment.

vidence. — Cited in reference notes in 77 Am. Dec. 553, to point that  
cannot be introduced to show interest of defendant, as it has no  
ency to show this fact; 121 Am. St. Rep. 406, in proceedings for  
ble entry and detainer title cannot be drawn directly into ques-  
and, considered as a defense, is always immaterial. The plain-  
need not establish any title on his part, and the defendant will not  
mitted to prove as a defense that, though his entry was forcible,  
as the owner of the property and therefore was and is entitled to  
possession thereof.

**16 Nev. 156-180. MARSHALL v. GOLDEN FLEECE G. & S. MIN. CO.**

ppel. — Cited in *Comstock Mill. & Min. Co. v. Allen*, 21 Nev. 330,  
ac. 435, to point that appeal will lie from order striking out state-  
on motion for new trial; *Bliss v. Grayson*, 25 Nev. 345, 59 Pac.  
to point that court will decide whether findings sustain judgment  
ppel from order denying motion for new trial.

ecision" of court defined. — Cited in *Brubaker v. Brubaker*, 74 Kan:  
86 Pac. 455, discussing and defining meaning of word "decision" of  
.

endment to pleadings. — Cited in *Grand Central Min. Co. v. Mam-*  
*Min. Co.* 29 Utah, 597, 83 Pac. 685, in discussing amendment to  
lings.

rporations — Sale of delinquent stock. — Cited in reference note in  
R.A. 310, to point that a sale of delinquent shares is not unlawful  
use the assessments not paid would not have been necessary if  
trustees of the corporation had not previously misappropriated its  
s.

**16 Nev. 180-184. BUCKLEY v. BUCKLEY.**

vidence. — Distinguished in *Schwartz v. Stock*, 26 Nev. 147, 65 Pac.  
questions not having been raised as to whether the widow and  
representative of her deceased husband was competent to testify to  
accuracy.

ted in reference note in 52 L.R.A. 558, to point that an account

book kept by a deceased person, accompanied by testimony of his personal representative that it was the book in which he kept his accounts; that the handwriting therein was principally the decedent's, the rest being the handwriting of the witness; that the entries were made at or about the time the transactions to which they referred occurred; and that it was the book in which the decedent had settled with persons with whom he had business.

**Personal property of deceased — Right of possession.** — Cited in reference note in 112 Am. St. Rep. 731, to point that the right to the possession of the personal property of a deceased person is in his personal representative, and not in his heirs or distributees, until after distribution.

**16 Nev. 185-193. GASS v. HAMPTON.**

No citation.

**16 Nev. 194-207. KLEIN v. KINKEAD.**

**Statutes.** — Cited in *Ex Parte Livingston*, 20 Nev. 288, 21 Pac. 324, discussing what may be embraced within a statute; *State v. Board of Com'rs*, 21 Nev. 239, 29 Pac. 976, as to validity of statute consolidating office; cited in dis. op. of Bonnifield, J., in *State v. Board of Com'rs*, 22 Nev. 415, 41 Pac. 151, to point that different steps in a statute by which purpose is to be accomplished are not different subjects, but minor parts of the same subject.

Cited in reference note in 64 Am. St. Rep. 74, to point that the different steps by which the purpose of an act is to be accomplished are not different subjects, but minor parts of the same subject.

— **Title to act.** — Cited in reference notes in 64 Am. St. Rep. 75, to point that the title of an Act is sufficient if the provisions of the act are germane to the general subject expressed in its title. When the general purpose is declared in the title, the means for its accomplishment, provided by the act, are presumed to be intended as necessary incidents and if the subject is properly expressed in the title, the act may, without vitiating the title, create the means and instrumentalities required for its own accomplishment; 64 Am. St. Rep. 98, a law providing for the construction of an insane asylum, that the money appropriated for that purpose shall be taken from the state school fund, and that in its place there shall be deposited state bonds, bearing interest, etc., together with a provision for the levy and collection of a tax to meet the payment of the bonds, has its subject,—the care of the insane,—expressed in its title, an "act to provide for the taking care of the insane of Nevada."

**Estoppel of owner to follow property, when.** — Cited in *Wilderman v. Harrington*, 2 Wilson (Tex.) 724, holding that where one person entrusts another with all the indicia of ownership of personal prop-



and the latter wrongfully disposes of it to an innocent purchaser, the lender will be estopped to pursue property and must look to seller. Cited in reference notes in 43 L.R.A. 750, to point that the owner of certificate of stock issued in the name of different parties and indorsed by them as trustees, who deposit them with a bank to be held as collateral security for any indebtedness then existing or thereafter incurred by reason of purchases or sales of stock that the bank might make for him, which stock is subsequently delivered by the bank with other stocks to another as collateral security for the payment of a loan made by him to the bank, and for further advances might be made, the lender having no knowledge of the ownership of the stock, cannot recover the value thereof of the second pledge as a conversion thereof; 43 L.R.A. 768, there is nothing in the mere fact of the disposition by a bank of certificates of mining stock issued in the name of different parties and indorsed by them as trustees as collateral security, to put them upon inquiry as to the ownership of the stocks, and as to whether the bank held them as collateral or not.

#### 16 Nev. 207-215. STATE v. ST. CLAIR.

Instruction. — Cited in *State v. Buralli*, 27 Nev. 54, 71 Pac. 536, to point that that court may properly refuse instruction asked where already given in substance; followed in *State v. Thompson*, 101 Pac. (Nev.) 101, on point that if party desires explicit instructions, it is his duty to prepare same and ask them to be given.

#### 16 Nev. 215-217. LAKE v. KING.

Final judgment — In divorce case. — Cited in *Lake v. Lake*, 17 Nev. 30, 30 Pac. 879, discussing what constitutes final judgment in divorce; *Lake v. Lake*, 17 Nev. 285, 30 Pac. 879, to question whether decree dissolving bond of matrimony before trial of issue touching property and children is final judgment upon which appeal can be taken; *Young v. Brehl*, 17 Nev. 383, 3 Am. St. Rep. 892, 12 Pac. 566, to point that judgment dissolving of every issue in case is final; *Macnevin v. Macnevin*, 63 Cal. 1, 40 Pac. 1, holding order for judgment is not final judgment.

Cited in reference notes in 60 Am. Dec. 428, to point that interlocutory judgment or decree, on the other hand, may be said to be one which does not dispose of the cause, but reserves further questions for directions for future determination; 60 Am. Dec. 438, where, in an action for divorce, the bonds of matrimony are ordered dissolved, but the court reserved its decision on the questions of the division of the common property and the custody of the child, the judgment is not final.

— Alimony pendente lite, appeal. — Cited in *Kapp v. Kapp*, 99 Pac. 1078 note, in holding order increasing alimony pendente lite appealable; *Lesh v. Lesh*, 21 App. D. C. 485, in holding that an appeal lies from an order for allowance of alimony pendente lite.

—Order appointing receiver.—Cited in *State v. Parker*, 6 Wash. 415, 34 Pac. 150, holding order of court appointing assignee in insolvency in place of person named in deed of assignment, is not a final judgment from which an appeal lies.

*Mandamus*.—Cited in *State v. Cox*, 155 Ind. 597, 58 N. E. 850, to point that mandamus will not lie when it appears from the bill that it cannot benefit person applying for same.

#### 16 Nev. 217-222. *HOOLE v. KINKEAD*.

*Mandamus*.—Cited in *State v. Murphy*, 19 Nev. 92, 6 Pac. 841, to point that where act done is judicial in character writ of mandamus will not direct in what manner inferior court shall act, but only direct that it act; *Hardin v. Guthrie*, 26 Nev. 252, 66 Pac. 745, to point that in mandamus court cannot say that particular conclusion or judgment is wrong; *State v. Curler*, 26 Nev. 356, 67 Pac. 1077, to point that mandamus will lie to compel an officer or tribunal to exercise judicial functions but not review their acts; *State v. Board of Com'rs*, 27 Nev. 474, 77 Pac. 986, to point that in mandamus court cannot substitute its judgment in place of board in its denial of petition; *State v. Boerlin*, 30 Nev. 477, 98 Pac. 404, to point that mandamus will not lie to review, regulate, revise, or annul the official discretion or judgment of the board of county commissioners after they have once heard, considered, and finally exercised their discretion and judgment, no matter whether said exercised discretion and judgment is erroneous or excessive; *People v. State Board of Dental Examiners*, 110 Ill. 186, to point that subordinate body vested with power to determine question of fact, duty is judicial and it may direct by mandamus to proceed but cannot compel to determine in any particular manner; *Johnson v. Sanitary District*, 163 Ill. 288, 45 N. E. 214, to point that mandatory injunction in nature of mandamus will not issue to compel letting of contract by public board; *Madison v. Harbor Board*, 76 Md. 398, 25 Atl. 338, to point that letting of contracts for public improvements to lowest bidder involves exercise of degree of official discretion which will not be controlled by mandamus; *State ex rel. Kaves v. Rickards*, 16 Mont. 153, 50 Am. St. Rep. 481, 40 Pac. 213, 28 L.R.A. 301, as to discretion of state board in awarding contracts; *State v. Rickards*, 16 Mont. 152, 50 Am. St. Rep. 480, 40 Pac. 212, 28 L.R.A. 300, to point that officer is required to let contract to lowest bidder if reasonable; *State v. State Medical Examining Board*, 32 Minn. 329, 50 Am. Rep. 579, 20 N. W. 241, to point that in mandamus proceeding correctness of decision enabling exercise of judgment cannot be brought into review; *Sawyer v. Mayhew*, 10 S. Dak. 23, 71 N. W. 143, to point that where public officer in the exercise of discretion, disallows his claim, mandamus will not issue to reverse his judgment; *State v. Board of Live-stock Com'rs*, 4 Wyo. 132, 32 Pac. 116, to point that subordinate body may be by mandamus directed to act, but not how it shall act;

State v. State Board of Land Com'rs, 7 Wyo. 488, 53 Pac. 295, to point that principal case was quoted to effect that subordinate body can be directed to act but not how to act in matter in which it has right to exercise its judgment.

Cited in reference notes in 50 Am. St. Rep. 490, to point that those whose duty it is to let contracts for public work are required, in ascertaining who is the lowest responsible bidder, to deliberate and to decide. Their duties, therefore, are not merely ministerial, but partake of a judicial character, requiring the exercise of discretion; 50 Am. St. Rep. 491, where the constitution or some statute does require the work to be let to the lowest responsible bidder giving adequate security, the administrative board whose duty it is to let the contract is not bound to let it to the one whose bid is merely the lowest; and, if it has done so, its action may be reconsidered, before the contract is closed, and the award be made to another. It has a discretion to determine who is "the lowest bidder" and what is "adequate security," and must exercise it, to the best of its judgment and for the public interest. When this has been done, mandamus will not lie, in the absence of a clear showing of fraud or bad faith, to compel the award of the contract to one whose bid is merely the lowest in amount; 50 Am. St. Rep. 496, it will issue to compel boards or officers to act with respect to the letting of a contract, and to do their duty by deciding and acting according to their best judgment, but a court cannot direct them in what manner to decide; 98 Am. St. Rep. 879, mandamus is not a remedy by which to review or interfere with the discretionary action of an officer to whom the people have intrusted the responsibility of auditing claims against the state; 26 L.R.A. 710, the "lowest responsible bid," imports "skill, ability and integrity," and the discretion will not be controlled by mandamus.

16 Nev. 222-228. **MACKEY v. WESTERN UNION TEL. CO.**

Telegrams — Liability for negligence. — Cited in Daugherty v. American Union Tel. Co. 75 Ala. 172; 173, 51 Am. Rep. 495, as to liability of telegraph company for non-delivery of cipher telegrams; cited in dissent of Somervill, J., in Western Union Tel. Co. v. Way, 83 Ala. 564, 10 So. 854, in discussing proper measure of damages for neglecting to transmit or deliver cipher dispatches; Hadley v. Western Union Tel. Co. 115 Ind. 200, 15 N. E. 850, to point that in determining what is fairly within contemplation of parties when dispatch sent, terms and contents thereof may be taken into consideration; Hughes v. Western Union Tel. Co. 79 Mo. App. 139, construing § 2729, Stats. 1889, in relation to the measure of damages for failure to send or deliver telegraphic message; Williams v. Western Union Tel. Co. 136 N. C. 85, 48 S. E. 180, in discussing damages for erroneous transmission of telegraphic messages; Ferguson v. Anglo-American Tel. Co. 16 Pa. Co. Ct. 102, and Ferguson v. Anglo-American Tel. Co. 4 Pa. Dist. R. 98, holding nominal damages only can be recovered for delay in delivering cipher

telegram; *Western Union Tel. Co. v. Reynolds*, 77 Va. 134, 46 Am. Rep. 715, and *Primrose v. Western Union Tel. Co.* 154 U. S. 33, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, as to rule of damages for failure to transmit or deliver cipher or other unintelligible dispatch.

Cited in reference notes in 71 Am. Dec. 472, to point that the weight of authority holds that where the meaning of a message is wholly unknown to the agent of the company, the sender can only recover nominal damages for failure to transmit the message in the form in which it is delivered to the company; 81 Am. Dec. 616, it is the duty, also, of a telegraph company to transmit and deliver messages promptly,—and it is consequently liable for an unreasonable delay; 81 Am. Dec. 617, it is the duty of a telegraph company to forward messages in the order of time in which they are received, unless it is under obligation, by statute or public policy to give precedence to certain messages, as those of the government, or those of great importance; 45 Am. Rep. 486, it is the duty of telegraph companies to transmit messages with reasonable diligence and in the order of time in which they are received; 45 Am. Rep. 498, telegraph companies are liable to the extent of the actual damage sustained for delay or failure in transmitting a dispatch, the importance of which is manifest either by its own words or made so by explanation; 117 Am. St. Rep. 289, in the absence of notice of special circumstances connected with the sending of a message, a telegraph company is liable only for nominal damages; 2 L.R.A. 777, the broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions—the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed.

#### 16 Nev. 228-242. BROWN v. WARREN.

Cited in *Brown v. Warren*, 17 Nev. 419, 30 Pac. 1078, same case on second appeal.

**Nonsuit.**—Cited in *Patchen v. Keeley*, 19 Nev. 409, 14 Pac. 350, as to presumption of appellate court in considering nonsuit; *Burch v. Southern Pac. Co.* 104 Pac. (Nev.) 240, to point that in granting or refusing motion for nonsuit, court must take as proven, every fact plaintiff's evidence tended to prove.

**Sufficiency of description.**—In indictment for forgery.—Cited in *McLean v. State*, 3 Ga. App. 663, 60 S. E. 334, in discussing sufficiency of description in indictment for forgery.

—In deed.—Cited in *Idaho Gold Min. Co. v. Union Mining etc. Co.* 5 Ida. 120, 47 Pac. 99, in discussing sufficiency of description in deed; *McColloch v. Price*, 14 Mont. 323, 43 Am. St. Rep. 639, 36 Pac.

95, holding description of premises in conveyance sufficient; *Huberman v. Evans*, 46 Neb. 797, 65 N. W. 1050, in discussing sufficiency of description in deed; *Abbott v. Coates*, 62 Neb. 249, 86 N. W. 1058, to point that extrinsic evidence admissible to locate lands conveyed by sheriff's deed containing an accurate but general description.

**Appeal—Sufficiency of assignment of error.**—Cited in *Wilcox v. Mutual Fire Ins. Co.* 81 Minn. 480, 84 N. W. 335, in discussing sufficiency of assignment of error "that court below erred in granting plaintiff's motion for new trial."

**Ejectment—By cotenant.**—Cited in reference notes in 50 Am. St. Rep. 842, to point that each cotenant, irrespective of the character of the cotenancy, is, as against all strangers thereto, entitled to the exclusive possession of all the property, and whenever a stranger to the title unlawfully seized or held possession of the property, either cotenant might recover such possession and procure a writ absolutely excluding the intruder from the possession of the property; 91 Am. St. Rep. 889, one tenant in common alone may, of course, bring an action of ejectment against a stranger; 6 L.R.A.(N.S.) 714, an action to recover possession of certain land, it was urged that, if plaintiff had any title or interest in the land, it was as tenant in common, and that he could not therefore maintain the action without joining his cotenants; but it was held that, as the action could determine no rights except those of present possession, the plaintiff could recover.

10 Nev. 242-259. **STATE EX REL. RANKIN v. LEETE.**

**Corporation—Trustee selling all of his stock.**—Cited in *Orr Water Switch Co. v. Reno Water Co.* 17 Nev. 170, 30 Pac. 696, to point that trustees of corporation selling all their stock ceased to be officer de jure.

**—Right to vote at stockholders' meeting.**—Cited in reference note in 12 L.R.A. 783, to point that the right to vote at stockholders' meetings is not governed by the fact that the party in whose name the stock is registered is merely the nominal owner.

**—Sale of stock, title passes when.**—Cited in reference note in 17 L.R.A. 663, to point that the principal case is a dictum to the effect that as to everyone but the parties to the transaction the legal title to the stock does not pass until it has been entered on the books of the company.

10 Nev. 260-271. **ABERNATHIE v. CONSOLIDATED VIRGINIA MIN. CO.**

**Adverse possession.**—Cited in *Unger v. Mooney*, 63 Cal. 594, 49 Am. Rep. 105, to point that possession of land by a purchaser, under deed of an entire lot, is adverse to the rightful owner, though tenant in common with the grantor.

Cited in reference notes in 91 Am. St. Rep. 867, to point that the

possession of one tenant in common is the possession of all. His sole occupancy of the common property is entirely consistent with the existence of the cotenancy and a full recognition of the rights of his cotenants to enter and share the possession with him at any time. In the absence, therefore, of facts showing that he holds possession of the premises in opposition to such rights in his cotenants, his occupancy will be presumed to be that of a tenant in common, recognizing the cotenancy; 91 Am. St. Rep. 868, where one claims the whole, and his possession is openly and notoriously adverse to his associates, this is sufficient to establish an ouster; 109 Am. St. Rep. 612, where a cotenant conveys to a stranger to the title by a conveyance appropriate in form to transfer an estate in severalty, and the grantee enters into exclusive possession of the property thereunder as a claimant in severalty, this is an ouster of the other cotenants of which they must take notice, and which, if sufficiently long continued, bars them of all right to the property.

Statute of limitations.—Cited in *Pratt v. California Min. Co.* 24 Fed. 875, in discussing statute of limitations in action to recover possession of mining property.

16 Nev. 271-277. LONKEY v. WELLS.

Mechanics lien law.—Cited in *Malter v. Falcon Min. Co.* 18 Nev. 212, 2 Pac. 50, to point that mechanics liens are to be liberally construed; *Maynard v. Ivey*, 21 Nev. 244, 29 Pac. 1091, discussing law of mechanics lien; *Porteous Dec. Co. v. Fee*, 29 Nev. 380, 91 Pac. 136, and *Tonopah Lumber Co. v. Nevada Amusement Co.* 30 Nev. 456, 97 Pac. 639, to point that mechanics lien law should be liberally construed, and that a substantial compliance with the law is sufficient to create a valid lien; *Leftwich Lumber Co. v. Florence etc. Ass'n.*, 104 Ala. 594, 18 So. 50, in discussing sufficiency of statement of demand under mechanics' lien law; *Smith v. Sherman Min. Co.* 12 Mont. 528, 31 Pac. 73, discussing sufficiency of statement of account of labor performed on a mine to secure valid lien; *Sandberg v. Victor Gold etc. Min. Co.* 24 Utah, 20, 66 Pac. 363, in discussing necessity for publication of statutory notice in action to enforce mechanics' lien.

Waiver by answer.—Cited in *Hammersmith v. Avery*, 18 Nev. 230, 2 Pac. 57, to point that misjoinder of cause raised by demurrer is waived by answer; *Gardner v. Gardner*, 23 Nev. 212, 45 Pac. 139, to point that an objection complained of does not state full cause of action is not waived by answer; *Hardin v. Emmons*, 24 Nev. 334, 53 Pac. 856, to point that to take advantage of error in overruling demurrer party must let final judgment be entered, by answer he waives the objection; *Reynolds v. Lincoln*, 71 Cal. 189, 9 Pac. 179, discussing waiver by answering after overruling of demurrer for misjoinder.

Appeal—Presumption on.—Cited in *Quinn v. Quinn*, 27 Nev. 175, 74 Pac. 6, to point that any fact necessary to support the order is

presumed to have been proven in the absence of an affirmative showing to the contrary.

**16 Nev. 277-297. BUNTING v. CENTRAL PAC. R. CO.**

Instruction—Personal injury.—Cited in *Olsen v. Oregon etc. Ry.* Co. 9 Utah, 140, 33 Pac. 626, in discussing refusal to charge as to particulars asked in action to recover damages for injury at railroad crossing; *Haun v. Rio Grande W. R. Co.* 22 Utah, 358, 62 Pac. 911, in discussing instruction in action for personal injuries by railroad company.

Cited in reference notes in 12 L.R.A. 284, to point that where the plaintiff had negligently exposed himself or his property to injury, and the defendant, with knowledge of the risk the plaintiff had taken, by ordinary care might have avoided doing the injury, his failure to exercise such care would constitute the proximate cause and would render him liable; 55 L.R.A. 452, a railroad company is liable for injuries caused by a collision of a train with a team at a crossing, notwithstanding the plaintiff's own negligence, where the engineer could, by the exercise of ordinary care and reasonable diligence, have seen the team on the track in time to have avoided the collision.

**16 Nev. 298-302. ALDERSON v. MENDES.**

No citation.

**16 Nev. 302-307. FLOWERY MIN. CO. v. NORTH BONANZA MIN. CO.**

Sheriff's deed—Presumption as to seal.—Cited in *McCoy v. Cassidy*, 96 Mo. 434, 9 S. W. 928, to point that where copy of sheriff's deed, as recorded, contains no seal, but attestation clause recites deed signed and sealed, presumption is that original deed was sealed; *Todd v. Union Dime Sav. Inst.* 118 N. Y. 347, 23 N. E. 301, in discussing presumption deed was sealed at time of delivery; *Strain v. Fitzgerald*, 130 N. C. 601, 41 S. E. 872, holding where sheriff's deed lost and registration books containing copy of deed which was without a seal, but recited that it was given under the grantor's hand and seal, it was error to admit testimony that original had seal.

Instructions.—Cited in *Reusens v. Lawson*, 91 Va. 249, 21 S. E. 354, discussing instruction as to inefficiency of document without seal to convey title, but sufficiency to give color of title.

**16 Nev. 307-311. STATE v. HING.**

Accused as witness—Credit to be given to testimony.—Cited in *State v. Slingerland*, 19 Nev. 141, 7 Pac. 283; *State v. Hartley*, 22 Nev. 360, 40 Pac. 376, 28 L.R.A. 41, and *State v. Johnny*, 29 Nev. 224, 87 Pac. 10, as to credit to be given to defendant's testimony in criminal case when he offers himself as witness.

**Murder—Indictment, sufficiency.**—Cited in *State v. Wong Fun*, 22 Nev. 340, 40 Pac. 96, as to sufficiency of indictment to sustain verdict of murder in first degree although not charging the killing to have been with deliberation and meditation.

**Instruction.**—Followed in *State v. Thompson*, 101 Pac. (Nev.) 563, on point that where party wishes instruction upon a particular point it is his duty to prepare it and ask to have it given; *Vaughan v. State*, 58 Ark. 365 24 S. W. 887, in discussing instruction in homicide case.

**16 Nev. 311-317. BROWN v. ASHLEY.**

**Injunction—Invasion of right, small damage.**—Cited in *Shields v. Orr Extension Ditch Co.* 23 Nev. 356, 47 Pac. 196, holding plaintiff entitled to injunction against escaping waters which if permitted might ripen into adverse right; *Anderson Land etc. Co. v. McConnell*, 133 Fed. 583, to point that principal case follows *Barnes v. Sabroa*, 10 Nev. 217, 247, to point that act complained of is committed under claim of right, which if allowed to continue a length of time would ripen into adverse right, plaintiff is entitled to call for vindication of right and also for preservation.

**Tenants in common—Duty court of equity.**—Cited in *con. cur. op. of Thornton, J., Anaheim Water Co. v. Semitropic Water Co.* 64 Cal. 197, 30 Pac. 627, to point that it is between tenants in common, in controversy as to right, duty of court of equity, to determine respective right so as to give plaintiffs just proportion to which each may be entitled.

**16 Nev. 317-324, 40 Am. Rep. 497. STRAIT v. BROWN.**

**Water rights.**—Cited in *Clough v. Wing*, 2 Ariz. 382, 17 Pac. 456, in discussing water rights, rights of riparian owner and injunction for protection of rights; *Howard v. Perrin*, 8 Ariz. 354, 76 Pac. 462, to point that there is a distinction between water running in distinct channel, whether surface or subterranean, and those oozing or percolating; *Tampa Waterworks Co. v. Cline*, 37 Fla. 602, 53 Am. St. Rep. 268, 20 So. 784, 33 L.R.A. 382, as to right in subterranean waters; 51 Am. Rep. 548, generally as to right of land-owner with respect to subterranean waters.

—**Springs, water from.**—Cited in *De Wolfskill v. Smith*, 5 Cal. App. 180, 89 Pac. 1008, to point that water flowing from springs in the lands of United States is subject to appropriation; *Rait v. Furrow*, 74 Kan. 110, 85 Pac. 937, 6 L.R.A.(N.S.) 161, as to when stream from spring is water course; *Leonard v. Shatzer*, 11 Mont. 428, 28 Pac. 459, as not on point, findings of trial court being that spring not source of creek.

Cited in reference note in 30 L.R.A. 187, to point that the water of a spring which goes to feed a creek, although part of the way by



underground or unknown channels, cannot be diverted to the injury of a prior appropriator of the water of the creek.

— **Appropriation and diversion.** — Cited in *Bruening v. Dorr*, 23 Colo. 201, 47 Pac. 293, 35 L.R.A. 642, as to diversion of water; *Geddis v. Parrish*, 1 Wash. 591, 21 Pac. 315, to point that appropriator of water has right to have it flow in his ditch; *Low v. Schaffer*, 24 Or. 444, 33 Pac. 680, to point that appropriator first in time is prior in right and that water of tributaries cannot be diverted where it would injure appropriator.

Cited in reference notes in 43 Am. Dec. 279, to point that property in the water of a stream upon the public lands may be acquired by mere appropriation for mining or other beneficial purposes, and that the first appropriator is, to the extent of his appropriation, the owner as against all the world except the government; 43 Am. Dec. 282, prior appropriator is entitled to the natural flow of the stream down to the head of his ditch, without diversion or material interruption to his injury.

— **Underground channels or streams.** — Cited in *Medano Ditch Co. v. Adams*, 29 Colo. 326, 68 Pac. 434, in discussing underground channels; *Willis v. City of Perry*, 92 Iowa, 301, 60 N. W. 729, 26 L.R.A. 126, to point that if, in fact, or by reasonable inference, it is known that a subterranean stream of water flows in a well-defined channel, capable of being distinctly traced, it is said to be governed by the rules of law applicable to streams flowing upon the surface of the earth.

Cited in reference note in 67 Am. St. Rep. 665, as to right in subterranean water running in already defined channel.

— **Watercourse, easements, etc.** — Cited in *Malad Val. Irr. Co. v. Campbell*, 2 Idaho, 415 (2 Idaho, 383) 18 Pac. 54, in discussing findings as to watercourse, water rights and easement, including prior appropriation.

— **Percolating waters.** — Cited in *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 80, to point that water filtering or percolating through a part of soil to which adjoining appropriator has no absolute or natural right and can acquire no prescriptive right.

Cited in reference notes in 67 Am. St. Rep. 669, defining percolating waters; 19 L.R.A. 97, the law governing percolating water does not become applicable merely because a surface stream is obstructed by a lime-stone barrier a half mile long formed by the water itself through which it finds its way either by percolation or by some underground channel coming from under the lime-stone a good sized stream.

16 Nev. 325-327. **SEVER v. GREGOVICH.**

**Cotenants.** — Cited in reference notes in 91 Am. St. Rep. 853, to point that cotenant will not be permitted to question the validity of the common title. As between themselves, each is estopped to deny the validity of the original location, or to assail the common source of

title. Having entered under it, one cannot, as against his cotenant, be heard to assert its invalidity; 91 Am. St. Rep. 861, the relation of cotenant of mining claim is sufficient in itself to charge with a trust for all of the co-owners any relocation of the common property by one of their number. Until the claim is appropriated by a stranger, forfeiture for failure to do the annual work is not complete. Until such appropriation the parties remain tenants in common, and a location by one of them in his own name is the simple case of one tenant in common acquiring an independent title to the benefit of all; 7 L.R.A. (N.S.) 819, one who joined with another in claiming ground as a discovery claim, and afterwards recognized the rights of the other, and accepted from him his proportionate share of money expended for work and labor, is estopped from subsequently relocating the claim in his own name, and from claiming that his colocator was an alien, and that the former location was invalid.

**16 Nev. 327-340. CARSON OPERA HOUSE ASS'N v. MILLER.**

**Appeal.**—Cited in *Simpson v. Ogg*, 18 Nev. 30, 1 Pac. 828, as to notice of appeal.

**Contract of indemnity.**—Cited in *American etc. Ins. Co. v. Fordyce*, 62 Ark. 569, 54 Am. St. Rep. 306, 36 S. W. 1053, as to difference between contract of indemnity and one to pay legal liability.

**Mechanics lien law.**—Cited in *Glenn County v. Jones*, 146 Cal. 523, 80 Pac. 697, to point that payment in excess of partial agreement may under contract of building release sureties.

**Sureties.**—Cited in *Gato v. Warrington*, 37 Fla. 548, 19 So. 884, to point that liability of sureties is not to be extended, by implication, beyond term of contract; *Burley v. Hilt*, 54 Mo. App. 276, to point that surety on completion of work to be performed by contractor to be paid for in instalments is discharged by payment of larger instalment than that provided for; *Hand Mfg. Co. v. Marks*, 36 Or. 533, 59 Pac. 551, holding that surety on contractor's bond is not discharged by owner making premature payment which payment does not tend to bar his security; *Stephens v. Elver*, 101 Wis. 398, 77 N. W. 739, to point that failure to make weekly payments as contract requires will operate to discharge surety of contractor on building contract.

**Guaranty.**—Cited in *Pioneer Savings etc. Co. v. Freeburg*, 59 Minn. 234, 61 N. W. 26, to point that a contract of guaranty must be strictly performed or guarantor cannot be held.

**16 Nev. 341-354. MEYER v. VIRGINIA & T. R. CO.**

**Evidence—Admissions.**—Cited in *Hirschfeld v. Williamson*, 18 Nev. 71, 1 Pac. 203, to point that declarations were not admissible in evidence because not part of *res gestae*.

Cited in reference notes in 53 Am. Dec. 775, to point that admissions to be binding must be made as to a business matter within the scope

the agency; 131 Am. St. Rep. 326, the rules applicable to the sessions and declarations of officers and other agents of common law are the same as those applying to the agents of other persons and corporations.

16 Nev. 354-357. **TREADWAY v. WILDER.**  
No citation.

16 Nev. 357-360. **STATE EX REL. SCOTT v. TROUSDALE.**

Public officers. — Cited in *Placer County v. Freeman*, 149 Cal. 743, 112 Pac. 630, in discussing question as to whether personal and travel expenses may be allowed to public officer where compensation fixed by statute; *State v. Anson*, 132 Wis. 474, 112 N. W. 479, to point that one of the constituent elements to constitute county officer is that he must have some element of county government.

16 Nev. 361-363. **ABBOTT v. PRIMEAUX.**  
No citation.

16 Nev. 363-369. **LAKE v. LAKE.**

Divorce — Counsel fees. — Affirmed in *Lake v. Lake*, 17 Nev. 238, 30 Pac. 880, as to allowance for counsel fees in divorce case; cited in *dis. of Ross, J.*, in *Ex Parte Winter*, 70 Cal. 294, 11 Pac. 631, as to refusal to allow counsel fees in appellate court; cited in *dis. op.* in *Ex Parte Winter*, 70 Cal. 294, 11 Pac. 631, to point that trial court cannot make an allowance for suit money after appeal has been perfected; *Shors v. Shors*, 133 Iowa, 27, 110 N. W. 18, to point that where court has no jurisdiction to order suit money after appeal has been perfected in divorce case.

— Alimony pendente lite. — Cited in *Kapp v. District Court*, 108 Nev. 239, to point that alimony pendente lite may be granted where amount is in discretion of trial court; *Pleyte v. Pleyte*, 15 Colo. 25 Pac. 26, in discussing alimony on appeal; distinguished in *Phillips v. Phillips*, 32 Fla. 408, 18 So. 922, on ground that appeal for divorce had been demurred to in case on trial; cited in *Prine v. Prine*, 36 Fla. 684, 18 So. 784, 84 L.R.A. 90, as to power of court to grant alimony in divorce proceeding; *Benham v. Benham*, 107 Ill. 425, to point that court having jurisdiction of case may from time to time make proper allowance of alimony pendente lite; distinguished in *Bordeaux v. Bordeaux*, 26 Mont. 535, 69 Pac. 104, on ground of difference between the law and practice as to granting of temporary alimony.

— Cited in reference note in 60 Am. Dec. 674, to point that alimony may be granted either by lower court, according to some practices or by appellate court, according to other practice.

**Summons—Waiver by demurrer.**—Cited in *Sweeney v. Schultes*, 19 Nev. 57, 6 Pac. 47, as to demurrer waiving error in summons.

**Constitutional amendment—Notice to voters.**—Cited in *State ex rel. Galusha v. Davis*, 20 Nev. 231, 19 Pac. 901, as to service of notice to voters of submission of constitutional amendment.

16 Nev. 369-371. **MENDES v. KYLE.**

No citation.

16 Nev. 371-373. **STATE EX REL. SMITH v. FOURTH DIST. COURT.**

**Power of court.**—Cited in *Haley v. Eureka County Bank*, 20 Nev. 421, 22 Pac. 1101, as to power of court on motion under § 68, Civil Practice Act (Gen. Stat. 30, § 3090); *State v. Central R. Co.* 21 Nev. 177, 26 Pac. 226, as to want of power of district court to reconsider decision except in manner authorized by law.

16 Nev. 373-388. **STATE EX REL. NEVADA ORPHAN ASYLUM v. HALLOCK.**

**Constitutional law.**—Cited in conc. op. of Bigelow, J., in *State v. Grey*, 21 Nev. 386, 32 Pac. 193; 19 L.R.A. 137, as to constitutionality of Stat. 1881, p. 122, relating to orphan asylums; cited in *Cook County v. Chicago Industrial School*, 125 Ill. 549, 8 Am. St. Rep. 382, 18 N. E. 187, 1 L.R.A. 439, to point that Nevada orphan asylum under Stat. 1881, p. 122, was a sectarian institution; *Hysong v. School District*, 164 Pa. 643 (44 Am. St. Rep. 632, 30 Atl. 482), 26 L.R.A. 206, construing the word "sectarian;" *Synod of Dakota v. State*, 2 S. Dak. 375, 50 N. W. 635, 14 L.R.A. 422, construing constitutional provision for handling public money being used for sectarian purposes; *State ex rel. Weiss v. District Board of School Dist. etc.* 76 Wis. 216, 20 Am. St. Rep. 41, 44 N. W. 980, 7 L.R.A. 343, discussing constitutional prohibition against use of money for sectarian purposes.

Cited in reference notes in 8 Am. St. Rep. 418, to point that in principal case the court considered it necessary to examine the history of that state in relation to appropriations, as shown by the statutes and legislative journals, for the purpose of ascertaining what the people meant by the words "sectarian purposes," as used in the constitution, and determines that the words were used "in the popular sense" and that "a religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party by holding sentiments or doctrines different from those sects or people." In the sense intended in the constitution, every sect of that character is sectarian, and all members thereof are sectarians; 14 L.R.A. 418, a school connected with an orphan asylum controlled exclusively by officers of the latter, who are sisters of charity of the Roman Catholic Church, in which religious instruction is given to Roman Catholic

ren, is a sectarian institution within a constitutional provision  
not using public funds for "sectarian purposes."

mandamus.—Cited in *Roberts v. Bradfield*, 12 App. D. C. 474, man-  
us to compel State Controller to audit account will not lie.

#### 16 Nev. 388-404. MENDES v. FREITERS.

gment.—Cited in *Anderson v. Bank of Lassen County*, 140 Cal.  
74 Pac. 288, discussing judgment in excess of amount due as  
d upon creditor and relief in equity; *May v. Disconto Gesellschaft*,  
III. 316, 71 N. E. 1003, to point that irregularity upon which leave  
ight to correct as against defendant cannot be taken advantage  
y creditor or an interpleader whose rights have been acquired  
ente lite.

attachment.—Cited in *Wilson v. Barbour*, 21 Mont. 182, 53 Pac.  
holding that under Code Civ. Proc. § 893, writ of attachment  
aining amount of each of several causes of action separately  
led, based on an affidavit not stating a cause of attachment as  
ll, is not invalidated, because it alleged amount demanded as the  
egate of all the claims; *Suksdorff v. Bigham*, 13 Ore. 377, 12 Pac.  
in discussing whether or not increase of amount for which at-  
tachment suits for renders it invalid.

ted in reference notes in 123 Am. St. Rep. 1037, to point that on  
le to dissolve an attachment on the ground that the whole of the  
sued for was not due, the attachment should be sustained as to  
ortion of the debt that is due; 85 L.R.A. 767, subsequent attaching  
tors can show defects in prior attachments, and thereby get the  
liens out of their way; 35 L.R.A. 780, in principal case attachment  
on an acknowledged of indebtedness made without knowing  
exact sum due, and on the understanding that if for too great an  
unt the excess would be deducted from the sum stated. The intent  
efraud was wanting, and the court held that the commencing  
n attachment for a greater sum than was due, when not fraudu-  
y done, does not postpone the attachment to subsequent attachers  
ot as to the excess.

#### 16 Nev. 404-416. NASH v. MULDOON.

public officer.—Summary judgment against.—Cited in *Craig v.*  
h, 74 Ark. 366, 85 S. W. 1125, discussing provision of Penal stat-  
providing for summary judgment against officer.

ted in reference note in 95 Am. St. Rep. 111, to point that the  
re of an officer to pay over the money has been the subject of  
eat many statutes, giving an additional penalty therefor. It is  
under these statutes, that they apply only where the officer  
wilfully, and not where he is in honest doubt due to conflicting  
ns, and uses erroneous judgment.

**16 Nev. 416-426. ELDER v. WILLIAMS.**

**Exemptions and exempt property.**—Cited in *Elder v. Frevert*, 18 Nev. 453, 5 Pac. 70, as to damages for detention of property returned, cited in dis. op. of Leonard, J., in *Edgecomb v. His Creditors*, 19 Nev. 155, 7 Pac. 536, as to policy of constitutional and statutory exemptions; *Edgecomb v. His Creditors*, 19 Nev. 160, 7 Pac. 536, as to construction of words "used by debtor" in sustaining debt of family; *Florida Loan etc. Co. v. Crabb*, 45 Fla. 310, 33 So. 524, discussing fraudulent conduct on part of debtor as to deprivation of right to claim property specifically declared by statute; *Berry v. Hanks*, 28 Ill. App. 58, to point that omission of some property of debtor from schedule appeal is in the nature of a writ of error, conferring power on the will not work forfeiture as to portion named thereon; *Thebault v. Lennon*, 39 Ore. 284, 87 Am. St. Rep. 657, 64 Pac. 451, discussing exemption law; *Noyes v. Belding*, 5 S. Dak. 623, 59 N. W. 1076, position of his property, from claiming his statutory exemptions.

**Replevin bond—Liability of surety on.**—Followed in *Cain v. Sessions*, 16 Nev. 431, as to liability of security on replevin bond.

**Appeal from judgment—Effect.**—Cited in *Young v. Brehi*, 19 Nev. 383, 3 Am. St. Rep. 892, 12 Pac. 566, to point that the effect of an appeal from a judgment of a district court to the supreme court, with or without a stay bond, the validity of such judgment is not suspended or affected by a bare appeal; *Sharon v. Hill*, 26 Fed. 346, discussing effect of appeal from judgment; *Day v. Holland*, 15 Ore. 467, 15 Pac. 857, to point that pendency of appeal, when court has no duty over that to affirm, reverse or modify judgment does not to point that judgment debtor is not estopped, by fraudulent discease to operate as a merger and a bar.

**16 Nev. 426-431. CAIN v. WILLIAMS.**

Cited in reference note in 37 Am. St. Rep. 32, to point that if the appellate court to determine such errors as may have occurred at the trial or in the decision of the cause, and giving the court, upon such determination, no other authority than that of reversing, modifying, or affirming the judgment of the inferior court and of remitting the case back to the tribunal whence it came, that such a tribunal may conform its judgments and proceedings to the views of the superior, then the judgment appealed from does not, until vacated or reversed, suspend operation thereof.

—**Supersedeas, effect of.**—Cited in *Ransom v. City of Pierre*, 101 Fed. 669, 41 C. C. A. 585, to point that supersedeas bond merely operates to vacate judgment.

**Bar—Pleading judgment in.**—Cited in *Watson v. Richardson*, 110 Iowa, 701, 80 Am. St. Rep. 333, 80 N. W. 417, as to pleading judgment in equitable action in bar.

**16 Nev. 431. CAIN v. SESSIONS.**

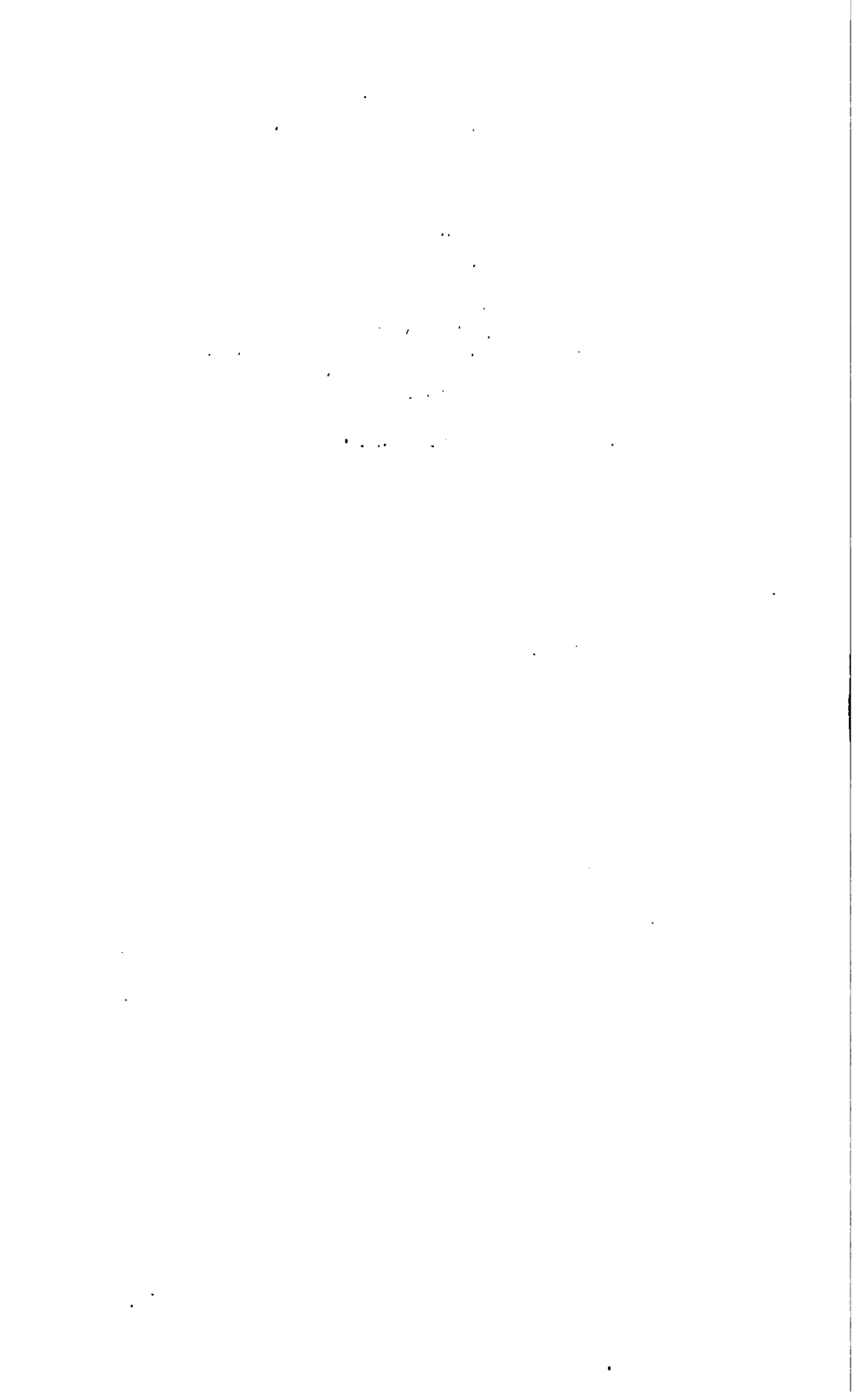
No citation.

**16 Nev. 432-449. STATE v. CONSOLIDATED VIRGINIA MIN. CO.**

**Constitutional law.**—Followed in *State v. California Min. Co.* 16 Nev. 450, as to special laws; *Esser v. Spaulding*, 17 Nev. 309, 30 Pac. 900, to point that constitution does not prohibit retroactive laws; *State ex rel. Copeland v. Woodbury*, 17 Nev. 358, 30 Pac. 1013, as to classification of counties; *Redford v. Spokane St. Ry. Co.* 15 Wash. 21, 46 Pac. 651, in passing upon constitutionality of act of March 9, 1895, requiring jurors to be house-holders.

**16 Nev. 449-450. STATE v. CALIFORNIA MIN. CO.**

No citation.





I N. M.







REPORTS OF CASES  
ARGUED AND DETERMINED IN  
THE SUPREME COURT

OF THE  
TERRITORY OF NEW MEXICO

FROM  
JANUARY TERM, 1852, TO JANUARY TERM, 1879,  
INCLUSIVE.

REPORTED BY  
CHARLES H. GILDERSLEEVE  
COUNSELOR AT LAW

VOLUME I

EXTRA ANNOTATED EDITION

CHICAGO:  
CALLAGHAN & CO.  
1911

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**PRESENT JUDGES AND OFFICERS**  
**OF THE**  
**SUPREME COURT OF NEW MEXICO.**

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**FIRST DISTRICT:**

**HON. L. BRADFORD PRINCE.....CHIEF JUSTICE.**

**SECOND DISTRICT:**

**HON. SAMUEL C. PARKS.....ASSOCIATE JUSTICE.**

**THIRD DISTRICT:**

**HON. WARREN BRISTOL.....ASSOCIATE JUSTICE.**

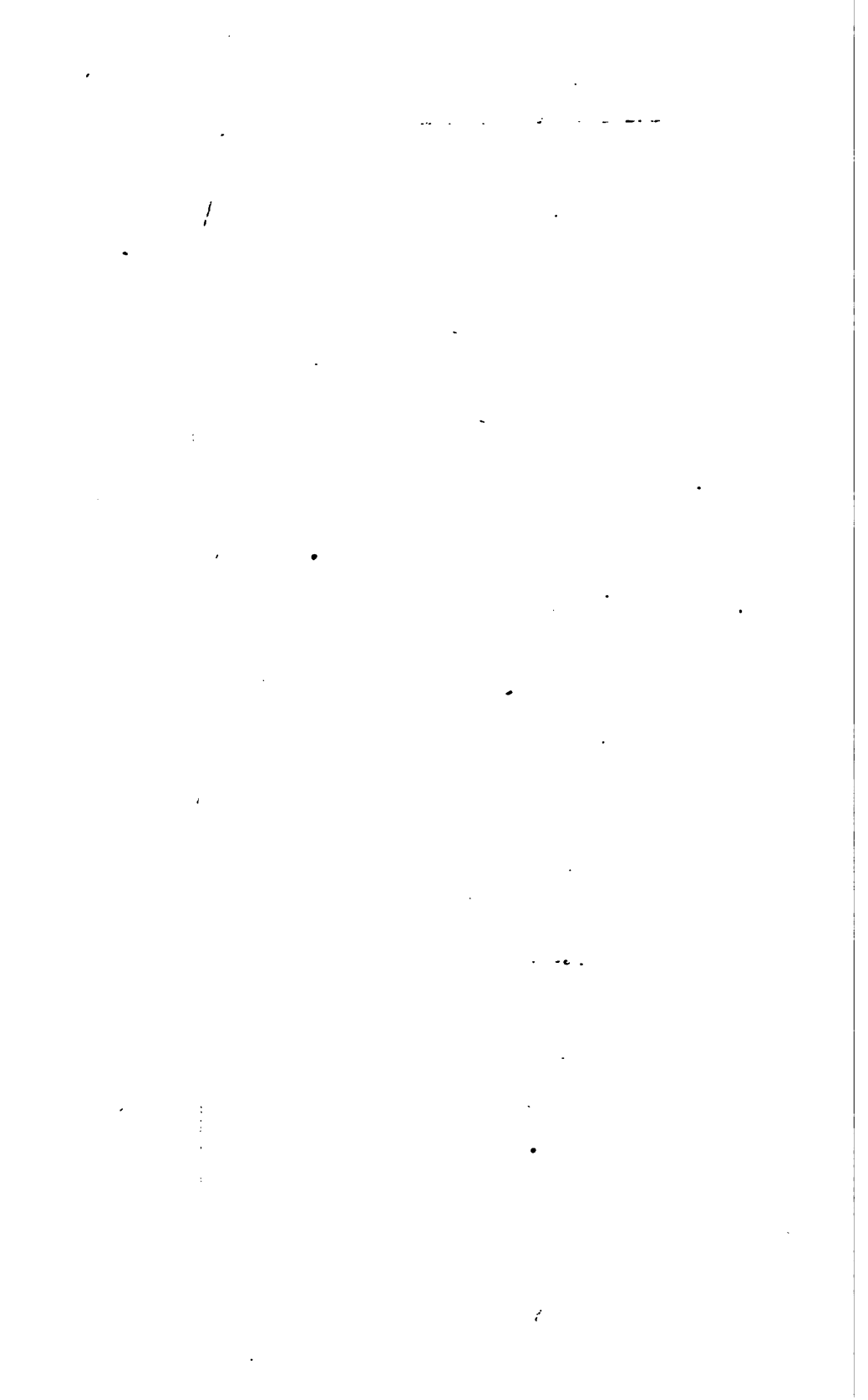
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**HON. SIDNEY M. BARNES.....U. S. DISTRICT ATTORNEY.**

**FRANK W. CLANCY.....CLERK.**

**JOHN SHERMAN, JR.....U. S. MARSHAL**

**[The office of Attorney-general for the Territory is vacant.]**





# LIST OF THE JUDGES

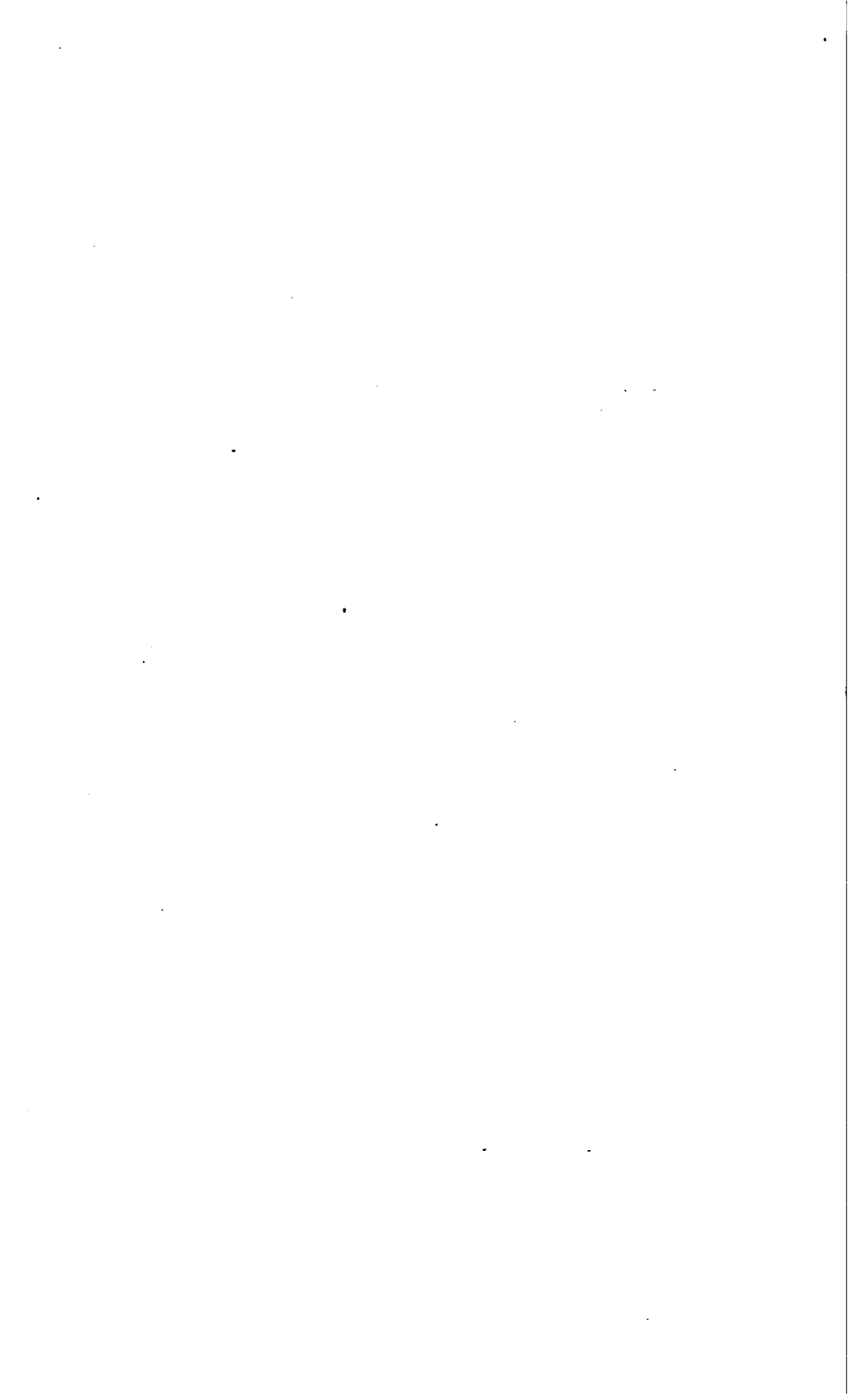
WHO HAVE BEEN APPOINTED FOR THE TERRITORY OF  
NEW MEXICO, SINCE ITS ANNEXATION TO  
THE UNITED STATES.

- 
- |  |   |
|--|---|
| 1. JOAB HOUGHTON, Chief Justice.....               | } These Judges served as<br>such under the Provisional<br>Government in 1846. |
| 2. CARLOS BRAUBLEN, Associate Justice.....         |   |
| 3. ANTONIO JOSE OTERO, Associate Justice.....      |   |
| 4. HORACE MOWER, Associate Justice.....            | Appointed in 1852.  |
| 5. JOHN S. WATTS, Associate Justice.....           | Appointed in 1852.  |
| 6. GRAPTON BAKER, Chief Justice.....               | Appointed in 1853.  |
| 7. JAMES J. DRAVENPORT, Chief Justice.....         | Appointed in 1854.  |
| (Afterwards Chief Justice from 1859 to 1867.)      |   |
| 8. KIRBY BENEDICT, Associate Justice.....          | Appointed in 1854.  |
| 9. PERRY E. BROOCHUS, Associate Justice.....       | Appointed in 1855.  |
| 10. W. T. BOONE, Associate Justice.....            | Appointed in 1855.  |
| 11. WM. G. BLACKWOOD, Associate Justice.....       | Appointed in 1855.  |
| 12. SYDNEY A. HUBBELL, Associate Justice.....      | Appointed in 1855.  |
| 13. JOSEPH G. KNAPP, Associate Justice.....        | Appointed in 1855.  |
| 14. JOAB HOUGHTON, Associate Justice.....          | Re-appointed in 1855.   |
| 15. JOHN P. SLOUGH, Chief Justice.....             | Appointed in 1857.  |
| 16. JOHN S. WATTS, Chief Justice.....              | Re-appointed in 1858.   |
| 17. JOSEPH G. PALEN, Chief Justice.....            | Appointed in 1859.  |
| 18. HEZEKIAH S. JOHNSON, Associate Justice.....    | Appointed in 1859.  |
| 19. R. J. WATERS, Associate Justice.....           | Appointed in 1871.  |
| 20. DANIEL B. JOHNSON, JR., Associate Justice..... | Appointed in 1872.  |
| 21. WARREN BRISTOL,* Associate Justice.....        | Appointed in 1872.  |
| 22. HENRY L. WALDO, Chief Justice.....             | Appointed in 1875.  |
| 23. SAMUEL C. PARKS,† Associate Justice.....       | Appointed in 1875.  |
| 24. CHARLES MCCANDLESS, Chief Justice.....         | Appointed in 1875.  |
| 25. L. BRADFORD PRINCE,‡ Chief Justice.....        | Appointed in 1875.  |

\*Third District.

†Second District.

‡First District.



# LIST OF ATTORNEYS

PRACTICING IN THE SUPREME COURT OF THE TERRITORY OF  
NEW MEXICO FROM THE ANNEXATION OF THE  
TERRITORY TO THE UNITED STATES  
UP TO THE YEAR 1881.

---

ALLEN, SAMUEL T.  
ASHURST, MERRILL  
BAIL, JOHN D.  
BAIRD, SPRUCE M.  
BARNES, SIDNEY M.  
BRENDON, MARSHALL A.  
BRENDON, WILLIAM  
CATRON, THOMAS R.  
CAYLASS, EDGAR  
CHAVEZ, J. FRANCISCO  
CHILDERS, W. R.  
CLANCY, FRANK W.  
CONWAY, THOMAS F.  
DAVIS, WILLIAM W. H.  
DOWNES, FRANCIS  
DUNN, EDMUND F.  
FINKE, EUGENE A.  
GARY, JOSEPH E.  
GILBERTSLEBY, CHARLES H.  
GINN, JOHN M.  
GOODWIN, JESSE C.  
GRAVES, WILLIAM C.  
HASTEDINE, WILLIAM C.  
HOUGHTON, JOAB  
HOYT, ABRAHAM G.  
HUBBELL, SYDNEY A.  
JOHNSON, HENRY C.  
KNAEBEL, JOHN H.  
LEMON, GEORGE  
LEONARD, IRA E.  
MCCOMAS, CHARLES C.

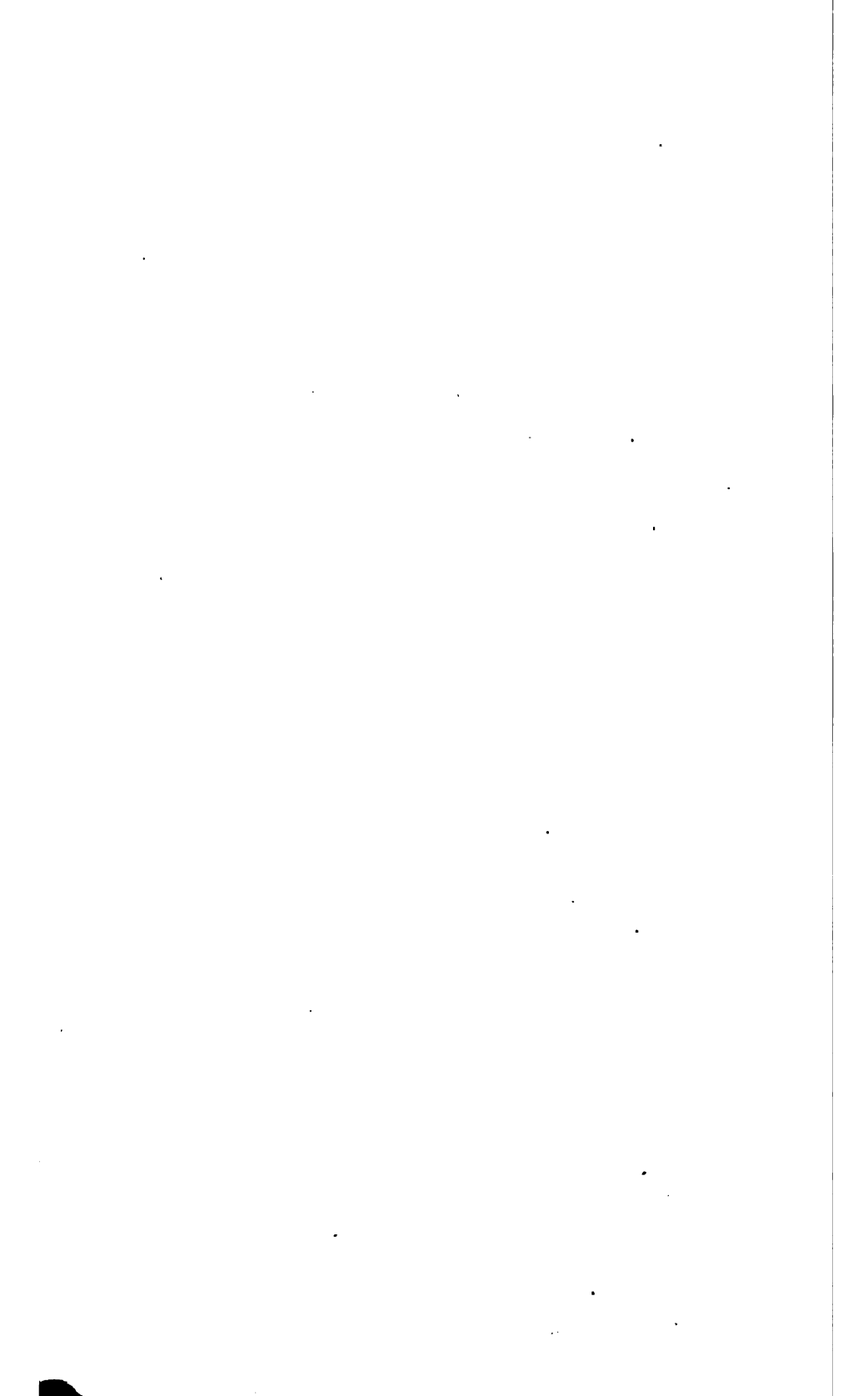
MILLS, MELVEN W.  
NEWCOMB, S. B.  
PILLIANS, PALMER J.  
POSEY, G. GORDON  
PRIOR, EDWARD V.  
PRICHARD, GEORGE W.  
QUINN, JAMES H.  
REYNOLDS, JAMES R.  
RISQUE, JOHN P.  
RITCH, WILLIAM G.  
RYNBERSON, WILLIAM L.  
SENA, JOSE D.  
SHAW, JAMES M.  
SKINNER, WILLIAM C.  
SLOAN, ANDREW  
SMITH, HUGH M.  
SPRINGER, FRANK  
STEVENS, BENJAMIN  
SULSBACHER, LOUIS  
TEBBILL, WILLIAM C.  
THORNTON, WILLIAM T.  
TOMPKINS, RICHARD H.  
TRIMBLE, L. S.  
TULBY, MURRAY F.  
WAITMAN, HANSON  
WALDO, HENRY L.  
WARNER, MILTON J.  
WATSON, W. W.  
WEST, ELIAS P.  
WHEATON, THEODORE D.



## EXPLANATORY NOTE.

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When the present volume was undertaken the reporter intended to include in it only a collection of the more important cases decided by the supreme court of New Mexico. On reflection, however, he concluded that as the cases were comparatively few in number it would be more acceptable to the bench and bar of the territory to report all the decisions in which written opinions had been filed. This has been an exceedingly laborious task, owing to the neglect of some of the clerks to record opinions deposited with them. After patient and careful search through the records and papers in the supreme court-rooms, the reporter has now the satisfaction of presenting to the profession a complete collection of the decisions of the court from its first session in January, 1852, to January term, 1879, inclusive. The concurring and dissenting opinions are also given in full; with a single exception, and the points relied on therein are included in the head-notes. As the clerks have taken no pains to preserve the briefs of counsel, it has been impossible to report the arguments except in a few instances. Indeed, it was only by great labor and care that even the names of the attorneys could be ascertained in most of the cases, as no record of them was kept. So far as the counsels' briefs could be found, their arguments are given.



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REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

JANUARY TERM, 1852.

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**RICHARD BRAY v. THE UNITED STATES.**

**LEGISLATURE MAY DEFINE CRIMES AND FIX PUNISHMENT.**—The territorial legislature has power under the organic law to define crimes and make penalties, and prescribe their punishment.

**CRIMINAL JURISDICTION OF TERRITORIAL COURTS.**—The supreme and district courts of this territory have no jurisdiction in criminal cases, except such as is conferred upon them by statutory enactment.

**JURISDICTION OF ASSAULT AND BATTERY.**—Justices of the peace have absolute and exclusive jurisdiction in cases of assault and battery, and an indictment for such an offense in the district court will not lie.

ERROR from the district court for the county of Santa Fe.  
The opinion states the case.

*Garey and Pillan*, for the plaintiff in error.

*W. West*, for the defendant in error.

By Court, **MOWER, J.:**

The facts in this case are briefly these, as presented by the record: **Bray** was indicted at the last September term of the district court of the United States for the county of Santa Fe, for an assault with intent to kill, in one count, and for a common assault in another count. It was averred that the offense was committed in the county of Santa Fe, the month of April, 1851, without any allegation that it

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Opinion of the Court—Mower, J.

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was committed against the laws of the United States. Upon the trial, the jury found Bray guilty of a common assault only, acquitting him upon the first count, and assessing a fine against him for the sum of twenty-six dollars and fifty cents. The counsel for Bray moved for an arrest of this judgment, assigning the following causes: first, the venue is improperly laid; second, there was no law in force punishing assault in the territory of New Mexico at the time the assault is alleged in the indictment to have been committed; third, the offense charged in the second count, on which the defendant was convicted, is not an indictable offense; fourth, and for many other and manifest errors apparent on the record. The court below refused to arrest the judgment, but entered a judgment on the verdict, and the counsel for the defendant filed his bill of exceptions, alleging this refusal as error, and the case comes into this court for a readjudication.

Passing by some questions of the gravest magnitude raised by the consideration of all of the features of the case presented, the court is disposed to follow the course of the argument adopted by counsel on both sides, and decide the cause upon the third point suggested in the motion in arrest. It is admitted in the argument by both parties that the offense committed is one against the laws of the territory, and not one against the laws of the United States. Now, by the original law of congress (sec. 7, Organic Law, p. 47), power is given to the legislature of the territory over all the rightful subjects of legislation, and no one will deny the definition of crimes and misdemeanors, and a prescription of the mode of punishment are not pre-eminently among these rightful subjects of legislative action; but the same act goes still further, and for all territorial purposes provides that the jurisdiction of all the courts provided for by the law, both appellate and original, shall be as limited by law (sec. 10, p. 48), thereby conferring upon the legislature the power of limiting and defining the jurisdiction of each court erected by the organic law so far as it regards the regulation of the municipal and criminal affairs of the territory, with the exception that no power can be

ven to justices of the peace when the title and boundaries of land are in question, or when the debt or sum claimed shall exceed one hundred dollars. In the exercise of these powers the legislature of the territory, at its first session, enacted the law under which it is claimed that this offense was committed, but expressly provided that it should be punished in a summary manner before a justice of the peace, and declared in the same section that all other cases should be indictable: Kearny Code, secs. 8 and 11 of art. Crimes and Punishments, pp. 54, 55. This construction is sustained by the Spanish reading of the law and the report of General Kearny to congress, Ex. Doc., No. 60, Cong. Rep. 1848, p. 200; besides, good sense will show a manifest defect in the English section, which is fully supplied and remedied by the Spanish exposition of the text. This inference is further corroborated by another section, under the title of Practice in Criminal Cases, which also describes the punishment of this offense, before a justice, in a summary manner: Kearny Code, sec. 33, p. 88. From a consideration of these different sections, collectively, there can be no doubt of the intention of the legislature to give to justices of the peace absolute and exclusive jurisdiction of this and other minor offenses; thus insuring to the community an ample and speedy punishment of all offenders in these respects, which is the best guaranty against a frequent repetition of the misdemeanor, and relieving the higher courts of a burden of cases which would greatly increase the cost to the public, and in a manner tram-  
pel up and clog the wheels of justice in these courts. But it is contended, that by the organic law, congress has conferred common law as well as chancery jurisdiction on the supreme and district courts: Sec. 4 of Organic Law. This is true, but in the same section it is provided that the jurisdiction is to be limited by law. The evident intention of this section is to clothe these courts with equity and law powers for the purpose of discharging with fullest effect the duties assigned to them by congressional and territorial legislation.

It can not be argued that, by virtue of this section, these

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Opinion of the Court—Mower, J.

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courts have cognizance of offenses at common law, without legislative sanction, for it is expressly decided in the case of *The United States v. Hudson*, 7 Cranch, 32, that the "courts of the United States have not jurisdiction derived from the common law to define and punish criminal offenses;" and in the case of *Wheaton et al. v. Peters et al.*, 8 Pet. 591, it is held that "there can be no common law except by legislative adoption." The same point is also reaffirmed in the case of *Kendall v. The United States*, 8 Id. 524. If, then, as it appears from these decisions, the exercise of these high functions by the district and supreme courts depends upon statutory enactment in criminal cases, where shall we find the statute by virtue of which the district court can take cognizance of a common assault and battery? It is not written in the criminal code of the United States, nor in the organic law, while the law of the territory, which defines the crime and punishment, in positive terms, confers exclusive jurisdiction upon justices of the peace. But it is said that when the crime is created by law, then the common law jurisdiction of the district court affixes. We think not; for if the district court could countervail the prerogative of the legislature in prescribing the mode of trial and the tribunal, it might go further and substitute the common law penalties, which have long since been abolished in England, because of their cruel and inhuman character. This practical absurdity will be claimed by none; yet, if the rules laid down by the legislature for the punishment of offenses against territorial laws can be disregarded in one respect, by virtue of this common law jurisdiction, the same force of reasoning would warrant the above incongruous conclusions.

The decision of the court is, therefore, that in this case the judgment of the district court of the United States for the county of Santa Fe be reversed, and the case be remanded to the said district court, with instructions to dismiss the case for want of jurisdiction, and to discharge the respondent, and that the plaintiff in error recover his costs, to be taxed.

Let it be certified accordingly.

## Points decided.

## TERRITORY OF NEW MEXICO v. TOMAS ORTIZ.

ORIGINAL JURISDICTION OF SUPREME COURT.—Original jurisdiction is given to the supreme court of the territory by the organic law of 1850, only in the single instance of the granting of a writ of *habeas corpus*.

AFFIRMATIVE GRANT OF JURISDICTION IMPLIES, WHAT.—An affirmative grant of original jurisdiction in particular cases implies a negative upon its exercise in any other case.

SECTION 3, ARTICLE 4 OF ORGANIC LAW OF 1846 REPEALED.—The organic law of 1850 repeals by implication section 3 of article 4 of the organic law of 1846, relating to the original jurisdiction of the supreme court.

LEGISLATURE CAN NOT EXTEND ORIGINAL JURISDICTION OF SUPREME COURT.—The legislative assembly has no power to extend the affirmative grant of original jurisdiction to the territorial supreme court, beyond the limits of the organic law of 1850.

MANDAMUS, JURISDICTION OF SUPREME COURT TO ISSUE.—The supreme court of the territory has no jurisdiction to issue a writ of mandamus, except, where it is necessary in aid of its appellate jurisdiction.

APPELLATE JURISDICTION OVER PROBATE COURTS.—The district courts, and not the supreme court, have appellate jurisdiction over judgments of the probate courts originating under sections 32 and 33 of the Kearny code relating to revenue.

MANDAMUS TO PROBATE COURT IN REVENUE CASE.—The supreme court has no jurisdiction to issue a mandamus to the probate court to proceed to judgment upon a complaint against a merchant for selling goods without a license.

MANDAMUS CONTROLLING DISCRETION AS TO CONTINUANCE.—In the absence of a statute regulating continuances, it is left to the sound discretion of inferior courts to determine for what causes and how long to continue a cause, and until the contrary appears, such discretion will be presumed to have been rightly exercised and with the consent of the parties, and a mandamus to proceed to judgment will not lie.

FAILING TO ATTEND TRIAL, MANDAMUS TO.—Where it is alleged as a ground for a mandamus to a judge to proceed to judgment, that he has failed to attend on divers days set for the trial, it must appear that some damage or inconvenience resulted from the failure, and that it was willful and without excuse, or the writ will be denied.

PLEADING CONSTRUED AGAINST PLEADER.—The allegations of a pleading are taken most strongly against the pleader.

MANDAMUS DIRECTING WHAT JUDGMENT TO ENTER, REFUSED.—A mandamus will lie, in a proper case, directing an inferior court to proceed to judgment, but not to give a judgment for or against a particular party.

TO SHOW CAUSE AGAINST MANDAMUS ISSUED IN VACATION.—A rule to show cause why a mandamus should not issue may be issued in vacation.

PETITION for a mandamus. The opinion states the case.

7. West, for the petitioner.

Carrey and Smith, contra.

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Opinion of the Court—Watts, J.

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By Court, WATTS, J.:

The question which is presented by the papers in this case is one which must determine an important branch of the jurisdiction of the supreme court of this territory. The facts out of which it arises are as follows: On the second day of January, 1852, the following petition was presented to one of the associate justices of this court:

**Territory of New Mexico, County of Santa Fe, ss.**

*Territory v. Ortiz.*

To the Hon. Grafton Baker, chief justice of the territory of New Mexico, and presiding judge of the first judicial district in said territory: The Territory of New Mexico, by E. P. West, her attorney, would most respectfully represent to your honor that James J. Webb and William Messervy, merchants and partners, trading and doing business under the name, style, and firm of Messervy & Webb, have been and still are dealing and vending goods as merchants in the county of Santa Fe, in said territory, without a license so to deal and vend goods as merchants as aforesaid, as required by law, and although they have been called on by R. M. Stephens, the sheriff in and for said county, to take out such license, they have hitherto wholly neglected and refused, and still do neglect and refuse, to take out such license to deal and vend goods as merchants as aforesaid.

The territory aforesaid, by her attorney aforesaid, would further represent to your honor, that on the second day of October, 1851, Hon. Tomas Ortiz, probate judge in and for the county of Santa Fe, in said territory, issued his warrant upon complaint of the sheriff of said county, as provided by law, under his hand, for the arrest of the said James J. Webb and the said William S. Messervy, in words and figures as follows, to wit:

**Territory of New Mexico, County of Santa Fe.**

Territory of New Mexico to the sheriff of the county of Santa Fe, greeting:

Whereas complaint has this day been made by the sheriff of said county to me, Tomas Ortiz, prefect and probate judge of said county, that William S. Messervy and James

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Webb, trading and doing business under the firm and  
 yle of Messervy & Webb, did at the county of Santa  
 e aforesaid, from the twenty-fifth day of June, A. D.  
 1851, to the second day of October, A. D. 1851, deal as  
 merchants without a license first obtained, according to  
 w, you are, therefore, hereby commanded to arrest the  
 id William S. Messervy and the said James J. Webb, and  
 uthwith bring them, or either of them, before me, Tomas  
 rtiz, prefect and probate judge of said county, at the  
 ourt-house of said county, to answer to the complaint of  
 e territory of New Mexico upon a charge of having dealt  
 u merchants without a license first obtained, according to  
 w.

In testimony whereof, I, Tomas Ortiz, prefect and pro-  
 te judge, have hereunto set my hand and affixed my seal  
 is second day of October, 1851.

[L. S.] TOMAS ORTIZ, Prefect.

territory of New Mexico, County of Santa Fe.

In witness whereof, I, James M. Giddings, clerk of said  
 urt, have hereunto set my hand and affixed my private  
 al, there being no seal of office provided, the day and year  
 ove written.

J. M. GIDDINGS,  
 Clerk of the Prefect and Probate Court.

Upon which said warrant the said James J. Webb was  
 rested and produced into court by the sheriff of said  
 unty, and upon which said warrant is the return of the  
 eriff of the said county, in the letters and figures follow-  
 g, to wit: Executed the within by arresting and bringing  
 court the body of James J. Webb; William Messervy not  
 be found. October 2, 1851.

R. M. STEPHENS, Sheriff.

That on the arrest of the said James J. Webb, as afore-  
 id, by the sheriff aforesaid, the said probate judge con-  
 ned his court for the purpose of taking cognizance of said  
 mplaint, against the said William Messervy and the said  
 mes J. Webb, and did take cognizance of the same; and  
 ter several days spent in determining the preliminary

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questions in said case, by said court, and after which said preliminary questions as aforesaid were determined and disposed of and said case ready for trial, the said court, on the third day of October, 1851, adjourned for fifty days, at the expiration of which said fifty days the said court neglected and failed to sit to take cognizance of and to try said cause; and still neglects and fails to sit for the trial of the same, although several other days since the expiration of the said fifty days have been set for the trial of said cause, at which the said court has in like manner failed and neglected to attend for the trial of said cause to the great damage and deception of the said territory, defrauding the said territory out of her just revenue, and to the disorder and violation of the laws of said territory, and to the delay and hindrance of justice. Your petitioner, the said territory, by the said attorney, would therefore pray your honor to grant a writ of mandamus to compel the said Tomas Ortiz, probate judge as aforesaid, to proceed immediately to judgment in said cause against the said William S. Messervy and the said James J. Webb, as aforesaid, and to do prompt justice in the premises and in the execution of the laws of said territory.

E. P. WEST,

Attorney for the Territory of New Mexico.

I, R. M. Stephens, sheriff in and for the county of Santa Fe, in the territory of New Mexico, do solemnly swear that the matters and things set forth in the foregoing petition are true to the best of my knowledge and belief, and that I know the contents thereof.

R. M. STEPHENS.

Sworn to and subscribed before me, this thirtieth day of December, A. D. 1851.

H. MOWER,

Associate Justice United States Supreme Court.

Upon which said petition the following rule was granted: The President of the United States of America to Tomas Ortiz, judge of the court of probate, in and for the county of Santa Fe and territory of New Mexico, greeting: Whereas, we have been informed that there are certain



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atters pending in your court wherein the territory of New Mexico is plaintiff, and William S. Messervy and James J. Webb are defendants; and whereas, we have been informed that you have failed to sit in judgment upon said cause; therefore we command you that you be and appear before the supreme court, for the territory of New Mexico, at Santa Fe, in said territory, on Monday, the fifth day of January, 1852, to show cause, if any you have, why you have not proceeded to trial and judgment in said cause, and why a peremptory mandamus shall not issue against you; and also abide the further order of our supreme court in the premises. Hereof fail not at your peril.

In witness, the Hon. Horace Mower, associate justice of the supreme court of the territory of New Mexico, issued the second day of January, 1852.

H. MOWER,

Associate Justice Supreme Court United States, for the Territory of New Mexico.

On the back of this process is the following indorsement: "I certify that I executed the within notice by delivering to Tomas Ortiz a true copy of the same, January 2, 1852, in Jones, marshal, by R. M. Stephens, deputy marshal." On the fifth day of January, A. D. 1852, being the first day of the present term of the supreme court, the said Tomas Ortiz appeared in court, and by his attorneys, filed the following motion: *Tomas Ortiz ads. Territory of New Mexico*, mandamus supreme court, January term, 1852.

The said Tomas Ortiz, by his attorneys, H. A. Smith and E. Garey, comes and moves the court to dismiss the writ of mandamus, issued in this cause.

Because the petition for the same is not made by any person authorized by law to appear for the territory in court, or before a judicial tribunal.

A writ of mandamus can not be issued in vacation, or in term time.

A writ of mandamus to the probate court of Santa Fe county can only be issued from the district court of the United States for the first judicial district of said territory.

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4. The petition does not show a case requiring the extraordinary remedy of a mandamus.

5. The writ is not such a one as the petition prays for, nor can such a writ as the petition prays for be issued.

6. E. P. West, Esq., by whom said petition is made, as attorney for the territory of New Mexico, is not, and by law is prohibited from being, attorney for said territory, has not, and by law can not have, any authority to appear in court or before any judicial tribunal for said territory and for any other cause.

SMITH & GAREY,  
Attorneys for Ortiz.

The question presented to the court by the papers in this case is this: Has authority been conferred upon the supreme court of the territory of New Mexico to issue the writ of mandamus to the probate courts of the territory?

The supreme court of the territory of New Mexico owes its existence to the organic law of congress approved September 9, 1850, providing for the erection of a territorial government for the territory of New Mexico, and it is to that organic law our attention should be first directed, to ascertain the extent of its jurisdiction.

The tenth section of this organic law says: "That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace shall be as limited by law, and the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdictions, and the said supreme and district courts of the said territory and the respective judges thereof shall and may grant writs of *habeas corpus* in all cases in which the same are grantable by the judges of the United States in the District of Columbia." It is further provided in the tenth section of the organic law "that writs of error, bills of exceptions and appeals shall be allowed in all cases from the final decisions of said district courts to the supreme

urt under such regulations as may be prescribed by law, at in no case removed to the supreme court shall trial by jury be allowed in said court."

It will be seen by the above quotations from the organic law, that by that law appellate jurisdiction has been given to the supreme court from the final decisions of the district courts only, and original jurisdiction has been given to the supreme court only in the single instance of the granting of writ of *habeas corpus*. It now remains to be considered whether any acts of the legislative assembly, which have been passed since the organization of the territorial government of New Mexico, confer any additional original jurisdiction upon the supreme court. By an act of the legislative assembly of this territory, approved July 25, 1851, it is provided that all laws that have previously been in force in this territory that are not repugnant to or inconsistent with the constitution of the United States, the organic law of this territory, or any act passed at the present session of the legislative assembly, shall be and are continued in force, excepting, in Kearny's code, the law concerning registers of land. If by this section the article in Kearny's code, upon the subject of courts and judicial powers, is in force, a matter in regard to which no opinion is expressed, no other than appellate power is there given to the supreme court.

By reference to our act regulating the practice in the district and supreme courts of the territory of New Mexico, approved July 12, 1851, section 4, it is provided that the district courts of said territory shall have original jurisdiction in all cases, civil and criminal, in which the jurisdiction is not specially delegated to some other court, and such appellate and supervisory jurisdiction as may be granted them by law. By all of the laws now in force in this territory, it can not be perceived that any other or further original jurisdiction has been given to the supreme court of this territory than such as was conferred upon it by the organic law published twenty-second of September, 1846, by Brigadier-general S. W. Kearny. This power of issuing the writ prayed for in this case exists. The third section of article 4, upon the subject of judicial power, says: "The superior

court shall have a general superintending control over all inferior courts and tribunals of justice, and shall have power to issue original writs to compel inferior courts and their officers to perform their duties according to law whenever they may fail or refuse so to do." This section would undoubtedly authorize the issuing a writ of mandamus, if it is now in force and applicable to this court. The action of civil government imports an act of sovereignty. The change of the basis of civil government made by the proper authority, and acquiesced in by the people, must be regarded as valid, and the true source from which power must be derived, and beyond which it can not be extended. The promulgation by congress of an organic law for this territory, of necessity repeals and abrogates any existing organic law, whether emanating from the same or any other source. The fact that the legislative assembly continued in force the Kearny code does not affect the matter; for, if the legislative assembly had power to adopt the organic law in the Kearny code, and enforce obedience to its requirements, it would be the virtual assumption of sovereignty, and operate as a repeal of the form of government furnished by Congress for this territory. In the case of *The Steamboat Orleans v. Phœbus*, 11 Pet. 175, it was held by the supreme court of the United States that local laws can never confer jurisdiction on the courts of the United States; they can only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies where the jurisdiction is vested by the laws of the United States. The organic law passed by congress vests in the supreme court of this territory full appellate jurisdiction; but it does not give it original jurisdiction in any case but that of granting writs of *habeas corpus*.

It has been repeatedly decided in courts of the highest authority that an affirmative grant of original jurisdiction implies a negative upon its exercise in any other case. By the constitution of the United States the original jurisdiction of the supreme court of the United States is limited to cases affecting ambassadors, and other public ministers and consuls, and those in which a state may be a party. Under

his affirmative grant of original jurisdiction the supreme court of the United States decided that congress had no power to extend it: See *Marbury v. Madison*, 1 Cranch, 137; *Johnson v. The State of Virginia*, 6 Wheat. 264; *Osborn et al. The Bank of the United States*, 9 Id. 738. Adhering to the principles thus laid down in those adjudications of the supreme court of the United States, the conclusion is manifest that the legislative assembly, by its laws, can not extend the affirmative grant of original jurisdiction to the supreme court of the territory beyond the limits of the organic law of congress approved September 9, 1850. Hence the third section of article 4 of the organic law of September 22, 1846, published in the Kearny code, is not considered in force and can not enlarge the original jurisdiction of this court beyond the limits of the organic law of congress. If the case now under consideration were a case in which the issuing the writ of mandamus was necessary to the exercise of the appellate jurisdiction of this court, the opinion of the court would be quite different. The law in force, under which this cause originated with the probate court, will be found in sections 32 and 33 of article in the Kearny code, upon the subject of revenue. The thirty-third section says appeals may be taken from all such judgments of the prefect to the circuit court, but no such appeal shall be allowed unless it be taken on the day of trial. It will thus appear that the district, and not the supreme court of the territory, is by law the appropriate tribunal of appellate jurisdiction from the judgment of the probate court. In the case *Ex parte Jesse Hoyt, Collector of the Port of New York*, 13 Pet. 279, the supreme court of the United States refused to issue a mandamus to the district court, upon the ground that the appellate jurisdiction in the case, if any, was direct and immediate to the circuit court of the southern district of New York.

If this view of this case is not well founded; if, in fact, the power of issuing this writ of mandamus to the probate court of Santa Fe county does exist in this court, the question yet remains to be considered, does the petitioner make out in his petition such a case as calls for

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the exercise of this power? The facts stated in the petition upon which this motion is predicated are these: First. An adjournment of the case for fifty days after said cause was ready for trial. Second. A failure and neglect to sit for the trial of said cause, although several other days since the expiration of said fifty days have been set for the trial of said cause, at which the said court has in like manner failed and neglected to attend for the trial of said cause. In the absence of law limiting the time for which a cause may be continued, or specifying the reasons or causes which will entitle a party to a continuance, it must be regarded as left to the sound discretion of the inferior court, for what, and how long to continue a cause. For aught that appears in this petition the continuance may have been, and until the contrary appears, this court must presume it to have been right and proper. The petition does not state that either party objected to the continuance, and in the absence of such an averment, this court must conclude that said continuance of fifty days was with the consent of both parties. The case of *Ex parte Martha Bradstreet*, 8 Pet. 588, is in point, upon questions of discretion in inferior courts. In that case a mandamus had been issued against the judge of the northern district of New York, directing him to reinstate certain suits which had been dismissed from the docket of his court, and to proceed to adjudicate them according to law. A motion was made for an attachment against the judge of the northern district for contempt, upon the ground of great delay which had taken place in the proceedings, which was supposed to amount to a contempt of the mandamus. A motion was also made for a rule to show cause why a mandamus should not issue to the district judge. Both motions were overruled, and the supreme court held that a judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit. The consul of the French republic, under the provisions of a convention between that republic and the United States, applied to one of the United States district judges for a warrant to apprehend Captain Barre, who was alleged to be a deserter from the French

dict. The district judge refused to issue the warrant, application was made to the supreme court for a mandamus compelling the district judge to issue the warrant, and the supreme court refused to issue the mandamus, upon the ground that the district judge had acted judicially in the case, and that the supreme court had no power to compel a judge to decide according to the dictates of any judgment but his own: See *The United States v. Judge Lawrence*, 3 Dall. 42.

So far as the second reason is concerned, the petition does not disclose that any damage or inconvenience resulted from the failure of the probate judge to attend upon the other occasions set for trial, for the petition does not inform us that either party attended on those days or were ready for trial, and if the parties did not attend, or attending, were not ready to proceed with the cause, no damage or inconvenience could result from the absence of the probate judge or his failure to attend. The speedy progress of any cause does not infrequently depends as much upon the action of the parties as upon the court. The failure to attend in this case is not charged to have been a willful failure. The probate judge may have been sick and unable to attend, or may have had some other sufficient reason for his absence, and charity requires us to presume he had a valid reason for his absence, unless it is stated to have been willful or shown to be without excuse.

The petition in this case prays for the issuing of a writ of mandamus to compel the said Tomas Ortiz, probate judge as aforesaid, to proceed immediately to judgment in said cause against the said William S. Messervy and the said James J. Webb, and to do prompt justice in the premises and in the execution of the laws of said territory. This language is susceptible of a double construction. It may be considered as meaning simply that the probate judge proceed to judgment in the case referred to, or it may mean that the probate judge be directed to render judgment against the defendants in the case. It is in the power of a pleader, by the use of proper language, to strip his meaning of ambiguity and place the construction intended be-

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yond cavil. If the pleader omits to do so, his language must be construed most favorably to the party against whom the pleading is exhibited, and most unfavorably to the pleader. Under this rule of construction this court would have no power to grant such a mandamus as is prayed for in this petition. In the case of *The Life and Fire Insurance Company of New York v. Adams*, 9 Pet. 573, the petitioners required of the supreme court a mandamus requiring the judge to render specific judgment in their favor. The petition in that case, like the petition now under consideration, did not show that the case was in condition for a final judgment, nor that the judge was unwilling to render one.

In the same case the supreme court held that they would not order an inferior tribunal to render judgment for or against either party, but that in a proper case it would order such court to proceed to judgment. It is further held by the supreme court of the United States in the same case, that, should it be possible in a case ripe for judgment, the court before whom it was depending should perseveringly refuse to terminate the cause, the supreme court, without indicating the character of the judgment, would be required by its duty to order the inferior court to render some judgment in the case; but to justify this mandate, a plain case of refusing to proceed in the inferior court ought to be made out. In such case the supreme court of this territory would not hesitate to issue a mandamus if necessary in the exercise of its appellate jurisdiction. The writ issued in this case is not a mandamus, but a new rule requiring cause to be shown why a mandamus shall not issue. In cases of doubt or difficulty such rule usually precedes the motion for a mandamus, and is unexceptionable in the present instance, on account of its issuance in vacation. If, in answer to the rule, the party complained of show no sufficient cause why a mandamus should not issue, then on motion the court will direct an alternative or peremptory mandamus against the party complained of. The jurisdiction and power of the district judge in the first judicial district in this case, is a point upon which we intimate no opin-



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; each district court must settle for itself its jurisdiction and power, subject to the review of this court as supreme appellate tribunal. The expression of an opinion on the other points made in this cause is unnecessary. In the very beginning of the existence of this court it has been thought proper to define at length the position upon which it stands in regard to this important branch of judicial power.

By Court: It is ordered by the court that the rule in this case be discharged. It is further ordered by the court that the petition herein filed be dismissed.



REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

ADJOURNED TERM FOR MARCH, 1852.

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FACUNDO PINO *v.* HUGH M. BECKWITH.

**DEMURRER TO ANSWER GONE BACK TO PETITION.**—A demurrer to the answer operates as a demurrer to the petition, if that be demurrable.

**PARTY ALLEGING ERROR MUST SHOW WHAT.**—The party alleging error must show error to his prejudice. Thus, when it appears by the bill of exceptions that the party excepting was not permitted to examine an opposing witness fully, as to his interest, the judgment will not be reversed on that ground, where it is not shown that the witness' testimony was material and prejudicial to the plaintiff in error.

**PARTY TO RECORD NOT A COMPETENT WITNESS.**—A party on the record, though divested of all interest, is not a competent witness.

**FAILURE OF CONSIDERATION.**—Money paid upon a consideration which has wholly failed may be recovered back; as where part of the consideration has been paid upon a purchase of land, and the vendor is unable to make title.

**REFUSAL TO EXCLUDE PAROL EVIDENCE EXPLAINING WRITING.**—Where parol evidence is admitted without objection to explain a writing, a subsequent refusal to exclude it from the consideration of the jury will not be deemed erroneous where the testimony and the instructions to the jury are not embodied in the bill of exceptions.

**RENDERER OF POSSESSION WHERE TITLE FAILS.**—Where, in an action to recover purchase money paid for land the title to which has failed, there is no evidence to show who has possession, but the answer alleges the plaintiff to be in possession, it will be presumed that the plaintiff gave or tendered possession, with payment of rent, before bringing the action.

**INTEREST ON PURCHASE MONEY.**—In an action to recover purchase money for land for which the title has failed, interest is recoverable from the time the vendor was notified of the intention to reclaim the consideration.

APPEAL from Santa Fe circuit court. The opinion states the case.

*Wheaton and Pillan*, for the appellant.

*Ashurst and Smith*, for the appellee.

By Court, WATTS, J.:

Previous to the establishment of a civil government in this territory by the passage of the organic law of congress, approved September 9, 1850, the judicial power of said territory was vested in alcaldes, prefects, circuit courts, and a supreme court; the judges of the supreme court were the judges of the circuit courts; and the territory was divided into three circuits, called central, northern, and southeastern districts.

Upon the erection of a territorial government here under the organic law of congress, above mentioned, these courts passed away, and the legislative assembly at its June session, 1851, in accordance with the requirements of the organic law, vested the judicial power of said territory in a supreme court, district courts, probate courts, and in justices of the peace. At the said June session, 1851, of the legislative assembly, an act was passed perpetuating and declaring in force certain acts, orders, and laws, and for other purposes; the second section of which act provides, "that all bonds, writs, and process, that have remained in force, shall be carried to a final decision in the courts established by the legislative assembly, to the same effect as they would have been in the courts previously existing." The case now before us was tried in the circuit court for the central district at Santa Fe; and an appeal was taken from the judgment of the circuit court, to the supreme court, and by virtue of the section above quoted, comes before the supreme court created by the organic law, for adjudication. The suit in this case was a petition in debt; the writ was issued twenty-fifth of May, 1850; served on the defendant on the fourth of June, 1850; and the petition is in these words:

In the Santa Fe circuit court, June term, 1850, the petition of Hugh M. Beckwith respectfully states, that some

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me in January, 1850, he, through his agent, Jose Maria Rascen, contracted with one Facundo Pino, who alleged himself to be the agent, with a sufficient and legal power of attorney of Maria de la Luz Rascen, which latter asserts himself to be the heir, devisee, and legal representative of Juan Rafael Rascen, deceased, under his last will and testament, for the purchase of a certain house and lot of ground situated in the city of Santa Fe, county of Santa Fe, New Mexico, lying in Main street, and bounded south by the Rio Chiquito, west by land of Denaciano Vigil, and east by an alley, for and in consideration of the sum of three thousand dollars, of which two thousand were to be paid cash in hand, and were accordingly paid, and the balance to be paid in two equal installments, payable in three and six months thereafter. Your petitioner further states, that a few days after the said first installment became due and payable, he was ready, and offered to pay the same to the said Facundo Pino, and made him a full tender thereof, and also the amount of the last installment, and made demand of a deed, sufficient in law to make him a good and legal title to the premises aforesaid. Your petitioner further states that the said Facundo Pino has hitherto failed to make him any such deed; and as your petitioner believes and is advised, has no sufficient legal authority or legal power from the said Maria Rascen, or any other person in whom rests the true title to the said premises, to make a legal conveyance to your petitioner. Your petitioner further prays the court for a judgment against the said Facundo Pino, for the said sum of two thousand dollars, with legal interest thereon, from the time of payment of same, together with his damages and costs, and to award him an execution therefor.

AUGNEY & ASHURST, for the plaintiff.

This petition was sworn to in the usual form, before the clerk, at the June term, 1850, of the circuit court. The defendant appeared and filed his answer to the above petition. Subsequently, during the same term, on the eighth day of August, 1850, a motion was made by defendant for leave to file an amended answer. The motion was sustained by the

court, and on the eighth day of August, 1850, the following amended answer was filed by the defendant:

*H. H. Beckwith v. F. Pino.* The answer of said Pino, agent of Dona Maria de la Luz Rascen, states as follows:

1. Protesting against the manifold errors, imperfections, and incongruities contained in said petition, by which the same is absolutely null and void, and illegal, respondent as agent as aforesaid, for answer to the same, answering, says that the matters and things contained in said petition are untrue, in manner and form, as therein stated and set forth.

2. Further, that he, as agent as aforesaid, did some time in January, A. D. 1850, contract with the said Jose Maria Rascen, not as the agent of his son-in-law, the plaintiff, but in his own proper person, and in his own name and right, for the sale of the house and property, as in said petition mentioned and described; that before the making and signing of said contract, he, the said respondent, should have fully explained to said Jose Maria his power as agent of said Maria de la Luz, as also the evidences he possessed, showing the right of said Maria de la Luz to said above-described property; and that said Jose Maria, having thoroughly examined his said power, and the documents in possession of said respondent establishing the right of said Maria de la Luz to the said land and property, expressed himself fully satisfied therewith, and deliberately made and executed a written contract, herewith shown to the court and marked A, by which the said Jose Maria, not as the agent of another, but in his own proper right, contracted with said Maria de la Luz to purchase of her said land and property for the sum of three thousand dollars, two thousand dollars to be paid down, and the other thousand to be paid in two equal installments, as in petition mentioned, the said installments being secured by the said property; that said two thousand dollars first mentioned were paid and the possession of the land delivered up to the said Jose Maria, in whose hands it still remains, without disturbance or molestation of any kind; that on or about the expiration of the time for the payment of the first installment of the above-

umed equal part of the one thousand dollars so agreed to be paid as aforesaid, he was called on by said Beckwith, son-in-law of said Jose Maria as aforesaid, to go with him and receive the money on said first installment; but instead thereof, Pino was conducted to the law office of Messrs. Ashurst and Daley, two distinguished counselors of said city of Santa Fe, where he saw some silver lying on the table (which this respondent presumes is the custom of offices of that character), but that said silver was never counted out or offered to said respondent; nor does he know how much was there, or for what purpose it was there placed.

Your respondent was then for the first time informed that he had been trading and contracting with said Mr. Beckwith, and not with Jose Maria, and that his, respondent's, power and documents were deemed insufficient, and that said Jose Maria intended to back out of said contract, and instead of paying and counting out the sum as he had agreed to do, by some kind of legal machinery unknown to your respondent, to get back the two thousand dollars so paid as aforesaid, and to never pay the other thousand so agreed to be paid as aforesaid; all of which actings and doings, contrary to the good old rules of fair trading and good faith, your respondent attributes to bad advice given to said Jose Maria by others, and not to the suggestions of his own part and understanding. Your respondent protests against the substitution on the part of said Jose Maria, of his son-in-law, Beckwith, as principal in said contract and party in said suit so long a period of time after the execution of said agreement as aforesaid. He also protests against the right assumed by said Jose Maria of going behind his said contract and refusing to carry out his said agreement after the same has been solemnly signed and executed by him as aforesaid, with full knowledge on his part of all documents, powers, rights, and powers in possession of said Pino relative to said land, and without the slightest imputation of fraud, bad faith or deceit expressed against your respondent or his principal in making and executing said contract, and while the said Jose Maria remains in undisputed possession of said land and property, and is in receipt of

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large rents and revenue for the same. Your respondent, therefore, prays that said Jose Maria Rascen be made and considered by the court as party to this suit; that the same, as far as the said Beckwith is concerned, be dismissed at the proper cost of said Beckwith, and that said Jose Maria be compelled by a decree of this court to pay to your respondent, as agent of said Maria de la Luz, the above-named sum of one thousand dollars, so by him agreed to be paid as aforesaid, and which your respondent alleges has never been paid or tendered to either him or his said principal, Maria de la Luz. At the same time this respondent declares his readiness, upon payment of the same, to make as agent as aforesaid such conveyance as he in said contract A agreed to make, and to do *bona fide* what he therein agreed to do and perform, and he further states that he has always been ready and willing to do the same, but has been prevented by reason of the failure of the said Jose Maria to perform his part of said contract as aforesaid; that is to say, that your respondent avers his readiness always to do and perform honestly and *bona fide* as agent and on the part of his said principal, Maria de la Luz, all his part of said contract marked A, and in which not even a suspicion of fraud or bad faith is even expressed by said Jose Maria or said plaintiff Beckwith, and prays that said Jose Maria be also required to carry out his own part of the same and to perform with the same good faith the agreement made by him, and that the said Jose Maria be also compelled by this court to pay all interest and damages which your respondent alleges his principal has sustained, to a large amount by reason of the said failure and delay on the part of said Jose Maria to perform the provisions of his said contract; and that said Jose Maria and said Beckwith be compelled to pay such other costs and damages as to this court may seem just and right, and your respondent will ever pray, etc.

WHEATON & PILLAN, for defendant.

This answer was sworn to in the usual manner. Document A, above referred to, was signed Jose Maria Rascen, Facundo D. Pino, and being substantially set forth in the



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above answer of Pino, is not now essential to be copied. After the filing of the above answer of Pino, on the eighth day of August, 1850, the plaintiff, Beckwith, demurred to the answer of Pino. Whether this demurrer was ever decided by the court, or if so, in what manner it was decided, is unexplained by the record before us. The cause was then continued until next term of the court in 1850, the parties appeared, issue was joined, and the cause was tried by a jury, who rendered a verdict for the plaintiff for the sum of two thousand and seventy-five dollars, and judgment was rendered on the finding of the jury for that sum and costs of suit. The defendant moved to set aside the verdict, and grant a new trial, for the following reasons: first, that the court admitted illegal testimony before the jury; second, the court instructed the jury; third, that jury found against the law and evidence; fourth, the court refused testimony that ought to be admitted. The record is in like manner silent as to what disposition was made of this motion for a new trial in the circuit court. During the progress of the cause four bills of exception were signed by the court upon the part of the defendant, and made a part of the record: first, that the demurrer of the plaintiff to defendant's answer was overruled as to plaintiff's petition, as well as to said answer; second, that the plaintiff offered to introduce as a witness in the same cause Jose Maria Rascen, who being on his *voir dire*, the court refused to allow any other questions by the defendant, except as follows: are you directly or indirectly interested in the event of this suit; third, that on the trial of the cause a certain written contract, marked A, and filed in the cause, was introduced as testimony, and proved to be the contract on which the suit was founded. The plaintiff introduced testimony to show by parol a different party to said contract, which defendant moved to exclude from the jury, on the ground that parol testimony was inadmissible to show that Rascen made the contract on account of another, which motion the court overruled; fourth, that on the trial of this cause, the defendant offered as a witness the said Facundo Pino, to testify in the same, who was rejected by the court. On the first day of November, 1850, the usual affidavit for an appeal

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was made by Facundo Pino, and on the second day of November, 1850, an appeal bond was executed by Facundo Pino, Jose Maria Baca, and Manuel Chavez, and approved by the circuit judge.

Such is the history of this cause in the Santa Fe circuit court, as disclosed by the record herein. The points made by the appellant in this case in this court, upon which its reversal is sought, are: 1. The circuit court erred in overruling the demurrer filed by the plaintiff as to plaintiff's declaration in exception marked A. 2. The circuit court erred in not allowing questions to be asked witness to show his interest other than the question stated in the exception marked B. 3. The circuit court erred in not admitting the testimony of Facundo Pino, as stated in exception marked C. 4. The court erred in allowing parol evidence to alter or contradict a written contract, as shown in exception E. The first error assigned is the overruling the demurrer filed by plaintiff as to the plaintiff's declaration. The ground of this exception, when we come to examine the bill of exceptions, seems to be this: the plaintiff filed a demurrer to the defendant's answer, and the defendant asserts that the demurrer so filed goes back to the petition, and that it was the duty of the circuit court to have dismissed the petition. The principle of law, that he who objects to the legal sufficiency of his adversary's pleading must be certain that his own pleadings are in substance good, is a correct principle. A demurrer filed by a plaintiff to a defendant's answer will operate as a general demurrer to the petition of the plaintiff. In examining this petition, no substantial defect in it has occurred to the court, nor has any been pointed out. So far as the exception to the opinion of the court is concerned, for not permitting a full examination of the witness, Jose Maria Rascen, as to his interest, this court can not undertake to say that the circuit court committed any error. The party alleging error, must show error tending to his prejudice in the court below, before this court can decide upon the point in dispute. The bill of exceptions does not show that Jose Maria Rascen was examined as a witness in the

he, or testified to any fact connected with the case; and the court can not undertake to presume he was examined as a witness in the cause. The decision of the circuit court in refusing to admit Facundo Pino, who was the defendant, as a witness in the cause, was not erroneous. A party upon the record, although divested of all interest in the event of the suit, is not a competent witness in the case: *Bridges v. Armour*, 5 How. 91; *De Wolf v. Johnson*, 1 Wheat. 367; *Scott v. Lloyd*, 12 Pet. 145; *Stein v. Bowditch et al.*, 13 Id. 209. The exclusion in such a case is based upon the ground of policy, which forbids a party from being a witness in his own cause.

The fourth error assigned is, that the court erred in allowing parol evidence to alter a written contract. The suit in this case was not founded on the written contract; that contract may or may not have been useful to the plaintiff as an argument of evidence, but is not made any part of the petition. The petition is based upon the fact that Beckwith paid Pino two thousand dollars on a consideration which wholly failed, and, therefore, should be refunded. It is the correct principle of law that money paid upon a consideration which has totally failed may be recovered back: See *Greenleaf v. Cook*, 2 Wheat. 13; 4 Cond. 7. The case now before this court comes within this principle. That a written instrument can not be shown by parol evidence to be different from what it purports to be, seems to be clear: See *Russell et al. v. Branham et al.*, 8 Blackf. 277. In this case the written contract was introduced by the defendant; parol evidence was admitted to explain it without objection; and the subsequent refusal of the court to exclude it from the case on the motion of the defendant, if that motion was a proper one, can not now be considered by this court as erroneous, in the absence of the testimony in the cause, and in obedience of the instructions of the circuit court to the jury. In the absence of the evidence given in the court below, this court will presume that every fact stated in the petition, material to be proved before the jury, was proved, and that the jury on the evidence would not have found a verdict for the plaintiff in the court below. The petition is silent as to the possession of the house and ground; the answer

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of the defendant states it to be in the plaintiff. If it be true that the plaintiff, Beckwith, has possession of the premises, it is equally true that the legal owner can at any time assert his right to the possession and payment of such rent as the premises have or might have yielded. A refusal on the part of Beckwith to surrender the possession, and account for the rents and profits, might be construed into an affirmation of the contract. There being no evidence before this court showing in whom the possession is, this court must take it for granted that the possession was given or tendered to Pino by Beckwith, with payment of rent, if the possession was ever in Beckwith. Whether a demurrer, noticed on the record as being filed, and no notice of any subsequent action of the court upon it, is to be regarded as withdrawn or overruled, is a point not now decided. Interest on money is regulated by the contract of the parties, or fixed by law. The plaintiff Beckwith, in his petition, shows that Pino was not notified of his intention to reclaim the two thousand dollars, upon the ground of the total failure of the consideration upon which it was paid, until the twenty-first day of April, 1850. The judgment was rendered on the first day of November, 1850, being six months and ten days. The interest for that time amounted to only the sum of sixty-three dollars and thirty-three and one third cents. The jury gave the plaintiff seventy-five dollars interest, making an excess of interest of eleven dollars and sixty-six and two thirds cents. The judgment must be reversed, unless the proper remittitur be entered.

It is ordered by the court, that the judgment of the Santa Fe circuit court in this case be affirmed, at the costs of the appellee in this court, and that an execution issue in this cause against the said Facundo Pino, Jose Maria Baca and Manuel Chavez for the sum of two thousand dollars, debt, and interest thereon from the twenty-first day of April, 1850, until this date, being the sum of two hundred and twenty-nine dollars and sixty-seven cents, and costs of suit in the Santa Fe circuit court, taxed at — dollars and cents. It is further ordered that the appellee pay the costs in this court.

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

JANUARY TERM, 1853.

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NICOLAS QUINTANA *v.* R. H. TOMPKINS.

TESTED ELECTION OF JUSTICE OF THE PEACE, APPEAL IN.—An appeal from a judgment of a probate judge, to the district court, in a case of a contested election for justice of the peace.

JUDGMENT RENDERED IN VACATION IN SUCH CASE.—A judgment of a probate judge, deciding a contested election for justice of the peace may be rendered in vacation.

APPEAL FROM PROBATE COURT TRIED DE NOVO.—In all cases of appeals from the probate to the district court, including contested election cases, the cause is to be tried *de novo* upon a full hearing of the evidence.

RIGHT OF ELECTION AS TO CITIZENSHIP UNDER TREATY.—The right of election secured to Mexican citizens of this territory by the treaty with Mexico, to retain their citizenship or to become American citizens, was not required to be exercised in any particular mode, but could be exercised and proved in any manner appropriate to the nature of the case.

DECLARATION OF INTENTION TO RETAIN CITIZENSHIP.—A declaration of intention by a Mexican citizen to retain such citizenship, by signing his name in a list authorized to be kept by the clerks of the prefects' courts, by a proclamation of the military governor of the territory, is a sufficient and binding exercise of the right of election provided by the treaty, and not affected by a subsequently declared intention to withdraw such signature, which is not shown to have been acted on.

APPEAL from Santa Fe county. The case is stated in the opinion.

Ashurst, for the appellee.

By Court, BAKER, C. J.:

At an election for justices of the peace, held in and for Santa Fe county, on the first Monday of September, 1852, the appellant received a plurality of votes and was returned by the probate judge as having been duly elected as justice of the peace. The appellee, having also received a number of votes for the same office, contested the election of the appellant, and the probate judge, upon the hearing of the case, gave judgment in favor of the appellant; thereupon the appellee appealed to the district court, and at the September term a motion was made by the appellant, Quintana, to dismiss the appeal, which motion was overruled. and, upon a hearing of the cause, that court reversed the judgment of the probate judge, and adjudged that the appellant was not a citizen of the United States, and was therefore disqualified to hold the office of justice of the peace. To reverse this judgment of the district court the appellant has brought the case to this court, by appeal.

Three grounds are urged for a reversal: 1. Overruling the motion to dismiss the appeal; 2. Overruling the objections of appellant to the admission of the testimony on the part of the appellee upon the hearing of the cause; and, 3. The rendering of the judgment for the appellee.

The following are the various sections of the law prescribing the appellate jurisdiction of the courts, regulating appeals, and prescribing the mode of determining cases of contested elections: Every person aggrieved by any judgment or decision of any circuit court in any civil case may make his appeal to the superior court: R. C., act 49, sec. 9. The superior court shall have appellate jurisdiction in all cases, both civil and criminal, which may be determined in the circuit court: *Id.*, sec. 8.

The circuit courts in the several counties shall have \* \* appellate jurisdiction from the judgments and orders of the prefects and alcaldes in all cases not prohibited by law, and shall possess a superintending control over them: *Id.*, sec. 18.

appeals from the judgments of the prefects shall be allowed to the circuit court in the same manner and subject to the same restrictions as in case of appeals from the circuit court to the superior court: *Id.*, sec. 22.

The fiftieth section of the election law acts, 203, provides that the election of justices of the peace may be contested before the probate judge, and that the contest shall be heard and determined in a summary manner. The fifty-first section provides that if a contested election be pending, the person holding the certificate of election shall take possession and discharge the duties of the office until the contest is decided.

The opinion of the probate judge in the transcript of the record from his court is substantially a judgment, and determines the matter in contest, the citizenship of the appellant, and his due election as justice of the peace.

There is nothing in the objection that it was not rendered at a regular term of the probate court, for the statute requires the matter to be heard and determined in a summary manner, and the decision could as regularly be made in vacation as in term time. By the eighteenth section, above cited, the district court has "appellate jurisdiction from judgments and orders of the prefects and alcaldes in all cases not prohibited by law." This is not a case prohibited by law, and this is such a judgment as an appeal may well be taken from under the twenty-second section. The affidavit and appeal bond seem to be in accordance with the requirements of the law regulating appeals from the district court to the supreme court. The appeal, therefore, ought not to have been dismissed. Appeals in cases of this character from the probate courts to the district courts are, like all other appeals so taken, to be tried, not upon an inspection of the record, but *de novo* upon their merits, upon a full hearing of the evidence and the parties.

The next objection is to the admission of the evidence in this cause. The question was whether the appellant at the time was an American citizen. By the article of the treaty between the United States and the Mexican republic, it is provided that Mexican citizens who shall prefer to re-

main in said territories may either retain the titles and rights of Mexican citizens or acquire those of citizens of the United States, but they shall be under obligation to make their election within one year from the date of the exchange of ratifications of this treaty, and those who shall remain in said territories after the expiration of that year, without having declared their intention to retain the character of Mexican citizens, shall be considered to have elected to become citizens of the United States.

The appellee sought to prove at the hearing that the appellant had made his election to retain the character of a Mexican citizen. No mode of making this election was prescribed in the treaty, or by the American government, or under its authority. But this omission did not deprive the Mexican citizen of either the right or the power to make it. Various modes of making the election might have been adopted, any one of which would have been effectual, provided that it sufficiently evidenced the determination of the mind to retain or acquire respectively either character of citizenship. As no mode had been prescribed, and no particular species of evidence required, it was an act that might have been performed in any sufficient manner, and proved, like any other disputed fact, by the best evidence of which the nature of the case admitted.

The appellee produced in evidence a book purporting to contain a list of persons choosing to retain the character of Mexican citizens, according to the provisions of the treaty between the United States and Mexico. This book contained a caption or statement at the commencement of the list, stating in effect that it was a register of the names of persons mentioned as desiring to retain the character of Mexican citizens. Also a proclamation of J. M. Washington, at that time civil and military governor of the territory, dated the ninth of April, 1849, authorizing the enrollment of the names by the clerks of the prefects' courts of the several counties of the territory. The correctness of this list was certified at the foot thereof by J. Giddings (by deputy) as such clerk. Said Giddings also proved that he was



present and saw appellant sign his name to said list in the year 1849, and before the expiration of the time fixed by the treaty for making such declaration. It was further proved that the appellant had afterwards stated in conversation that he was a Mexican citizen. There was also proof that the appellant, on the day he signed said list, stated publicly his determination to withdraw his signature from said list, and that he went away with the clerk of the district's court, with the intention of doing so. There was also proof that the appellant had held the office of constable under the present government of the territory. We think this evidence sufficient to justify the district court in the judgment which it gave.

Here the act of signing his name by the appellant, under the caption declaring it the purpose of the signers to retain the character of Mexican citizens, and in pursuance of a proclamation of a public officer in authority, calling attention to the matter of making such election, is evidence unequivocal of his determination of his election to retain the character of a Mexican citizen.

It is true he seems a short time afterwards to have repented the act, and declared his determination to withdraw his signature from the list, and that he went away with the clerk who had charge of the book with that object in view; but there is no evidence of his having done so; for aught that appears to the contrary, he may have abandoned that determination, and in the absence of evidence, his name still remaining on the list, it is to be presumed that he did.

We do not perceive any error in the record of the proceedings, and are of opinion that the judgment of the district court ought to be affirmed.

Points decided.

## EUGENE LEITENSDORFER AND JOAB HOUGHTON v. JAMES J. WEBB.

**VALIDITY OF PROVISIONAL GOVERNMENT OF NEW MEXICO.**—The provisional government erected in this territory, upon its conquest by General Kearny, under the authority of the president of the United States, and the laws and courts established as a part of such government, were valid, and abrogated those previously existing here, so far as they were in conflict.

**PROVISIONAL GOVERNMENT NOT ABROGATED BY TREATY OF PEACE.**—The laws of the provisional government in force at the ratification of the treaty of peace between the United States and Mexico were not thereby abrogated, but remained in force, together with the unrepealed Mexican laws, though it would have been otherwise if the territory had been restored to Mexico by that treaty.

**CESSION OF CONQUERED TERRITORY, EFFECT OF.**—Upon a cession of conquered territory to the conqueror by a treaty of peace, the laws then in force there, whether established by the conqueror or previously existing, so far as they relate to the intercourse and conduct of the inhabitants, remain in force, while those which regulate the political relations of the inhabitants to the sovereign state are changed.

**TRANSFER OF CAUSES FROM PROVISIONAL TO TERRITORIAL COURTS.**—The legislative assembly had power to provide by statute for the transfer of causes from the circuit courts of the provisional government to the territorial district courts, without abatement, this being a rightful subject of legislation under the organic law.

**INTENTION GOVERNS CONSTRUCTION OF STATUTES.**—In construing a statute, the intention of the law-makers, as gathered from the purpose for which the law was enacted, or from other circumstances, should govern.

**JUDICIAL POWER OF TERRITORY, WHERE VESTED.**—The whole judicial power of the territorial government is vested in the supreme, district, and probate courts, and in courts of justices of the peace under the organic law, and the legislature can create no others.

**EFFECT OF ACT OF JULY 14, 1851, TRANSFERRING CAUSES.**—By the act of July 14, 1851, all causes then pending in the courts of the provisional government were transferred to the appropriate courts of the territory, each court determining for itself the particular causes of which it thus acquired jurisdiction. Hence the district court may assume cognizance of any cause within its jurisdiction, which was pending and undetermined in the circuit courts of the provisional government.

**AFFIDAVIT FOR ATTACHMENT, SUFFICIENCY OF.**—An affidavit for an attachment, stating the amount of the debt and that the attaching creditor has good reason to believe, and does believe, that the debtor has fraudulently disposed of his property to hinder, delay, and defraud his creditors, is sufficient.

**CONTINUANCE OF INSOLVENT PARTNERSHIP NOTWITHSTANDING DISSOLUTION.**—An insolvent partnership continues to exist, notwithstanding its dissolution, as to its joint creditors and the partnership effects.

Points decided.

**FRAUDULENT ASSIGNMENT BY ONE PARTNER.**—Where one partner makes an assignment of partnership effects in fraud of creditors, which is subsequently approved by his copartner, the latter is equally a party to the fraud, and an attachment may issue against both.

**POSSESSION OF NOTE AS EVIDENCE OF PROPERTY.**—The mere possession of a note is sufficient evidence of property in it to enable the holder to sue, especially where it is indorsed.

**MEXICAN LAW GOVERNS ASSIGNMENT IN 1848.**—The validity of an assignment for the benefit of creditors, made in December, 1848, is determined by the Mexican law as modified by the Kearny code. *Contra*, Watts, J., dissenting.

**COMMON LAW EXTENDED TO THIS TERRITORY.**—By the organic act the common law is extended over this territory, so far as it relates to the regulation and control of the proceedings of the supreme and district courts in the determination of causes.

**HOW TO DETERMINE VALIDITY OF ASSIGNMENT.**—In courts proceeding according to the common law, it is the duty of the court to determine whether an assignment is fraudulent in law or not.

**ASSIGNMENT INVALID, WHEN, BY MEXICAN LAW.**—An assignment for the benefit of certain preferred creditors, made without presenting a petition to any court or judge, without any schedule of debts or creditors, without the sentence of any court sanctioning the *cession* or *surrender*, and without any citation of creditors, is contrary to the Mexican law, and must be pronounced fraudulent in law as to creditors.

**VOID IN LAW AS GROUND OF ATTACHMENT.**—An assignment which is fraudulent in law though not fraudulent in fact, is ground for an attachment.

**VERDICT PRESUMED CORRECT WHERE NO EVIDENCE IN RECORD.**—Where upon a bill of exceptions, the record contains none of the evidence, the verdict will be presumed to have been right.

**CORRECT INSTRUCTIONS NOT VITIATED BY ERRONEOUS REASONS.**—Instructions which are correct in themselves will not be deemed invalid because erroneous reasons are given for them.

**EX LOCI CONTRA CTUS.**—The law in force at the time and place of making a contract governs its construction, unless otherwise stipulated by the parties.

**VALIDITY OF ASSIGNMENT WITH PREFERENCES.**—A general or partial assignment in trust for creditors, containing preferences, where no liens have attached, is valid unless prohibited by statute, or unless there is a bankrupt law in force; and, there being no law to the contrary, such an assignment is valid in this territory. *Per* Watts, J., dissenting.

**ABSENCE OF SCHEDULE OF ASSETS AND LIABILITIES, ETC.**—An assignment for the benefit of creditors is not invalid for want of attaching to it a schedule of assets and liabilities, and of the preferred creditors. *Per* Watts, J., dissenting.

**UNATTACHED SCHEDULES SUFFICIENT.**—Proper schedules of debts, assets, etc., made pursuant to the assignment and in the hands of the assignees, though unattached, are sufficient. *Per* Watts, J., dissenting.

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**ASSENT OF CREDITORS UNNECESSARY.**—An assignment to a trustee, for the benefit of creditors, which is not fraudulent, does not require the assent of creditors to render it valid. *Per* Watts, J., dissenting.

**FRAUD BY ONE PARTNER.**—A fraudulent assignment by one partner, without the privity of his copartner, does not warrant an attachment against both. *Per* Watts, J., dissenting.

**SEALED ASSIGNMENT BY ONE PARTNER.**—Although a partner can not, without special authority, bind his copartners by a sealed instrument, yet an assignment by a partner under seal is not invalid where a seal is not essential to its validity. *Per* Watts, J., dissenting.

APPEAL from the district court for the first judicial district. The opinion of Mr. Chief Justice Baker sufficiently states the case.

*Ashurst and Tully*, for the appellants.

*Smith and Garey*, for the appellee.

By Court, BAKER, C. J.:

This case comes before us as by appeal from the district court for the first judicial district. On the thirtieth day of June, 1849, the appellee, J. J. Webb, filed in the office of the clerk of the circuit court of Santa Fe county, his petition in the usual form, his affidavit and bond, and sued out a writ of attachment against the lands and tenements, goods and chattels, moneys, effects, and credits of Eugene Leitenschorfer and Joab Houghton, partners, under the name and style of Eugene Leitenschorfer & Co., to recover the sum of eight thousand two hundred and ninety-seven dollars and ninety-two cents, the amount of a promissory note made by said firm at St. Louis, March 1, 1848, payable to the order of Doan, King & Co. of that place, and by them indorsed to the appellee. The writ of attachment was returned to the October term of the circuit court: "Levied on all the goods, wares, merchandise, books, and credits in the store of E. Leitenschorfer & Co., and now in the possession of C. H. Merritt, sheriff, as per invoice," etc.

At the October term, 1849, the appellants appeared and filed their demurrer to the petition, which appears to have been the only steps taken in the pleadings in the case in the circuit court. At the September term, 1851, of the United

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the district court, for the first judicial district, the appellee entered his motion for leave to file the papers of the case in the district court, and that the case be entered on the docket and considered a part of the records of that court, which motion was sustained. At the March term, 1852, the appellants filed their plea under the statute, putting in issue the truth of the affidavit upon which the writ of attachment issued. At the following term a trial of this case was had, and a verdict was found for the appellee. On the trial the appellee introduced as evidence a paper purporting to be a deed of assignment from E. Leitchendorfer to H. N. Smith and Thomas Biggs, of all and singular the goods and wares and merchandise of said E. Leitchendorfer, and of all the property and effects of the late firm of E. Leitchendorfer & Co., for the purpose of paying the creditors of E. Leitchendorfer and E. Leitchendorfer & Co. This deed bears date the eleventh of December, 1848, is signed by E. Leitchendorfer and by said Smith and Biggs, and after stating that said Leitchendorfer, as a partner in the late firm of E. Leitchendorfer & Co. is largely indebted, "and that he wishes to secure his creditors as far as his effects will extend," proceeds: "he, the said Eugene Leitchendorfer, of the first part, has this day assigned, etc., his goods, wares, and merchandise, and all his property and effects of the late firm of E. Leitchendorfer & Co., unto H. N. Smith and Thomas Biggs, parties of the second part, for the use and benefit of the creditors of E. Leitchendorfer & Co." The assignees bind themselves to receive and dispose of the property so assigned to them, and to receive and collect all property accounts and debts due to said Eugene Leitchendorfer, and due the late firm of E. Leitchendorfer & Co., and to dispose of the proceeds for the use and benefit of the creditors of E. Leitchendorfer & Co. Eugene Leitchendorfer in the following manner—that is to say: 1. The clerks and agents now serving in the store of Eugene Leitchendorfer are to be paid their wages, and all arrearages due them; then after paying the actual expenses of conducting the business assigned, etc., they, said Smith and Biggs, are to pay, as the assets are col-

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lected or converted into money, all the annexed debts as being those placed in the list of preferred creditors for money borrowed or deposited, or such as Eugene Leitensdorfer may have considered more especially bound to pay, in which are the following: to Lewis and Courtney, nineteen thousand nine hundred and ninety-four dollars and twelve cents; Moodie and Simpson, seventeen hundred and forty-five dollars and fifty cents; to A. Laroux, four hundred and sixty-two dollars and thirty-three cents; and to Henry O'Neil, fourteen hundred and fifty dollars; and all other sums of money due by E. Leitensdorfer, etc., for simple deposits or money loaned without interest; and after which payment of preferred creditors, with all assets collected, they, the said Smith and Biggs, are to pay all the other creditors *pro rata* until the assets are expended. This assignment was ratified by said Joab Houghton, as appears by the following writing at the foot thereof, viz.:

Know all men by these presents, that I, Joab Houghton, do hereby authorize and empower Hugh N. Smith and Thomas Biggs as assignees of Eugene Leitensdorfer & Co., to use my name and sign my name in any way that it may be necessary further to use it in settling up business of the late firm of E. Leitensdorfer & Co.

Given under my hand and seal, this eleventh day of December, A. D. 1848.

(Signed)

JOAB HOUGHTON. [SEAL.]

No schedule of the assets assigned or of the conditions was annexed to the deed of assignment. Thomas Biggs, one of the assignees, proved that the assets assigned amounted to about thirty-two thousand dollars; that some four or five days after the assignment an inventory of assets was made out. A rancho of Leitensdorfer was turned over to the assignees, but they had been unable to sell it. Some cattle of Leitensdorfer, on hand at the time, were sold for less than the expense of keeping them, so that a balance had to be paid. Before the assignment Leitensdorfer sent to Chihuahua a considerable amount of merchandise; that of the proceeds thereof he, Biggs, paid out upon orders of

appellants about fifty-one thousand dollars. A short time prior to this transaction the appellants had brought from the states merchandise to the amount of between eighty thousand and ninety thousand dollars. Smith states it at about eighty-nine thousand nine hundred forty-four dollars and sixty-six cents; besides an outfit in the way of wagons and teams, estimated at about twenty thousand dollars, making the entire cost nearly one hundred and ten thousand dollars. This outfit was sent back to the states, and was attached at Independence, Missouri, by creditors of appellants. The liabilities of the appellants at the time of the assignment were one hundred and five thousand nine hundred and forty-four dollars and four cents. There were several agents and clerks in the store before the assignment, and many depositors of money, and debts due for money loaned without interest, not named in the assignment. The assignees paid out to creditors upwards of twenty-two thousand dollars, preferred creditors being paid *pro rata* as money was collected. Agents, clerks, depositors, and creditors named in the deed only were paid. The assignment was made because creditors were pressing the payment of their demands. Smith, one of the assignees, was agent and attorney for several of the creditors, whose demands amounted to some twenty thousand dollars, and threatened to attach the property of the appellants should payment not be made. The books of the appellants, transferred upon the assignment, showed about seventy-five thousand dollars due them, but not above three thousand or four thousand dollars could be collected. The debtors held receipts, offsets, etc. Of the merchandise brought out, about forty thousand dollars' worth were sent to Chihuahua by the witness, leaving about fifty thousand dollars to be accounted for. The assignment was on the eleventh day of December, 1848. Two or three months after the return of witness from Chihuahua, the goods arrived from the states—arrived in June or July of the same year.

Smith, the other assignee, stated that some small depositors, and the clerks and agents, were paid in full. Assignment was made because creditors were urging pay-

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ment. The assignee, Smith, as attorney for Lewis and Courtney, threatened to sue for them, but agreed to await the return of the Chihuahua adventure. Had threatened before the return of the Chihuahua adventure to attach the appellants' property. The Chihuahua expedition had gone as early as September or October. Understood the amount of goods brought out in the summer of 1848 was eighty-nine thousand nine hundred and forty-four dollars and sixty-four cents. Lewis and Courtney and Moodie and Simpson were preferred as creditors because they had assisted appellants in Independence when they were in difficulty. The deed of assignment was written out to be submitted to some other parties before signing, some short time before its execution. There was some other testimony, but it is not necessary to state it.

Appellants' counsel requested the court to instruct the jury:

1. That as the assignment was the act of Leitensdorfer alone, with which Houghton had nothing to do, the act of one defendant would not authorize an attachment against two, and their verdict must be for the defendants.

2. Also the deed of assignment was not fraudulent in law, and unless the jury find from the evidence that, in fact, at the time of the commencement of this suit, the plaintiff had good reason to believe that the defendants had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, they must find for the defendants.

3. Also that the plaintiff had shown no title to the note sued on, in himself, he had no authority to sue, and the jury must find for the defendants.

4. Also that if the assignees of the defendants had erred in paying off any of the creditors of the defendants, no advantage could be taken of that matter in this suit, but it could only be complained of by the party injured thereby in a suit against the assignees.

The court refused all these instructions, except the fourth, which it gave, and further instructed the jury:

1. That said deed was fraudulent in law, for want of a schedule thereunto annexed by the assignees of the prop-



ty and effects conveyed to them by the defendants; and because of the want of a schedule thereunto annexed of the preferred creditors, and because of the preference given to some creditors by said deed; that if the jury found from the evidence that the defendants, or either of them, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors at the time of the commencement of this suit, they must find for the plaintiffs; that the execution of said deed by Leitenschorfer, unaccompanied by proper schedules, was such a fraudulent disposition in law as aforesaid.

2. That the commission of a fraud in law by defendants, either of them, without any fraud in fact, or without any intent to defraud, was as sufficient cause for attachment as the commission of a fraud in fact, or with intent to commit fraud.

3. That on the trial of this issue it was not necessary for the plaintiff to show himself a creditor of the defendants, other than is shown in the affidavit, to entitle him to a verdict in his favor on this issue, on the truth of the affidavit, that the sole issue was whether the defendants, or either of them, at the time of the commencement of this suit, had fraudulently disposed of their property and effects, so as to hinder, delay, and defraud their creditors.

As to the refusal to give the first, second, and third instructions, and to giving the instructions above given, appellants excepted. The jury returned a verdict for the plaintiffs, and the defendants pleaded to the merits. The appellants moved to set aside this verdict, and that a new trial might be granted, and the motion was overruled by the court. Whereupon a trial was then had upon the merits, and a verdict rendered for the plaintiffs.

The defendants moved to set aside this verdict, and that a new trial might be granted, which motion was also overruled by the court. The defendants then moved in arrest of judgment, and this motion was likewise overruled by the court. Sundry bills of exception were taken by the defendants to the ruling of the court, and filed of record in the case. Appellants assign the following errors: 1. The

district court erred in placing the cause upon its docket. 2. The district court erred in overruling the motion to set aside the verdict on the first issue. 3. The court erred in overruling the instructions asked for by the defendants. 4. The court erred in giving the instructions asked for by plaintiff. 5. The court erred in overruling the motion in arrest of judgment. 6. The court erred in overruling the motion for a new trial on the second issue.

As to the first point: By the second section of the act of the legislative assembly, entitled "an act perpetuating and declaring in force acts, orders and laws, and for other purposes, passed July 14, 1851," it is provided that all bonds, writs, and processes that have remained in force shall be carried to a final decision in the courts established by the legislative assembly, to the same effect as they would have been in the courts previously existing: See Acts, 176.

The third section of the act of the legislative assembly defining the judicial districts, assigning the judges and fixing the times and places of holding the respective courts, passed July 10, 1851, provides that any judge of either district shall have power at any time, at his discretion, to hold a special term of the circuit court in any county of his district, etc.: See Acts, 119, 120. An act amendatory to this last act was passed on the twentieth of July of the same session, wherein, after a recital in the preamble, "whereas, among other things, the word circuit is used in the third section of said act instead of district, it is enacted, section 1, that the word circuit wherever found in the third section of said act shall be so construed and understood to mean district." These acts, and parts of acts, being *in pari materia*, must be taken and construed together. It is insisted on behalf of the appellants, that the district court had not power under these acts to take jurisdiction of this case: 1. Because the legislative assembly had no authority to pass the act providing for the transfer of the cause. 2. Because, if it had such power, it has not properly exercised it. In other words, that these acts are not sufficient to effect that purpose. Before considering these points, it is proper to dispose of a preliminary objection raised on

the argument of the cause, viz., that the circuit court of Santa Fe county was not a court in contemplation of law, and hence this cause never had a legal existence.

In the year 1846 a conquest was made of this territory by the Americans under General Kearny. The civil government then existing here having been completely overthrown and destroyed, a provisional or temporary government was established in its stead by the conquering general, under and by authority of the president of the United States, as commander-in-chief. This was recognized and sanctioned by the law of nations. By that authority the circuit courts were established, their jurisdiction vested, and the proceedings therein regulated; but it is insisted that upon the establishment of peace, the authority to establish such courts ceased to exist, and that such courts must necessarily cease with the power that created them. By the act to establish the temporary government, act 4, section 1, it is provided that the judicial power shall be vested in a superior court and inferior tribunals to be established by law; section 2, that the superior court shall consist of the judges appointed by the president of the United States. The judges \* \* \* shall hold court at such times and places and perform such duties as shall be prescribed by law. Section 18—tit. Courts and Judicial Powers—it is further provided that the judges of the superior court shall be *ex officio* judges of the respective circuit courts. By the eighteenth section the jurisdiction of the circuit courts is thus defined: "The circuit courts in the several counties in which they may be held shall have power and jurisdiction as follows: 1. Of all criminal cases that shall not be otherwise provided for by law. 2. Exclusive original jurisdiction in all civil cases which shall not be cognizable before the prebets and alcaldes."

Here, then, we have established by competent authority a temporary or provisional government, consisting of legislative, executive, and judicial powers. Upon the conquest it was competent for the president to have abrogated all laws then existing in the territory; this power, however, he did not exercise, save so far as the laws adopted here by

his authority were inconsistent with the existing Mexican laws. On the contrary, it is provided by the first section under the title "Laws," that all laws heretofore in force in this territory which are not repugnant to or inconsistent with the constitution of the United States and the laws thereof, and the statutes in force for the time being, shall be the rule of action and decision in this territory. There is no question, then, as to the validity of these laws and these powers thus established and acknowledged by the conqueror. Up to the time of the ratification of the treaty of peace between the belligerent powers, the unrepealed Mexican laws and those adopted by the conquering power were the laws existing in the country upon the restoration of peace. What effect did the re-establishment of peace have upon these laws? Did the laws adopted by authority of the United States instantly cease, and the repealed Mexican laws as suddenly revive? Had the territory been surrendered to Mexico under the treaty, the *jus postliminii* would have operated, and the laws adopted and the changes in government made by the conquering power would have been abrogated, and the Mexican laws restored to their former force and effect. "The right of the *postliminii*," says Vattel, "is that in virtue of which persons and things taken by the enemy are restored to their former state on coming again into the power of the nation to which they belonged:" Vatt., b. 3, c. 14, sec. 204.

But the territory having been retained by the United States under the treaty, the *jus postliminii* could have no operation, and it is believed it can be clearly shown, both by reason and authority, that these laws, just as they were at the ratification of the treaty of peace, remained in full force and vigor until they should be repealed by the conquering power. The law of nations on this subject is stated with clearness by Chief Justice Marshall in delivering the opinion of the supreme court in the case of *The American Insurance Co. et al. v. Canter*, 1 Pet. 541. That case went up from the district court of the United States for the territory of Florida, and involved to some extent the question of the force of the Spanish laws in that terri-

ry. He says the usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territories as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as the new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the new government that has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it, and the law which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly-created power of the state. Upon the transfer of the country then under the treaty of peace, all the laws which regulated the intercourse and general conduct of individuals remained unchanged, as well as those adopted under the authority of the United States, as the unrepealed Mexican laws, and none but those which are political in their nature, such as affected their relations with their former and their connections with their new sovereign, were changed.

Such being understood to be the law, it is deemed unnecessary to consider the power of the president in respect to the government of the territory after the treaty of peace and previous to the passage of the organic law. First, then, as to the power of the legislative assembly to pass the act providing for the transfer of causes from the circuit court to the district court. This objection seems to be without force. Could the congress of the United States have passed a law authorizing such transfer? That body, in legislating for the territories, exercises the combined powers of legislation which are vested in the state and the federal government. There is certainly nothing in the constitution of the United States, or in the nature of the subject, to prohibit the passage of such

a law. If congress, then, could pass such a law, it could confer that power upon the legislative assembly, and it has done so in the organic law to a very enlarged extent.

It is declared in the seventh section of that law: "The legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act." The transfer of these causes, and thus virtually reviving them, was a rightful subject of legislation not inconsistent with the constitution or the organic law. It is no more than the providing for the revival of an abated suit. As for the transfer of a cause from one jurisdiction to another for trial, acts of legislation similar to this are to be found in the statutes of almost every state in the union.

2. Do the acts of the legislative assembly above quoted authorize the district court to take jurisdiction of these causes? In endeavoring to arrive at the true construction of statutes which may be of doubtful meaning, it is safe to be guided by the well-established rules which govern such construction. Such construction ought to be put upon a statute as best meets the intention of the makers, which intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and when such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute. A thing which is within the intention of the makers of a statute is as much within the statute as if it was within the letter, and a thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers, and such construction ought to be put upon it as does not suffer it to be eluded: 6 Bac. Abr. 1, 5, 10, p. 379; 15 Johns. 379 [*People v. Utica Ins. Co.*, 8 Am. Dec. 243]; 12 Mass. 385; 1 Bl. Com. 61; 1 Kent Com. 461. If the meaning of a statute be doubtful, the consequences are to be considered in the construction: 6 Bac. Abr. 391.

What was the cause or necessity of making the statutes before quoted? A court which had been legally established.

h jurisdiction of causes of a class to which this case properly belongs, had, upon the taking effect of the organic law, ceased to exist, leaving unsettled a number of cases now pending, involving rights and interests to a large amount, no provision for them having been made in the organic law. To provide that these causes should not absolutely and finally abate, was a rightful subject of legislation. It is clear, that the district courts, established by the organic law, are the only courts in the territory to whose jurisdiction these cases properly appertain. It is equally clear that the legislative assembly did not intend that these cases should absolutely and finally abate. And we must presume (exercising reason and discretion) that it intended that they should be transferred to and disposed of by a court of competent jurisdiction. By the tenth section of the organic law it is provided, that the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. Here is the whole judicial power of the territory. In the same section it is provided, that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be ascertained by law." A part of the jurisdiction of the district courts is defined and limited by the organic law, which vests in them the combined jurisdiction of both the circuit and district courts of the United States. Another portion of its jurisdiction is defined and limited by the Kearny code and subsequent statutes, and among these are the statutes here quoted, providing for the transfer of these causes from the old circuit courts, and for their final disposal in the district courts. It must be presumed that the object of the legislative assembly was neither unjust, contradictory, nor absurd. It is true, the language used in the statute is not the most felicitous that might have been used for the expression of its obvious intention. Nevertheless, it is sufficiently so to lead, under the recognized rule of construction, to a satisfactory comprehension of the meaning intended to be conveyed.

The object of a law may sometimes be ascertained by

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reference to the title or to the preamble. The act of July 14 is entitled, "An act declaring in force acts, orders, and laws, and for other purposes." The second section provides that "all bonds, writs, and processes that have remained in force, shall be carried to a final decision in the courts established by the legislative assembly to the same effect as they would have been in the courts previously existing." As the legislative assembly had no power to establish courts, and it is clear beyond doubt that its intention was that these cases should be carried to a final decision, it seems equally clear that this final decision must be in the newly established courts, to whose jurisdiction these cases properly belong, or else the legislative act must be adjudged an absurdity.

In taking cognizance of these cases, there can be no difficulty. Each court is competent to determine its own jurisdiction, and whether any particular case from the former courts properly falls within it, and to take or decline the same accordingly. Nor is there any well-founded doubt as to the meaning of the words of the statute, "the courts established by the legislative assembly." The whole judicial power of the territory had been vested in certain courts, specified in and created by the organic law. The legislative assembly must be presumed to have known that it had no power to create or establish courts, in the proper sense of these terms. It had, only a few days before the passage of the act now under consideration, on the tenth of July, passed the act "defining the several judicial districts, assigning the several judges to their respective districts, and defining the times and places of holding courts." The third section of this act provides that any judge of either district shall have power to hold a special term of a circuit court in any county in his district. Here the legislative assembly, in using the words circuit courts, committed an error of which it seems it afterwards became sensible; and to remedy which, it passes the act of the twentieth of July, already mentioned. In the act of the fourteenth of July, the word established, in the sentence, "the courts established," is in the past tense, and must be



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ken to refer to an act then already passed; and as the act of July 10, was the only act which had then been passed upon the subject, to it alone could reference be had. The legislative assembly may have supposed, however, that the act of organizing districts, assigning the judges, and fixing the times and places of holding the courts, was in some way an "establishing of courts," and was hence led to use these terms in the act of July 14. Such an error would, however, in no degree weaken the force of the act. If these cases can be carried to a final decision in the courts established by the legislative assembly, as is contended on the part of the appellants, then, as the legislative assembly has created and can create no courts, it follows that its legislation touching this subject must be treated as a nullity. This would be to violate the well-established rules of construction applicable to the facts of the case.

As to the refusal to set aside the verdict on the first issue: This issue involved the truth of the affidavit on which attachment issued. The affidavit contained all that was required to authorize the writ to be issued: the amount of debt; that the plaintiff had good reason to believe, and believe, that the defendants fraudulently disposed of their property and effects so as to hinder, delay, and defraud their creditors, in the language of the act. The defendants, by their plea, say that at the time of the institution of suit, etc., they, the said defendants, had not fraudulently disposed of their property and effects so as to hinder, delay, or defraud their creditors. Such is the issue, and it involved simply the question whether or not they had made such a disposal of their property and effects, and nothing more. The justice of this decision of the court depends upon its ruling in refusing and giving instructions to the jury. These instructions have already been inserted herein. There is no direct proof of the dissolution of the partnership, although it is inferable from the instrument of assignment and the testimony of some of the witnesses. The rule of law is, that when a partnership once exists, it continues to exist as to its creditors, notwithstanding it may have been regularly dissolved as between the mem-

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bers; and also, in case of the insolvency of the concern, as to the partnership effects; and the partnership estate can not be used in a manner inconsistent with the winding up of the concern. Hence, notwithstanding a dissolution of the firm may have taken place between Leitchendorfer and Houghton, they still were partners as to their joint creditors, and also, being insolvent, as to the partnership estate. The deed of assignment, it is true, is made on the one part by Leitchendorfer alone; but it recites that he, as a partner of the firm of Leitchendorfer & Co., is largely indebted, and then proceeds to convey all of his own goods, wares, and merchandise, and also "all his property and effects of the late firm of E. Leitchendorfer & Co." It appears to have been executed on the eleventh of December, 1848, and on the same day (and, it is presumable, at the same time) Houghton, the other member of the partnership, naturally ratified this act of Leitchendorfer by indorsing on the assignment, in writing, under his hand and seal, his authority to the assignees named in the deed, to use his name in any way that it might be necessary for them to use it in settling up the business of the late firm of E. Leitchendorfer & Co. Thus Houghton, by empowering the assignees to use his name for all the purposes contemplated by the assignment, sanctions the acts of Leitchendorfer, and so far as these tend to hinder and delay or defraud the creditors of the firm, becomes equally implicated with him in a suit against partners. All the members must be joined, for they are so far considered as but one person.

The act of one partner touching the partnership concerns, is the act of and binds all the members of the firm; so the fraud of one partner, in respect to the partnership estate, affects all the others, and especially where it is with their privity or consent. If this were not so, it would be impossible to make the attachment process effectual against any partnership, however grossly fraudulent its acts might be, so long as there should be one honest member of the concern. The first instruction asked for is not law, and was properly refused. The first part of the second instruction asked for by the appellants will be considered in connection

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th the instructions given, the remaining part of the instruction having been subsequently given in substance.

The third instruction was properly overruled. The mere possession of the note was sufficient evidence of property the same to entitle the holder to sue, especially when endorsed as this was; besides, the property in the note was at issue on the trial of the first issue. The next instruction given by the court was, "that the deed of assignment is fraudulent in law." To determine the correctness or incorrectness of this instruction involves a consideration of the laws regulating and controlling such transactions, in force in this territory at the date of assignment. If under these it be valid, the instruction was erroneous; if invalid, it was correct. It has already been seen that the Mexican laws, as modified by the Kearny code, remained in force in the territory after the restoration of peace; and as the deed of assignment bears a subsequent date, it follows that its character must be determined by the Mexican laws so modified. The Mexican laws which regulate and control the disposition of the property and effects of insolvents and bankrupts, so far as we have been able to consult them, may be found in 5 Febrero, c. 10, p. 352; Los Suite Partidas, lib. 5, pt. 5; and in White's Recopilacion, vol. 1, pp. 170-175, and the authorities there cited.

Few proceedings are prescribed by which their property and effects may be disposed of for the payment of their debts: first, cession of property; second, *concurso*, or a meeting of the creditors of the debtors, by which the creditors secure what is due to them, so far as the amount of their property is capable of satisfying them. By the proceeding of cession, which is termed surrender in the Partidas, those who are unable to pay their debts with the property they possess, cede it to their creditors, in order that they may be paid out of it as far as it may be sufficient. This cession or surrender may be made, first, by every person who is his own master, or who is subject to the power of another not having the means of paying his debts; second, the cession ought to be made before the judge by the debtor himself, or by his attorney, acknowledging his debts,

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and after a sentence has been given against him; third, it is to be done by a petition of the debtor to the proper judge, stating the reason upon which it is founded, accompanied by two memorials or schedules, one of his property and effects, and the other of his creditors, praying that the cession may be admitted, the petitioner being held to merely nominal security to pay any balance that may be, if he should become able. To authorize this proceeding. Febrero and Palacio both say at least three creditors are necessary, and their names must be set forth in the schedule or list to be given by the debtor at the time of making the cession.

The *concurso*, or meeting of the creditors, is the other proceeding whereby creditors obtain payment as far as the insolvent's effects will satisfy their demands, and in which the debtor cites all his creditors, in order to be paid according to the force and priority of the right of each.

The *concurso* differs from the surrender of property in this: 1. Because, in *concurso*, as the only contention is with respect to the strength and preference of the sum due to the creditors, the amount due to each of them ought not to be expressed in the schedule or list of creditors. 2. Because, in the proceeding of *concurso*, each creditor is cited individually and particularly. 3. Because bankrupts may form a *concurso*, but can not make a cession. In reference to the two modes of proceeding, Palacio says that it ought to be observed, in order to avoid confusion and mistake; that what is said of one appertains to the other, and that really they are the same thing, whether under the name *cession de bienes*, or under that of *concurso voluntario y preventivo*; the first being called *cession de bienes*, because the debtor makes the cession, and the other *concurso*, because the creditors resort to it, and that there is no effectual difference between *cession* and *concurso*, they are both directed to the same end—the payment of the debts due by the insolvent, as far as the property will go in satisfaction of them. Such are the general rules of the Mexican law which were applicable to and controlled the disposition of property and effects of insolvent debtors in this ter-

ory, at the date of assignment; if there are other and different laws bearing upon the subject, they have not been used to us; neither have they been found.

By what authority, then, shall the validity or invalidity of this assignment be determined? By the tenth section of the organic law, it is provided that the supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction. Jurisdiction is properly the power to hear and determine causes. The common law, then, at least so far as to control and regulate the proceedings of the district court in the hearing and determining of causes, has been extended over this territory by the act of congress, and that court, when it proceeds to hear and determine, must observe the course of proceeding prescribed by the common law, although the rights and liabilities of parties are to be determined according to the Mexican laws then in force, and the acts of congress and of the legislative assembly applicable to the subject. In courts whose proceedings are according to the course of the common law, it is the duty of the court to pronounce upon the legal validity or invalidity of instruments of the class of the assignment in this case, and to determine all questions of fraud in law which may arise in the progress of a cause.

This is a principle which need not be supported by reference to authorities. The question, then, of the validity of a deed of assignment, when introduced in evidence, was to be determined by the court and by reference to the laws then in force in the territory at the time the assignment was made. Any attempt by the appellants, by means not sanctioned by the laws then in force, to dispose of their property and effects, and which tended to hinder and delay their creditors, was in law a fraud. "The doctrines of constructive fraud" (or fraud in law), says Story, "although they may seem to be of an artificial, if not of an arbitrary character, are founded in an anxious desire of the law to apply a preventive principle of justice, so as to shut out the incitements to perpetrate a wrong, rather than to rely on mere remedial justice after a wrong has been committed." Story Eq. Jur. 280. Thus acts contrary to public

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policy, to sound morals, to the provisions of a statute, etc., however honest the intention with which they may have been performed, are deemed constructive frauds, or frauds in law, and are absolutely void. The policy of the Mexican laws in force here had prescribed certain modes in which the property of insolvents should be disposed of for the benefit of their creditors. It is clear that the parties to the assignment in this case did not comply with the essential requisites of those laws in their attempts to dispose of the property of the appellants. No petition was presented to any judge or court, no schedule of debts or creditors was made out and submitted, no sentence of a court or judge sanctioning a cession or surrender, no citation of creditors, general or special. The parties to the assignment saw proper to disregard the requirements of the law in their attempt to dispose of their effects, and the ordinary consequences must follow. The instruction of the court upon this point was therefore correct.

This also disposes of the third and fourth errors assigned, as they are based upon the ruling of the district court in giving and refusing instructions to the jury. It is objected that the court erred in overruling the motion to set aside the verdict on the trial of the second or main issue. It is difficult to perceive any foundation for this objection. As the record contains no part of the evidence upon the trial of this issue, the verdict of the jury must be presumed to have been founded on sufficient evidence. This, then, in the absence of the evidence, cures any defect that may have existed on the score of evidence. Lastly, it is insisted that the district court should have arrested the judgment upon a critical examination of the record; and upon the best examination of the laws bearing upon the case which circumstances have permitted, I am unable to see any sufficient grounds to support this objection. Some stress has been laid upon the reasons assigned by the district court for its instructions. It has never been held, I believe, that if instructions be correct in themselves, they shall be deemed invalid because an erroneous reason may have been given for them. To allow such objections to prevail would be to

sight of the merits of the case, and to decide it upon mere quibble.

The common law had not, at the date of this assignment, force in this territory; and it would violate a plain maxim of all municipal laws, that contracts must be determined according to the *lex loci*, by the law of the place where made, unless stipulated otherwise—a maxim resting upon the reasonable presumption that all men contract with reference to existing laws. Apply this rule to this case and we are led to determine the character of this assignment by the Mexican law, as modified by the Kearny code. I hold that the courts of the territory are bound to be governed in their adjudications upon rights and liabilities by the Mexican law as modified by statute, and by no other. We may look to other similar systems, with a view to illustrate, but not to change, the positive provisions of our own. In Florida the Spanish law prevails under modifications. There we look to the Spanish authorities for the law. In Louisiana the same system prevails to a certain extent. At one time it existed there in all its vigor. When the territory passed under the dominion of the French, the civil law, as modified by the policy of that nation, was introduced to a certain extent, and, so far as it was inconsistent with, repealed or modified the Spanish law. Those systems, thus adopted, prevail there at this day. The Spanish civil law and the French civil law are derived from the same source, the Roman civil law, and are scarcely more dissimilar than the common law of New York and that of Indiana. It would, therefore, be much more just to look at the civil law of Louisiana for rules to guide us than to the common law of any state. I find that in the civil code of Louisiana the principles of the Mexican law in relation to insolvents and their estates are strongly supplanted. By article 1979 of that code it is provided every contract shall be deemed to have been made in fraud of creditors when the obligee knew that the obligor was in insolvent circumstances, and when such contract gives the obligee, if he be a creditor, any advantage over the creditors of the obligor, and by article 1980 it is provided that by being in insolvent circumstances, is meant

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that the whole property and credits are not equal in amount, at a fair appraisement, to the debts of the party. Such is the French and Spanish civil law as adopted in Louisiana, and it is certainly quite as strong against the transaction in this case as the Mexican law.

But whatever be the laws of other states, I am bound by the Mexican laws, as they prevail in this territory, to disregard them, and to seek elsewhere for rules to govern the case would be to legislate and not to adjudicate. I have examined the common law cases having analogy to this, and have been unable to find any one wherein an assignment has been sustained, in which it has been attempted to prefer creditors simply by a classification of their claims, without the names of those creditors or the amounts of their demands. On the contrary, in the case of *Naylor et al v. Fosdick*, 4 Day, 146 [S. C., 4 Am. Dec. 187], the most strictly analogous to this, the assignment was declared void, although it was more certain in its details than this, and was accompanied with schedules. But this case is not determined by the common law. I am therefore of opinion that the judgment of the first district court ought to be affirmed.

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[His honor first stated the facts very minutely, but as they are sufficiently stated in the foregoing opinion of Chief Justice Baker, it seems unnecessary to duplicate that statement. With this exception, the following is Mr. Justice Watts' opinion in full:]

The third instruction asked for by the defendant and refused by the court, and the fourth instruction asked for by the defendant and given by the court, were immaterial to the issue then on trial, and the giving or refusing of them could not affect this case. The issue was whether *Leitenschorfer* and *Houghton* had fraudulently disposed of their property and effects so as to defraud, hinder, or delay their creditors; whether the assignees had or had not discharged their duty in making payments under the deed, could not be material to that issue. It is a well-settled principle of law that a fact alleged in a bill in chancery, and not denied



the answer, must be taken to be true: *Conwell v. Claypool*, Blackf. 124. It is an equally well-established rule of pleading that every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse: 10 Rep. Pl. 216, 217.

From these authorities it seems clear that the pleadings must be regarded as having admitted and confessed the indebtedness set forth in the affidavit of Webb, in not denying it in the answer put in by the defendants to that affidavit, and hence it was unnecessary to prove a fact which was thus admitted by the pleadings to be true. Under this view of the case, the court below committed no error in refusing to give the third instruction asked for by the defendants.

The substance of the instructions given by the court below is about this: The deed of assignment made by Leitchschorfer to Smith and Biggs is fraudulent in law for the following causes: 1. Because of the preference given to some creditors by the deed; 2. Because of the want of a schedule thereunto annexed by the assignees of the property and effects conveyed to them by the defendants; 3. Because of the want of a schedule thereto annexed of the preferred creditors, and that the execution of this deed of assignment, fraudulent in law for the causes above mentioned, sustained the affidavit in attachment, without the existence of any fraud in fact or intent to defraud. If these instructions are in conformity with law, the verdict of the jury in the first trial was correct; if they are not in accordance with law, the court gave erroneous instructions to the jury, and the motion for a new trial should have been sustained by the court, and the overruling of the motion for a new trial was error. The subject of preference in a deed of assignment to one creditor over another, and its effects upon the validity of the deed, has been often adjudicated upon in almost every State of the union, and some contradictory decisions may have been given, some of the apparent contradictions of which are easily explained. It seems to be clearly established that in the absence of any statutory prohibition and a bankrupt law, a debtor may, at any time before liens are attached upon his property, make a general or partial

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assignment to a trustee for the benefit of his creditors with preference, which assignment will be valid in law against the process of creditors from the time of the execution of the deed. The following authorities will be found to support this position: *Brashear v. West et al.*, 7 Pet. 609-614; *Lippincott v. Barker*, 2 Binn. 174-186 [S. C., 4 Am. Dec. 433]; *Wilkes and Fontaine v. Ferris*, 5 Johns. 335 [S. C., 4 Am. Dec. 364]; *De Forest v. Bacon*, 2 Conn. 633, 637; *McOullough et al. v. Sommerville*, 8 Leigh, 416-426; *Niolen v. Douglas et al.*, 2 Hill Ch. 443, 446; *Smith, Wright & Co. v. C. O. Campbell & Co.*, Rice, 353-366; *Moore v. Collins*, 3 Dev. 126-134; *Pearson and Anderson v. Rockhill & Co.*, 4 B. Mon. 296, 297; *Cross v. Bryant et al.*, 2 Scam. 37-43; *Grover v. Wakeman*, 11 Wend. 200-203 [S. C., 25 Am. Dec. 624]; *Hempstead v. Starr*, 3 Day, 340.

In this territory, there being in force no statutory prohibition against assignments giving preference to one creditor over another, and no bankrupt law, the above authorities are in point and seem to be sufficient to establish the doctrine that a deed of assignment is not fraudulent in law because it prefers one creditor to another. It is perfectly competent for the legislative assembly, if it chooses to do so, to pass an act prohibiting assignments with preference to creditors, but until such a law is passed the general doctrine must govern this case. The decisions which appear to conflict with the above-cited authorities upon the subject of preferences, are, for the most part, made under the authority of statutes of the different states which prohibit the making of assignments with preferences to creditors. Notwithstanding preferences in general assignments are good, as established by many decided cases, yet such preferences have been prohibited by the laws of several states, as follows: In New Jersey, by Act of April 1, 1836, *Bers. Laws*, 674; in Maine, February 23, 1820, 3 *Laws, Me.* 550; in New Hampshire, July 5, 1834; in Connecticut, 1828, 3 *Laws*. 182; in Massachusetts 1836, c. 238. In Ohio, by act of 1835 and 1838, all assignments with preferences inure to the benefit of all the creditors of the assignor; and in Pennsylvania, by act of seventeenth April, 1843, all assignments

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h preferences, except for payment of wages of labor to extent of fifty dollars, inure to the benefit of all the ditors. The doctrine of preference in all those states in ch the principle of preference has not been proscribed the statute is now viewed with strong disfavor by the rts, and the determination seems to be universal not to ntenance it further than adjudged cases require: See *Cardman v. Halliday*, 10 Paige, 224-229; *Cram v. Mitchell*, andf. Ch. 251-253.

o far as the abstract right of the debtor to prefer his ditors is concerned, the view which is now generally pted seems to be this, that inasmuch as the claims of ditors may be meritorious in unequal degrees, and inas- ch as particular creditors have it in their power to attain riority by legal proceedings, the preference of creditors n allowed object or result of a debtor's assignment, but t it is not permitted to be used as a means of accomplish- ends which are not the legitimate object of a debtor's rts. These authorities seem to be clear and conclusive in blishing the fact that the deed of assignment now under sideration is not fraudulent in law because of the prefer- e given to some creditors.

s this deed fraudulent in law because of the want of a edule thereto annexed by the assignees of the property effects conveyed to them by the defendants? The court ow instructed the jury that it was fraudulent in law for want of this schedule. This point has been decided in eral of the states of the union. In New Hampshire it been decided that a schedule containing a detailed cification of the property transferred is not necessary in eral to the validity of an assignment for the benefit of ditors: *Rundlett v. Dole*, 10 N. H. 458.

n Connecticut a similar decision was made: *Clark v. Mix*, Conn. 152. In Virginia a similar decision was made: *an v. Branch*, 1 Gratt. 274. In Massachusetts a similar sion was made in the case of *Woodward v. Marshall*, 22 k. 468. In Pennsylvania a similar decision was made he case of *Wilt v. Franklin*, 1 Binn. 502 [S. C., 2 Am. c. 474]. In Missouri a similar decision was made in the

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case of *Duvall v. Raisin*, 7 Mo. 449. In this Missouri case a list of assets and liabilities was referred to in the deed as a part thereof, but in fact was not made out by the debtor and made a part of the deed of assignment; and the court decided that the neglect of the debtor to make out a list of assets and liabilities, referred to in the deed as part thereof, would not render the deed of assignment inoperative. If the neglect of the debtor himself to make out a schedule of his assets and liabilities would not render the deed fraudulent in law, much less likely would it be, that the neglect of the assignees to make out a schedule would render the deed of assignment fraudulent in law, for the want of such a schedule. The want of such a schedule has many times been held to be, *prima facie*, a presumption of fraud: See *Stevens v. Bell*, 6 Mass. 339; *Pearpoint v. Graham*, 4 Wash. C. C. 232; *Witt v. Franklin*, 1 Binn. 523 [S. O., 2 Am. Dec. 474]; *Burd v. Smith*, 4 Dall. 76; *Hover v. Geesaman*, 17 Serg. & R. 251; *Halsey v. Whitney*, 4 Mason, 206; *Haven v. Richardson*, 5 N. H. 113; *Cunningham v. Freeborn*, 11 Wend. 241. In this last case in 11 Wend. 241, the court says the fact that the assignment is unaccompanied with any schedule of the property assigned, or a list of the creditors to be paid, is not such evidence of fraud as will justify a court of equity in pronouncing the assignment void where the case is submitted on bill and answer, in the latter of which the fraudulent intent is denied.

The fraud in the case now under consideration is alleged in an affidavit in attachment and is denied in the answer of the defendants to that affidavit, which renders the above case one peculiarly in point. In the case above cited of *Stevens v. Bell*, 6 Mass. 339, the court decided that where a schedule was to be made out as soon as might be, and also an account of the debts and liabilities, which were to be arbitrated in case of dispute, the presumption of fraud was held to be removed. In the case above cited of *Pearpoint v. Graham*, 4 Wash. C. C. 232, the court decided that if possession of the property assigned accompany the transfer, and the transaction be in all other respects fair, the mere want of a schedule will not render it fraudulent. This opinion is also

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stained by the case of *Deaver v. Savage*, 3 Mo. 252 [S. C., 25 Am. Dec. 437], and also by the case of *Robinson Rapelye*, 2 Stew. 86. In the above-cited case, *Witt v. Franklin*, 1 Binn. 523 [S. C., 2 Am. Dec. 474], the court held that "the want of a schedule is less suspicious when the whole of the assignee's property is conveyed for the benefit of all the creditors, than where part of it is conveyed for the benefit of particular creditors." In the case of *Emerson v. Fowler*, 8 Pick. 63, it was decided that an assignment containing a release of the demands of creditors executing and providing that a schedule of the debtor's property shall be annexed as soon as may be, is valid though no such schedule is annexed, the annexing it not being a condition precedent. The authority of this case is supported by the case of *Keyes v. Brush*, 2 Paige, 311, in which case it was further held by the court that "if the assignor neglects to furnish such schedule, the assignee may file a bill of discovery against him, and also to obtain a delivery of the books." From these authorities it seems that the deed of assignment in this case is not fraudulent in law for the want of schedules of assets and liabilities. It is true that in the case of *Drakeley v. Deforest*, 3 Conn. 272, the court decided that a deed of assignment of goods, not identifying them, and referring only to a non-existing schedule for a description of them, was invalid as an instrument of conveyance; but in the same case it was also held that such a deed is effectual as a declaration of trust, and the reception of the goods by the assignee, being an assumption of that trust, constituted a sufficient consideration for the assignment. In addition to this authority upon the necessity of a schedule, the counsel for the appellee has cited to the court the cases of *The United States v. The Bank of the United States*, 8 Rob. (La.) 305; *Naylor and Sanderson v. Adick*, 4 Day, 146 [S. C., 4 Am. Dec. 187]; *Burd v. Smith*, 10 Dall. 76. In the case of *The United States v. The Bank of the United States*, the court does not say that the want of a schedule renders the deed void or fraudulent in law; the court only said that the absence of any schedule of the property assigned is evidence of fraud. In the same case

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the court decided that, considered *per se*, the absence of the schedules, though an *indicium* of fraud, would not be conclusive, and if the presumption were repelled by everything apparent on the deed, and everything proved *aliunde*, the deed would be sustained. To say that inconclusive *indicia* of fraud constitute a fraud in law, is drawing certain conclusions from uncertain premises, which is just as inadmissible in law as in logic.

In the case of *Burd v. Smith*, 4 Dall. 76, many other elements besides the absence of an annexed schedule entered into the decision; two judges dissented, and the judges of Pennsylvania afterwards said that the main point decided in that case was that the assignment was void because the shares of those who did not express their assent were to be paid over to a notoriously insolvent debtor, and that there was not time for all the creditors to have notice of the assignment and express their assent within the limited time: 1 Binn. 515, 528 [*Will v. Franklin*, 2 Am. Dec. 474]. In the case of *Thomas v. Jenks*, 5 Rawle, 225, Gibson, C. J., in commenting on the above case of *Burd v. Smith*, 4 Dall. 76, says: "Indeed the reasons of the judges are so indistinctly set forth in that case, the discrepancy of their views is so remarkable, as to render it of little value as a precedent." The only remaining case of any authority in which the absence of a schedule was held to invalidate the deed of assignment is the above cited case of *Drakeley et al. v. Deforest et al.*, 3 Conn. 272. This case was reviewed in the case of *Clark v. Mix*, 15 Id. 176, and the court there said: "It is further objected that the assignment is invalid, as it referred to an instrument not then existing, and reliance is placed on the case of *Drakeley et al. v. Deforest et al.*, 3 Conn. 272. In that case there was no specification or description at all of the property, but a reference to a schedule not then made, and the court held that all depended upon the schedule. But this is an assignment of all the property of the firm in this state, excepting household furniture, a schedule of which is to be made and annexed thereto as soon as may be. The assignment then is complete; but for the greater facility in finding the goods,

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the schedule is to be made. In *Emerson et al v. Knower*, 8 Pick, 63-65, there was an assignment of a quantity of leather and stock for the manufacture of boots and shoes, and of boots and shoes already made or partly made, in the hands of certain persons, with a proviso that a schedule of the property should be made and annexed as soon as may be; and the supreme court of Massachusetts held that the conveyance was good; that the annexation of a schedule was not a condition on which the validity of the assignment depended, and that the covenant was not essential, the property and the place where it was to be found being mentioned; and it is said that the words 'as soon as may be' prove that it was not considered by the parties as affecting the validity of the assignment. A similar decision was made in New York in the case of *Keyes v. Brush*, 2 Paige, 311, and we concur in the views taken by the court in these cases."

So far as the want of a schedule is concerned, this case of *Clark v. Mix*, 15 Conn. 176, overrules the case of *Drakeley et al. v. Deforest et al.*, 3 Id. 272; for the supreme court of Massachusetts in the case of *Emerson et al. v. Knower*, 8 Pick. 63-65, says that the covenant in the deed of assignment as to the schedule, was not essential; and Chief Justice Williams, in the above case of *Clark v. Mix*, 15 Conn. 176, says he concurs in the view taken by the supreme court of Massachusetts in the case of *Emerson et al. v. Knower*, 8 Pick. 63-65. It would thus seem that the position that the deed of assignment now under consideration is fraudulent in law for the want of schedules of assets and liabilities is without authority to sustain it, except the case of *Burd v. Smith*, 4 Dall. 76, which, it has already been seen, "is of little value as a precedent;" and authorities are numerous which assert that a deed of assignment is not fraudulent in law for the want of such schedules. The court below, in this case, further instructed the jury, that the deed of assignment was fraudulent in law because of the want of a schedule thereto annexed of the preferred creditors, and because of the preference given to some creditors by said deed. The only way by which a preference

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can be given is by naming the preferred creditors, specifying the amount due them, and directing them to be first paid, or by referring to them as a class in such definite terms as clearly to indicate to the assignees who are to be so preferred. Now, if this deed of assignment does indicate in the above manner who are preferred, then the deed itself is a sufficient schedule of the preferred creditors, and no other was necessary. If the deed does not so indicate who are the preferred creditors, then no preference is given by the deed, and it must be considered as a general assignment for the benefit of all the creditors, *pro rata*. To say that this deed is fraudulent in law because of the preference given, and because there is no list of the preferred creditors, is equivalent to saying that the deed is fraudulent in law because it prefers creditors, and because it does not prefer them; two propositions which can not very well be predicated of the same instrument. If the assignor, in describing his preferred creditors, indicate some with certainty, and others so indefinitely that they could not come in under the deed as preferred creditors, because of this uncertainty, it still forms no valid objection to the deed; for where rights are multifarious, the uncertainty of one man's right can not defeat the certain right of another. Now, it is certain, without any annexed schedule, that a debit of nineteen thousand and ninety-four dollars and twelve cents to Lewis and Courtney, one thousand seven hundred and forty-five dollars and fifty cents to Moodie and Simpson, four hundred and sixty-two dollars and thirty-three cents to A. Laroux, and one thousand four hundred and fifty dollars to Henry O'Neil, is preferred; and if this deed of assignment is in other respects valid, their rights under the deed can not be defeated, because it may be uncertain whether the simple depositors or lenders of money without interest are entitled to preference or not.

In the case of *Da Costa v. Guen*, 7 Serg. & R. 462, the assignment was made for the payment (among others) of all accommodation notes subscribed or indorsed for the assignors, so as to exonerate the makers or indorsers of said notes from their liability therefor. It was held, that a bill drawn



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in the assignees for their accommodation, in favor of and endorsed by the drawer, and accepted and negotiated by the assignees, was within the preference given by the clause. This clause, thus held good in the above cause, is quite as definite as any clause in the deed of assignment now before the court. A preference may be created for a class of debts without naming the holders of these debts, and this preference will inure to the benefit of all who hold claims properly belonging to the preferred class of debts; and whether the debt of A. B. or C. D. does or does not fall within the list of the preference class seems to be susceptible of proof *dehors* the deed. In this deed of assignment there is a covenant on the part of Smith and Biggs for the making of proper schedules in ten days, and annexing them to the deed. What is the object of these schedules? The object is: 1. To let the assignees know what assets have been transferred to them, and on whom; 2. To let the assignees know what debts they have to pay, and to whom; and these objects are just as well effected with proper schedules in the hands of the assignees unattached to the deed, as if they were fastened to it with hooks of steel. The assignees are agents and trustees of the creditors, and all books, papers, and schedules in the hands of said assignees, whether attached or unattached to the deed, are open to the examination or inspection of any creditor who may wish to examine them; and it can not well be perceived how a creditor could obtain any more information from reading a schedule attached to the deed, than from reading the same schedule unattached to the deed. In this case, possession of the property assigned was given immediately, and all the property of the assignor is devoted absolutely to the benefit of his creditors, without any reservation or stipulations for his own advantage.

In the case of *Grover v. Wakeman*, 11 Wend. 200 [S. C., 11 Am. Dec. 624], Mr. Justice Sutherland decided, that where the assignor parts with all control of the property, and devotes it absolutely to the benefit of the creditors without any reservation or stipulation for his own advantage, the honesty of his intention is so apparent, and the

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advantage to the creditors so direct and decisive, that they can not be said to be obstructed or delayed in their remedies. Outside of the instructions of the court in this case, it is contended by the counsel of the appellee that this deed is fraudulent in law for the want of assent on the part of the creditors, or at least, of the preferred creditors. It is undoubtedly the law, that when a conveyance is made directly to creditors, in consideration of indebtedness, their assent, actual or to be presumed, is necessary. The point was expressly decided in the case of *Tompkins v. Wheeler*, 16 Pet. 106-119. But where a conveyance is to a trustee for their benefit, their assent, where there is nothing fraudulent in the deed, is not necessary, as appears from the following cases: *Nicoll v. Mumford*, 4 Johns. Ch. 523-529; *Ounningham v. Freeborn*, 11 Wend. 241, 249; *Halsey et al. v. Whitney et al.*, 4 Mason, 207-214; *Houston v. Nowland*, 7 Gill and J. 480, 492; *Bank of the United States et al. v. Huth*, 4 B. Mon. 423-437. In Massachusetts, the assent of a creditor, to render an assignment valid as against him, is necessary, as appears from the following cases: *Russell v. Woodward*, 10 Pick. 408; *Stevens et al. v. Bell*, 6 Mass. 339, 342; *Widgery et al. v. Haskell*, 5 Mass. 141, 151 [S. C., 4 Am. Dec. 41]. But from an examination of these cases in Massachusetts, it will be found that the decisions are grounded upon the difficulty formerly felt respecting the power of the courts in that state to compel the trustee to execute the trust; and since the passage of the act of 1836, c. 238, which gives the creditors a remedy against the trustee, the assent of creditors is no longer necessary, even in Massachusetts, as appears from the decision of the court in the case of *Shattuck v. Freeman*, 1 Metc. 10. The court, in the case now under consideration, instructed the jury, "that if the jury found that the defendants, or either of them, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, at the time of the commencement of this suit, they must find for the plaintiff." This position, in the broad language here laid down, is at least doubtful authority in the present case. The affidavit asserts that Leitenschorfer

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and Houghton had made a fraudulent disposition of their property and effects, so as to defraud, hinder, and delay their creditors. The answer denies this allegation, and it would seem to be, under that issue, incumbent upon Webb to prove that both Leitensdorfer and Houghton had made this fraudulent disposition of property.

If the affidavit in this case had said that Leitensdorfer and Houghton had concealed themselves, or absconded or absented themselves from their usual place of abode in this territory, so that the ordinary process of law could not be served upon them, would it have been sufficient to sustain such affidavit to prove that Leitensdorfer alone had so absconded, while Houghton remained at Santa Fe, unconcealed, and at his usual place of residence?

The proof in such a case would not sustain the allegation set out in the affidavit. That one partner should be held liable for the fraud of another, unless he was privy to it or connived at it, or by his affirmance made it his own, is a doctrine not founded in reason, justice, or law. The fraud of one partner, which entitles a creditor to his attachment, is no more the fraud of another partner than the larceny or murder of one partner is the larceny or murder of the firm. If the civil law is to be applied to and govern this case, by the civil law one partner is not liable for the frauds of the other. By that law injuries arising from the fault of any particular partner are chargeable entirely to him: See 1 *and Laws in California, Oregon, Texas, etc.*, 207. This position is fully sustained by the decision of the court in the case of *Pierce v. Jackson*, 6 Mass. 245, in which they say that a tort, or even a fraud, committed by one of the partners, will not bind the partnership, if it be not in a matter of contract, and there be no participation in it. The authority of this case is fully sustained by the case of *Herwood v. Marwick*, 5 Greenl. 295. That a fraud committed by one partner in a matter of contract, or in the usual course of business, does bind the firm, is too well settled to need the citation of authorities to support it. But a fraud rendering one partner liable is not within the rule. In the *Matter of Peter S. Smith, an abscond-*

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ing debtor, 16 Johns. 102, 109; the court says: "We have considered an attachment under the act for relief against absent or absconding debtors, as analogous to an execution; and in the *Matter of Chipman*, 14 Id. 217, we decided that it might issue where one or several partners had absconded for a partnership debt; but the sheriff can take the separate property only of the absconding debtor; he can not seize the partnership effects, for the other partner has a right to retain and dispose of them for the payment of the partnership debts." In this case the deed is under seal, and runs in the name of Leitensdorfer alone, is signed by him alone, and he describes himself as of the firm of E. Leitensdorfer & Co.

Now, whether an acting partner has authority in law, in the absence of the other member of the firm, to execute a general deed of assignment of all the partnership personal property to trustees, for the payment of the debts of the firm, though without the knowledge or consent of the other partner, is a question upon which the authorities are not uniform. The following authorities affirm such power: 3 Kent Com. 20-25; 3 Mo. 252; *Hodges v. Harris*, 6 Pick. 361; Gow. on Part. 195; *Anderson and Wilkins v. Tompkins et al.*, 1 Brock. 456; *Harrison v. Sterry*, 5 Cranch, 289, 300; *McOullough v. Sommerville*, 8 Leigh, 416, 431; *Robinson & Co. v. Crowder, Olough & Co.*, 4 McCord, 519, 537 [S. C., 17 Am. Dec. 762]; *White v. Union Insurance Co.*, 1 Nott & McC. 557, 560 [S. C., 9 Am. Dec. 726]; *Hennessy v. The Western Bank*, 6 Watts & S. 301, 311. The following authorities deny such power: *Dickinson v. Legare et al.*, 1 Desau. 537, 540; *Pearpoint and Lord v. Graham*, 4 Wash. C. C. 232; *Hughes v. Ellison*, 5 Mo. 463, 466; *Drake v. Rogers and Shrewsbury*, 6 Mo. 317, 320. In New York it is held, that one partner may assign the partnership effects directly to creditors in discharge of their debts, but can not, without the consent of the other, make a general assignment to a trustee for the benefit of creditors with preferences: *Havens v. Hussey*, 5 Paige, 30; *Hitchcock et al. v. St. John et al.*, Hoffm. 512, 517. The weight of authority seems to be in favor of the existence of the power. The

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of assignment in this case is under seal: See *Harrison Jackson*, 7 T. R. 207; *Clement v. Brush*, 3 Johns. Cas. 0; *Van Deusen v. Blum*, 18 Pick. 229 [S. C., reported in Am. Dec.]; *Ex'r of Fisher v. Ex'rs of Tucker*, 1 McCord. 169, 171; *Posy v. Bullitt*, 1 Blackf. 99; *Trimble v. Coons*, Marsh. (Ky.) 375 [S. C., 12 Am. Dec. 411]; *Oummins & v. Cassily*, 5 B. Mon. 74; *Blackburn v. McCallister*, Peck, 1; *Nunnely v. Doherty*, 1 Yerg. 26; *McNaughten et al. v. Trtridge et al.*, 11 Ohio, 223; *Doe on dem. v. Tupper*, 4 Med. & M. 261. But the above general principle, that a partner can not enter into agreements under seal, has received this important qualification: that where a seal is not essential to the nature of the contract, and will not change or vary the liability, the addition of a seal will not vitiate, and that where an act is done which one partner may do without deed, it is not less effectual if done by deed. This appears to be settled in reference to agreements that transfer an interest; and it has been decided in cases of sales and assignments, where the property may be transferred by delivery, such a transfer so consummated by delivery is not annulled by being attested, or having the instrument in which it is made described by deed; and this applies to a general assignment for the benefit of creditors, to a mortgage of chattels, and to an assignment of a chose in action by one partner under seal; See *Anderson and Wilkins v. Tompkins et al.*, 1 Brock. 456, and *Robinson & Co. v. Under, Clough & Co.*, 4 McCord, 519-537; *Deckard v. Watts*, 5 Watts, 22; *Halsey et al. v. Whitney et al.*, 4 Mason, 231; *Hennessey v. The Western Bank*, 6 Watts & S. 311; *Everit v. Strong*, 5 Hill (N. Y.), 163; *Tapley v. Butterfield*, 1 Metc. 515; *McCullough et al. v. Sommerville*, 8 Mich. 416.

Thus far this case has been viewed through the lights thrown upon it by the common law. This case of attachment originated under a statute of this territory fixing a common law mode of procedure, and the case was tried by jury—a thing unknown to the civil law; and the deed of assignment was introduced merely as an instrument of evi-

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dence, to sustain a statutory issue of fraudulent intent or not, and is a mere instrument of evidence. Its admissibility as evidence, and the legal effect of the instrument upon its face as a matter of evidence, would seem to be more appropriately determined by the principles and rules of the common law. The case might be different if the suit was upon the deed, or the rights of the parties under it were directly in issue; then, perhaps, the common law rules would give place to the civil law. To proceed with a case according to common law, so far as the issues are concerned, and the trial of these issues by a jury, and the examination of witnesses orally at the bar, and when written evidence happened to be introduced, to drop all the common law rules of procedure and commence a pilgrimage through the ancient civil law for our guidance, would seem to result in a mongrel mode of practice, unfavorable to the administration of justice either upon common law principles or civil law principles. The question will now be considered whether, even by the civil law, this deed of assignment is void and fraudulent in law. At the time this deed was made, Leitchschorfer was the absolute owner of the property assigned, had it in his possession and under his control. It was not pledged, pawned, or mortgaged, and no creditor had obtained any lien upon it by attachment or otherwise. Under such circumstances, it was not contrary to the civil law for him to dispose of it; for one of the first and plainest principles of the civil law is, that the absolute ownership of property confers the right to enjoy and dispose of it as you please: See Civil Law of Spain and Mexico. J. C. Schmidt, tit. 11, art. 188, p. 45. By the civil law, fraud was treated as a crime, and was never to be presumed if there was no proof of it: Domat, vol. 1, p. 511. The rule laid down by the civil law to determine what was a fraud by a debtor upon his creditors is this: If the act of the debtor diminished the estate which he had already acquired, it was a fraud upon the creditors; if it did not diminish the estate already acquired, it was no fraud upon the creditors. Domat, in speaking of the Roman law, says, they did not look upon anything as a fraud done to the

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prejudice of creditors except what was a diminution of the estate which the debtor had already acquired: Domat, vol. 1, p. 637. How this deed, which assigns all the debtor's property to the payment of his debts, can be considered as a diminution of the estate of the debtor, can not be perceived, unless the whole of anything is less than the sum of all its parts.

The doctrine of assignments is clearly recognized by Domat, vol. 1, p. 642. He says, the creditor who receives from his debtor that which is due to him commits no fraud, but does himself justice by taking care of his own interests, and it is lawful for him to do; and although his debtor be insolvent, and because of said payment there does not remain enough to satisfy the other creditors, or there remains even nothing at all for them, he is not bound to restore what he has received for his own payment, but the other creditors ought to blame themselves for not having been as watchful of their own interests as he has been of his, who has got payment. Further, says Domat, if, "after the seizure of the goods of a debtor, or after the debtor has assigned over his goods for the satisfaction of his debts to his creditors, one of them receives payment of his debt, either out of the stock of goods that have been seized, or out of what has been made over to the creditors, he shall not be obliged to share with the other creditors what he has received, because in that case he takes to himself what belongs in common to all the creditors. But this is not to be understood of what one who has seized on all the movables of his debtor may have received by means of his diligence before the other creditors have entered their actions." But it may be contended, that, admitting the right of the debtor to pay his creditors by the transfer and delivery of property, it does not follow that he could so pay or transfer his property to an attorney or trustee of his creditors. This point seems to be settled by the civil law, which says a contract may be for the benefit of a third person not party to it, whether it has for its object to liberate him from some obligation or to acquire some right: See Civil Law of Spain and

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Mexico, by J. C. Schmidt, art. 432, p. 97. This deed is for the benefit of third persons, the creditors of Leitensdorfer & Co., and has for its object the liberation of Leitensdorfer & Co. from the debts as far as the property assigned will go, and also has for its object the acquisition, upon the part of the creditors, of a right to that property or its proceeds for the extinguishment of said debts as far as it will go. Domat, 695, when speaking of the several sorts of assignments, says: "And there are some assignments which are made for a valuable consideration; as if a debtor assigns a debt that is owing to him for the payment of his creditors, or if a creditor makes over to a third person, for a certain price, a debt that is due to him." Now, if a debtor can assign one debt owing to him to pay one creditor he owes, may he not, in accordance with the civil law, assign all the debts owing to him, and all his property to pay his creditors, in the order he directs them to be paid? The distinction would seem to be a distinction without a difference. If a debtor, in accordance with the doctrine of the civil law, could pay his debt or a part of it by giving his creditor one sheep, the inference is legitimate that he might pay his debts as far as he could by the transfer of his whole flock to his creditors, or such of them as he wished to privilege. This deed of assignment, under the civil law, may be regarded as a pledge on the part of Leitensdorfer & Co. of all their property and effects to Smith and Biggs, with authority to sell the things pledged for the payment of debts as directed in the said deed of assignment, which is evidence of the contract between the pledgor and pledgees; and Domat, 928, says: "In the case of discomfiture or insolvency the creditor who is in possession of a pledge, which the debtor had given him for his security, is preferred on that pledge before the other creditors."

It is an admitted principle of the civil law, that "no one has the right of his own authority to take possession of the property of his debtors and retain it as a pledge without previous order from the judge, unless the debtor has given him this power." *Fuero Juzgo*, lib. 1, tit. 6, b. 5; *Fuero Real*,



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o. 2, tit. 19, b. 3; Partidas, lib. 11, tit. 13, p. 5. The course of this proposition, upon principle, ought to be true, and the authority would then say, that any one has the right, of his own authority, to take possession of the property of his debtor, and retain it as a pledge, without previous order from the judge, if the debtor has given him this power. It would thus seem, by the civil law, that this deed of assignment is neither void nor fraudulent in law. Had the facts connected with this deed of assignment, tending to show either a fraudulent or honest intent, been submitted to the jury for their consideration, their verdict would have been a satisfactory settlement of the issue submitted to them. Such was not the case, however. The court below, at the trial of this case, in substance told the jury that the deed of assignment was fraudulent in law, and proved the plaintiff's affidavit to be true; and they must therefore render a verdict for the plaintiff. We think the court below has taken for frauds in law circumstances only tending, *prima facie*, to prove fraud. An examination of the very many cases already cited in the progress of this opinion fully sustains this view. The defendants asked the court to instruct the jury, that "as the assignment was the act of Leitensdorfer alone, with which Houghton had nothing to do, the act of one defendant would not authorize an attachment against two, and the verdict must be for the defendants." This instruction was rightly refused to be given, on the ground that it assumed as true disputed facts, proper to be determined by the jury from the weight of the evidence.

The defendants also asked the court to instruct the jury, that the deed of assignment was not fraudulent in law; and that unless the jury find from the evidence, that in fact, at the time of the commencement of this suit, the plaintiff had good reason to believe that the defendants had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors, they must find for the defendants." We see no objection to this instruction, and think it ought to have been given to the jury.

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Upon the other points of this case I fully concur in the opinion of the chief justice; but because of the above errors in the instructions of the court, and because of the refusal of the court below to give the second instruction asked for by the defendants, I think such error supervened as entitled the defendants to a new trial, and that the motion for a new trial should have been granted in the court below; and because it was not granted, this case ought to be reversed, and sent back to the court below for further proceedings herein.

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

JANUARY TERM, 1854.

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JAMES N. WARD *v.* JAMES M. BROADWELL.

**CONQUEROR MAY PRESCRIBE LAWS FOR CONQUERED TERRITORY.**—By virtue of the rights of war, a conquering nation has power, without any formal act of legislation, to change the laws of conquered territory, and to prescribe new ones for its government while in the possession of the conqueror.

**VALIDITY OF "KEARNY CODE" AND ACTS OF 1847.**—The system of laws known as the "Kearny code," and the acts of the general assembly of New Mexico of the December session, 1847; were valid, except so far as they attempted to confer political rights upon the inhabitants, under the constitution of the United States, the same having been established by competent authority by virtue of the rights of war.

**LAWS NOT ABROGATED BY TREATY OF PEACE.**—The provisional government established in this territory by military authority was not abrogated by the treaty of Guadalupe Hidalgo, but remained in operation as a government *de facto* until the territorial government was established, and its laws continued in force until superseded by the laws of the new government.

**REPLEVIN ACT OF 1847, VALIDITY OF.**—The replevin act of 1847 was enacted by competent authority, and is now a valid law, having remained in force until July 14, 1851, when it was continued by the territorial legislature.

**CONSUIT NOT SUBJECT OF ERROR, WHEN.**—A voluntary nonsuit can not be made the subject of error.

**JUDGMENT FOR DEFENDANT IN REPLEVIN IS FINAL, WHEN.**—A judgment for the defendant in replevin, giving him the value of the property and double damages and costs, after reciting a submission to a jury "whereupon the said plaintiff fails to prosecute his said suit further, and there-

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upon the jury is discharged," etc., is a final judgment, and not a nonsuit, and is the subject of error.

**NONSUIT NOT VOLUNTARY, WHEN.**—Where a plaintiff is compelled to abandon his case by an adverse decision upon a vital point therein, to which he excepts, it can not, it seems, be deemed a voluntary nonsuit precluding an appeal.

**PARTY ON RECORD NOT COMPETENT WITNESS.**—A party on the record, though divested of all interest, is not a competent witness.

**PARTY ON RECORD, WHO NOT DEEMED TO BE.**—Where the question as to whether one is a party to the record or not depends upon a future event he should not be deemed so to be until the future event happens. Hence, one who has signed a replevin bond as agent for the plaintiff, and may become liable to a judgment against him, should not be deemed a party to the record until that event occurs.

**PROOF OF INTEREST OF WITNESS, HOW MADE.**—A witness' interest may be shown by his examination on his *voir dire*, or by evidence *alibis*, but the objecting party must elect between these methods, and can not resort to both.

**PARTY SIGNING REPLEVIN BOND AS AGENT NOT COMPETENT.**—One signing a replevin bond as the plaintiff's agent, is disqualified by his interest from being a witness for the plaintiff, though he denies that he is interested.

**DISCRETION REVIEWABLE, WHEN.**—The discretion of a court must be exercised in conformity with law and with the usages of courts, and if not so exercised, is reviewable in a superior court.

**SUBSTITUTING NEW PARTY ON REPLEVIN BOND.**—The refusal of the court to permit the plaintiff, in a replevin suit, to release one signing as his agent on the replevin bond, for the purpose of making him a witness by substituting another person on the bond in his stead, is error. *Contra*, Dear-  
enport, C. J., dissenting.

**ERROR from Santa Fe county.** The case is fully stated in the opinion of Watts, J.

*Quin and Smith*, for the appellant.

*R. H. Tompkins*, for the appellee.

By Court, WATTS, J.:

This was an action of replevin brought by James N. Ward against James M. Broadwell, for one buggy and one set of harness for two horses. The suit was instituted on the twentieth day of June, 1853. The replevin act under which this suit was brought was passed by the general assembly of the territory of New Mexico, at its December session, 1847. The treaty of Guadalupe Hidalgo was made on the second day of February, 1848. The question which

first suggests itself to the consideration of the court is this: Was the replevin act under which this suit was brought passed by that general assembly after the treaty of peace and before the passage by congress of the organic law, under which a territorial government was organized here, valid or void act?

If the law emanated from a body having no legislative power or legal existence, it is void, and no rights can be asserted under it. The first legislative assembly of the territory of New Mexico convened under the organic law of the ninth of September, 1850. On the fourteenth day of July, 1851, it passed an act, the first section of which reads as follows: "That all laws that have previously been in force in this territory that are not repugnant to or inconsistent with the Constitution of the United States, the organic law of this territory, or any act passed at the present session of the legislative assembly, shall be and continue in force, excepting in Kearny's code, the law concerning registers of land." See Laws of the Territory, sec. 1, p. 176. Was the replevin act ever was in force, that act continued in existence.

The capacity, then, of the general assembly of New Mexico to enact at its December session, 1847, a valid law, is now the point for consideration. On the thirteenth of May, 1846, congress acknowledged the existence of a state of war between the United States and the republic of Mexico, and provided for its prosecution. In the prosecution of that war General Kearny marched with forces of the United States against the department of New Mexico, and took possession of it. General Kearny, on the twenty-second day of August, 1846, issues to the people of said department a proclamation, in which he says: "As by the treaty of the republic of Mexico, a state of war exists between that government and the United States; and as the undersigned, at the head of his troops, on the eighteenth instant, took possession of Santa Fe, the capital of the department of New Mexico, he now announces his intention to hold the department, with its original boundaries (on both sides of the Del Norte), as a part of the United States

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and under the name of the territory of New Mexico." On the twenty-second day of September, 1846, General Kearny enacted an organic law for the government of the territory, and a system of laws for the administration of public justice, and the protection of life, liberty, and property of the people of New Mexico, known generally as the Kearny code. A copy of these laws, and a list of the appointments to civil offices in the territory, was inclosed to the adjutant-general on the twenty-second of September, 1846, and were received at the war department on the twenty-third of November, 1846. Thus the supreme authority and sovereignty of the republic of Mexico ceased to exist in New Mexico, and its assumption and exercise upon the part of the United States as the conqueror of this territory began.

Under what authority did this state of things take place. and what binding effect has the system of government thus instituted? This was a conquered territory, and in the case of the *Canal Appraisers v. The People*, 17 Wend. 584, it was decided that there is no doubt of the power of the sovereign to change the laws of a conquered or ceded territory by a mere declaration of his will, without any formal act of legislation, unless restrained by the capitulation or treaty of cession.

No formal act of legislation is necessary to change the law; the mere will of the conqueror is sufficient: 1 Kent, 178 note *a*. This principle of law that a conqueror has the right to enact laws for the government of his conquest, while in his possession, is illustrated and explained with reference to New Mexico in the message of the president of July 24, 1848, Ex. Doc. No. 70, as follows: "In my message of December 22, 1846, in answer to a resolution of the house of representatives calling for information in relation to the establishment or organization of civil government in any portion of the territory of Mexico which has or might be taken possession of by the army or navy of the United States, I communicated the orders which had been given to the officers of our army and navy, and stated the general authority upon which temporary military governments had been established over the conquered portions of Mexico,

men in our military occupation. The temporary governments authorized were instituted by virtue of the rights of war. The power to declare war against a foreign country, and to prosecute it according to the laws of war, as sanctioned by civilized nations, it will not be questioned, exists under our constitution. When congress has declared that war exists with a foreign nation, the laws of war apply to our situation, and it becomes the duty of the president, as the constitutional commander-in-chief of the army and navy of the United States, to prosecute it. In prosecuting a foreign war thus duly declared by congress, we have the right, 'by conquest and military occupation,' to acquire possession of the territories of the enemy, and during the war to exercise the fullest rights of sovereignty over it. The sovereignty of the enemy in such cases is suspended, and his laws can no longer be rightfully enforced over the conquered territory, nor be obligatory upon the inhabitants who remain and submit to the conqueror. By the surrender the inhabitants pass under a temporary allegiance to the conqueror, and are bound by such laws, and such only, as he may choose to recognize and impose. From the nature of the case no other could be obligatory upon them, for when there is no protection or allegiance, or sovereignty, there can be no claim of obedience. These are well-established principles of the laws of war as recognized and practiced by civilized nations, and they have been sanctioned by the highest tribunals of our country. The orders and instructions issued to the officers of the army and navy applicable to such portions of the Mexican territory as had been, or might be, conquered by our arms, were in strict conformity to these principles. They were, indeed, in amelioration of the rigors of war upon which we might have insisted. They substituted for the harshness of military rule something of the mildness of civil government, and were not only the exercise of no excess of power, but were a relaxation in favor of the peaceful inhabitants of the conquered territory who had submitted to our authority, and were alike politic and humane."

The president further says that New Mexico and Upper

California were among the territories conquered and occupied by our forces, and such temporary governments were established over them. "They were established by the officers of our army and navy in command, in pursuance of the orders and instructions accompanying my message to the house of representatives, December 22, 1846. In their form and detail, as first established, they exceeded in some respects, as was stated in that message, the authority that had been given, and instructions for the correction of the error were issued in dispatches from the war and navy departments of the eleventh of January, 1847, copies of which are herewith transmitted."

It is now necessary to direct our attention to the dispatches from the war and navy departments of the eleventh of January, 1847, in order to ascertain in what respect the government of New Mexico, as established by General Kearny, exceeded the authority given, and what "error" said dispatches were intended to "correct." W. L. Marcy, secretary of war, in his dispatch, says: "It is proper to remark that the provisions of the laws which have been established for the government of the territory of New Mexico go, in some few respects, beyond the line designated by the president, and propose to confer upon the people of that territory political rights under the constitution of the United States. Such rights can only be acquired by the action of congress. So far as the code of laws established in New Mexico by your authority attempts to confer such rights, it is not approved by the president, and he directs me to instruct you not to carry such points into effect." The term political rights, in its most extended signification, is "the power to participate, directly or indirectly, in the establishment or management of government:" See Bouv. Law Dict., vol. 2, tit. Rights, p. 475. But the secretary of war does not use the term in that sense, but he qualifies its signification by saying, "political rights under the constitution of the United States."

It is now necessary to examine the laws which have been established for the government of New Mexico, for the purpose of seeing what "political rights, under the constitu-



tion of the United States," had been conferred on the people of New Mexico. All the laws thus enacted will be found in the Kearny code, and section 8, of article 3 of the organic law of New Mexico, established by General Kearny September 22, 1846, as follows: "All free male citizens of the territory of New Mexico who then are, and for three months next preceding the election shall have been, residents of the county or district in which they shall offer to vote, shall be entitled to vote for a delegate to the congress of the United States and for members of the general assembly, and for all other officers elected by the people" (section 9). "The first election for a delegate to the congress of the United States and for members of the general assembly shall be on the first Monday in August, A. D. 1847, and the governor, by proclamation, shall designate as many places in each county as may be necessary for the public convenience, at which the electors shall vote." The tenth section provides that the general assembly shall convene at Santa Fe on the first Monday in December, A. D. 1847, and on the first Monday every two years thereafter, until otherwise provided by law, etc.

If there are any other laws which were then in existence, to which the secretary of war alluded, which conferred upon the people of this territory "political rights under the constitution of the United States," they have escaped our attention. If we be right in this, the secretary alluded to the authority given to elect a delegate to congress as the only excess of authority conferred by these laws "beyond the line designated by the president."

This point is presented more in detail in instructions prepared under the direction of the president by the secretary of the navy in his dispatch to Commodore Stockton, dated January 11, 1847. The secretary of the navy says: "The possession of portions of the enemy's territory acquired by justifiable acts of war gives to us the right of government during the continuance of our possession, and imposes upon us a duty to the inhabitants who are thus placed under our dominion. The right of possession, however, is temporary, unless made absolute by subsequent

events. If, being in possession, a treaty of peace is made and duly ratified on the principle of *uti possidetis*; that is, that each of the belligerent parties shall enjoy the territory of which it shall be in possession at the date of the treaty; or if the surrender of the territory is not stipulated in the treaty so ratified, then the imperfect title so acquired by conquest is made absolute, and the inhabitants of the territory are entitled to all the benefits of the federal constitution of the United States to the same extent as the citizens of any other part of the union. The course of our government in regard to California, or other portions of the territory of Mexico, now or hereafter to be in our possession by conquest, depends on those on whom the constitution imposes the duty of making and carrying treaties into effect. Pending the war our possession gives only such rights as the laws of nations recognize, and the government is military, performing such civil duties as are necessary to the full enjoyment of the advantages resulting from the conquest and to the due protection of the rights of persons and of property of the inhabitants. No political rights can be conferred on the inhabitants thus situated emanating from the constitution of the United States. That instrument establishes a form of government for those who are in our limits and owe voluntary allegiance to it. Unless incorporated with the assent of congress by ratified treaty or by legislative act, as in the case of Texas, our rights in our enemy's territory in our possession, are only such as the laws of war confer, and no more than are derived from the same authority. They are, therefore, entitled to no representation in the congress of the United States."

Now, as it was the object of the dispatch to correct the errors which had been committed in the organization of civil government here, and as no error is specified or pointed out in the dispatch but that of giving the people of this territory a representation in the congress of the United States, it is but rational to conclude that none other existed in the laws or form of government adopted for this territory. That the error alluded to did not consist in permitting the people

to elect agents to assist in the making or the execution of the laws for the government of the people is evident from the following paragraph from the same dispatch:

"In the discharge of the duty of government in the conquered territory during our military possession, it has not been deemed improper or unwise that the inhabitants should be permitted to participate in the selection of agents to make or execute the laws to be enforced. Such a privilege can not fail to produce ameliorations of the despotic character of martial law, and constitute checks, voluntarily and appropriately submitted to by officers of the United States, all whose instructions are based on the will of the governed. I have regarded your messages in authorizing the election of agents charged with the making of laws or in executing them as founded on this principle, and, so far as they carry out the right of temporary government under existing rights of possession, they are approved, but no officers created or laws or regulations made to protect the rights or perform the duties resulting from our conquest, can lawfully continue beyond the duration of the state of things which now exist, without the authority of future treaty or act of congress."

Upon the subject of the duration of such temporary government, the president, in his message of July 24, 1848, says: "On the conclusion and ratification of a treaty of peace with Mexico, which was proclaimed on the fourth instant, these temporary governments ceased to exist." From this view of the subject we infer that the legislative assembly which convened in December, 1847, was a lawful law-making agent of the military commandant of this territory, and that the acts passed by said assembly were valid when approved by said military commandant, so far as they did not confer on the inhabitants political rights emanating from the constitution of the United States. That the laws passed at the December session, 1847, of the general assembly of the territory of New Mexico, were approved by the commanding general of this territory will appear by the following order:

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[Special Order No. 5.]

HEADQUARTERS NINTH MILITARY DEPARTMENT, }  
SANTA FE, N. M., February 5, 1848. }

The foregoing legislative enactments of the territory of New Mexico having been duly reviewed by the commanding general of the territory, they are hereby approved and will be duly observed. By order of

Brigadier-General STERLING PRICE

W. E. PRINCE, A. D. C. & Adj.-Gen.

The Kearny code and the acts of the December session, 1847, of the general assembly of the territory of New Mexico were valid with the restriction above alluded to with regard to political rights under the constitution of the United States.

But it is suggested, that as the temporary government established here ceased to exist on the conclusion and exchange of ratifications of a treaty of peace with Mexico, the laws passed by said temporary civil government ceased to exist also, unless perpetuated by the treaty itself. There is nothing in the treaty upon this subject, except what is contained in the first paragraph of the ninth article, which is as follows: "The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights of citizens of the United States. In the mean time they shall be maintained and protected in the enjoyment of their liberty, their property, and the civil rights now vested in them according to the Mexican laws. With respect to political rights, their condition shall be on an equality with that of the inhabitants of the other territories of the United States, and at least equally as good as that of the inhabitants of Louisiana and the Floridas, when these provinces, by transfer from the French republic and crown of Spain, became territories of the United States."

Now, civil rights are those which have no relation to the establishment, management, or support of the government.

These consist in the power of enjoying and acquiring property, of exercising the paternal and marital powers and the like: See Bouv. Law Dict., vol. 2, tit. Rights, p. 475. We do not consider that the treaty in fact provided any system of government for the ceded territory, but only provided that civil rights that had been legally vested by the Mexican laws in Mexican citizens, who for the future should be American citizens, should not be taken away from them, and such would have been the law if nothing had been said about it in the treaty. During the war the temporary civil government established here was a government *de jure*. Under the laws of nations, after the ratification of the treaty, the civil government went on, not as a government *de jure*, but as a government *de facto* under the laws of nations, and tacit assent at least, of the congress of the United States and the people of this territory. The treaty of peace, by the cession of New Mexico to the United States, changed the jurisdiction and sovereignty over this territory from the republic of Mexico to the United States. But it had no effect, nor was it intended to have any effect, upon the system of government prevailing or laws in force at the time of the cession. It has been well settled by the authority of adjudged cases that the laws, usages, and municipal regulations in force at the time of the conquest or cession remain in force until changed by the new sovereign: Calv. Ous. 7, 60, 17; *Campbell v. Hall*, 1 Cowp. 209; 9 Pet. 711, 734, 748, 749; *Strother v. Lucas*, 12 Id. 410.

The situation of California and New Mexico were identical, so far as these temporary governments were concerned, and the intervention of some time between the conclusion of peace and the extension of the laws of the United States over them. Now, if congress alone had authority to legislate for California and New Mexico, and for some time did not do so, until congress did legislate, the government and laws existing at the date of the treaty, would still exist and continue until changed by the new sovereign, the United States. This view of the case is sustained by the president in his message of twenty-first of January, 1850, in which he says: "On coming into office, I found the military commandants

of the department of California exercising the functions of civil government in that territory; and, left as I was to act under the treaty of Guadalupe Hidalgo, without the aid of any legislative provisions establishing a government in that territory, I thought it best not to disturb that arrangement made under my predecessor until congress should take some action on the subject. I, therefore, did not interfere with the powers of the military commandant, who continued to act as civil governor as before; but I made no such appointment, conferred no authority, and have allowed no increased compensation to the commandant for his services."

The same thing might have been said with regard to New Mexico. That the laws in force at the time of the treaty continued, and that the form of civil government in existence continued as a government, is admitted and defended by Honorable James Buchanan in a letter from the department of state, dated October 7, 1848, addressed to William V. Voorhees, Esq. Mr. Buchanan, after expressing the deep regret of the president at the failure of congress to establish a territorial government for California, says: "In the mean time the condition of the people of California is anomalous, and will require on their part the exercise of great prudence and discretion. By the conclusion of the treaty of peace, the military government, which was established over them under the laws of war, as recognized by the practice of all civilized nations, has ceased to derive its authority from this source of power. But is there for this reason no government in California? Are life, liberty, and property under the protection of no authorities? This would be a singular phenomenon in the face of the world, and especially among American citizens, distinguished as they are above all other people for their law-abiding character. Fortunately, they are not reduced to this sad condition. The termination of the war left an existing government—a government *de facto*—in full operation, and this will continue with the presumed consent of the people until congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred, from the fact that no

civilized people could possibly desire to abrogate an existing government when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all law, and reduce them to the unhappy necessity of submitting to the dominion of the strongest."

Similar in this respect was New Mexico to California, and the above views are equally applicable to both. The Hon. John M. Clayton, in a letter from the department of state, dated the third of April, 1849, addressed to the Hon. Thomas Butler King, expressed similar views to those of Mr. Buchanan. Mr. Clayton says that the laws of California and New Mexico, as they existed at the conclusion of the treaty of Guadalupe Hidalgo, regulating the relations of the inhabitants with each other, will necessarily remain in force in those territories; their relations with their former government have been dissolved, and new relations created between them and the government of the United States; but the existing laws regulating the relations of the people with each other will continue until others lawfully enacted shall supersede them. The naval and military commanders on these stations will be fully instructed to co-operate with the friends of order and good government so far as their co-operation can be useful and proper. It is evident that General Price did not regard the dispatches of January 11, 1847, from the war and navy departments, as prohibiting him from using the assistance of the legislative assembly in the making of the laws, or he would not, with these dispatches before him, have approved the laws passed by the general assembly of the territory at the December session, 1847. If this view of the case be correct, the replevin act of December, 1847, was passed by a lawful agent of the commanding general of the territory, and was by him approved, and is, therefore, a valid law, in force in this territory on the fourteenth day of July, 1851, and by an act of the legislative assembly of the territory of New Mexico of that date continued in force.

No actual possession or visible exercise of sovereignty over New Mexico was ever perfected by the state of Texas, and the claim in dispute between her and the United States

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has been finally settled, leaving the United States her laws and the temporary government by her established, in undisturbed operation. No further notice need be taken of this inchoate claim of Texas, which has been satisfactorily extinguished. We will now proceed to consider the other points in this case.

The third section of the acts of the legislative assembly in regard to the action of replevin reads as follows: "Before the writ of replevin be issued, the plaintiff, or some credible person in his stead, shall file in the office of the clerk of the circuit court an affidavit alleging that the plaintiff is lawfully entitled to the possession of the property mentioned in the declaration; that the same was wrongfully taken or wrongfully detained by the defendant, and that the right of action accrued within one year." See Laws of the Territory, sec. 3, p. 413.

George Merritt, as agent of the plaintiff Ward, filed the affidavit required by said section. Section 4 of the same act reads as follows: "The plaintiff, or some responsible person, shall, before the execution of the writ, enter into bond, with sufficient securities to the officer to whom the writ is directed, in double the value of the property, conditioned for the prosecution of the suit with effect and without delay; make return of the property, if a return is adjudged; keep harmless the officer and pay all costs that may accrue." The bond required by this section was executed by George Merritt, as agent for James N. Ward as principal, and Ceran St. Varian and James H. Quinne as securities. The seventh section of the same act reads as follows: "In case the plaintiff fails to prosecute his suit with effect and without delay, judgment shall be given to the defendant and shall be entered against the plaintiff and his securities for the value of the property taken, and double damages for the use of the same from the time of delivery, and it shall be in the option of the defendant to take back such property or the assessed value thereof."

The defendant Broadwell pleaded not guilty to the petition and the cause was tried by a jury at the June term.



1853, of the district court; and in conformity with the section last mentioned, a judgment was rendered on said trial against Merritt, St. Varian, and Quinne, for the value of the property and damages and costs. From this judgment the plaintiff Ward takes an appeal to this court. The record in this case, after noticing the appearance of the parties, impaneling of a jury, and the submission of the issue to the jury, reads as follows: "Whereupon the said plaintiff fails to prosecute his said suit further, and thereupon the jury is discharged from further consideration in the premises; therefore it is considered by the court that the said defendant go hence without day and recover of the said plaintiff George W. Merritt, Ceran St. Varian, and James H. Quinne, his securities, his damages by reason of the premises." A jury was then called, and the value of the property assessed at one hundred and twenty-five dollars, the damages at thirty dollars, and a judgment rendered against them for the value of the property, damages, and costs. There was a motion made and overruled to set aside the nonsuit, and grant a new trial, for the alleged reason that the court erred in excluding George W. Merritt as a witness in the case. The circumstances under which said witness was presented to the court and excluded from giving evidence, are contained in the following bill of exceptions, to-wit: "Be it remembered that on the trial of the above-entitled cause, the plaintiff offered George W. Merritt, principal on the replevin bond as agent of plaintiff, as a witness in this case; said witness was sworn on his *voir dire*, and stated that he had no interest in the event of said suit; that he had only acted as agent for Ward in bringing the suit and filing the bond; and that witness considered himself indemnified for all loss he might sustain in the case. Plaintiff then offered to substitute another person on the bond in place of said Merritt, but the court refused to permit the substitution of another person in place of said Merritt, and refused to permit said Merritt to testify in said cause; to which refusal on the part of the court to permit said witness to testify, the plaintiff by his counsel excepts, and files herewith his bill of exceptions, and prays

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that it may be signed, sealed, and made a part of the record in this case, which is accordingly done," etc.

The appellant in this case insists that the court below erred in refusing to permit Merritt to testify for the plaintiff, and also in refusing to permit the plaintiff to substitute another person on the replevin bond in the place of Merritt. The appellee contends that the judgment in this case is nothing but a voluntary nonsuit, from which the plaintiff below could not appeal; that Merritt was properly excluded from giving evidence in the cause, for the reason that he was a party to the suit, and had a direct pecuniary interest in the result of the suit then pending, and that the question of substitution was a matter of discretion with the court below, not properly the subject-matter of a review in this court. The authorities are clear, that a voluntary nonsuit cannot be made the subject of error. See the following cases: *Collins v. Nichols et al.*, 2 M. R. 132; *Union Bank v. Carr*, 2 Humph. 345-346; *Worke v. Byers*, 3 Hawks, 228. A judgment of nonsuit is based upon the presumption that the party is called, does not answer, and elects to go out of court with a judgment for costs against him, leaving the merits of the controversy open for investigation in a subsequent suit. The parties in this case have chosen to call this judgment in the case now under consideration a nonsuit.

But the court has arrived at a different conclusion. The judgment in this case in the court below is a final judgment against the plaintiff, and in favor of the defendant, for want of prosecution of the case with effect upon the part of the plaintiff. It gave to the defendant all he could ask: the value of the property replevied by the plaintiff, and double damages and costs. We do not perceive what additional elements of finality could be added to this judgment. If this were not the correct view of the legal effect of the judgment in this case, still we are not prepared to admit, even if the judgment in this case could be considered a nonsuit, that it was voluntary on the part of the plaintiff below. Where a party has been compelled to abandon his case in consequence of an adverse decision of the court, to which

he excepts, upon a vital point in his cause, we are by no means prepared to concede that his action was voluntary. The plaintiff below was not then precluded from appealing his cause to this court for review.

It is contended by the appellee, that Merritt, the witness offered to be examined, was a party to the record, and from that fact alone, aside from the question of interest, was incompetent as a witness. This question was before this court at the January term, 1852, in the case of *Pino v. Beckwith*, ante, and it was then decided, in accordance with the authorities there cited, that "a party on the record, although divested of all interest in the event of the suit, is not a competent witness in the cause."

But in the case now before the court, we do not consider the witness Merritt, at the time he was offered as a witness, to have been a party to the suit on the record. The case stood on record as *Ward v. Broadwell*, and the mere circumstance that Ward, by failing to prosecute his suit with effect, might place the witness Merritt in a position which would authorize the court below to render a judgment against him, if that act could be enforced by the court, is not alone sufficient evidence that he, Merritt, was then a party to the record. Where the fact of whether a party be a party to the record or not depends upon the happening of a future event which may or may not take place, such person ought not to be regarded as a party to the record until such future event has happened. When a witness is presented in court for examination and his evidence objected to on the ground of interest, there are two methods by which it may be proven: 1. By examining said witness on his *voir dire*. 2. By proving his interest *aliunde*. But the principle of law is well established, that you can not resort to both of these modes at the same time. In support of this position, see the following cases: *Mifflin v. Bingham*, 1 Dall. 272; *Mallet v. Mallet*, 1 Root, 501; *McAlister v. Williams*, 1 Overt. 107, 119; *Bridge v. Wellington*, 1 Mass. 219; *Chance v. Hine*, 6 Conn. 231. In the case of *Dorr v. Osgood*, 2 Tyler, 28, it was decided by the court that if a witness is put on his *voir dire*, as to his interest, and

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purges himself, evidence to show his interest *aliunde* is not admissible either at that trial or on a motion for a new trial. The objecting party having made his election of proof, shall not afterward use another mode. The same principle was decided in the case of *Bisbee v. Hall*, 3 Ohio, 449. In the case now before us, the party objecting to the competency of Merritt as a witness upon the ground of interest in the event of the suit, elected to examine him respecting that interest on his *voir dire*. On such examination, Merritt stated that he had no interest in the event of said suit; that he had only acted as the agent of Ward in bringing the suit and filing the bond, and that witness considered himself indemnified for all loss he might sustain in the case.

Notwithstanding the witness considered himself uninterested in the suit, we think the court below was right in coming to the conclusion, from the facts stated by witness, that he was in fact interested in the event of the suit in such a manner as rendered him incompetent to testify while that interest continued to exist. We look upon Merritt, St. Varain, and Quinne, as all sureties for Ward, and as having by the replevin bond bound themselves that Ward should prosecute his suit of replevin with effect and without delay, and on his failure to do so, that he, Ward, would pay the assessed value of the property, double damages, and costs to the defendant Broadwell. That Merritt had, as the security of Ward in the replevin bond, such a direct, immediate, and subsisting pecuniary interest in the event of the suit then pending, as would exclude him as a witness, is too clear to need authority or argument to unfold it. Many authorities have been referred to in the argument of this case by the appellant's counsel touching the disqualification of a witness, upon the ground of interest in the event of a suit, and of the duty of courts to permit said interest to be released.

We do not consider it worth while to consider that feature of the case, for the reason that the record does not disclose that any person either executed, or offered to execute, a release to Merritt of his interest in the suit. The bill of exceptions in this case further states that the plaintiff of-

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Opinion of Deavenport, C. J., dissenting.

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ferred to substitute another person on the bond in place of said Merritt, but the court refused to permit the substitution of another person in the place of said Merritt. It is argued by the counsel of the appellee that the question of substitution was one addressed to the discretion of the court below, and is not receivable in this court. We think differently. The discretion of a court must always be exercised in conformity with law, and the usages of courts, and if not so exercised, is susceptible of being reviewed in a superior tribunal upon the question of such substitution of a new surety in lieu of the one offered as a witness, we are not without the light of adjudicated cases to guide us. Phillips on Evidence, vol. 1, p. 89, says: "A surety on a replevin bond is interested in procuring a verdict for the plaintiff, in the same manner as bail are interested in procuring a verdict for the defendant, and is therefore incompetent; but if his testimony be required, the courts will permit the substitution of a new surety in lieu of the witness, in order that the latter may be rendered competent." The same principle was decided in the case of *Bailey v. Bailey*, 1 Bing. 92; also, S. C., 7 Moore, 439.

We can not perceive how any injury would result to the defendant in the court below by permitting the substitution to be made. We can perceive how the plaintiff in the court below might lose a just and meritorious cause upon the refusal of the court to permit the substitution of a new surety in lieu of the witness offered. In the refusal of the court below to permit the plaintiff to strike out the name of Merritt and substitute a new surety in his place, we think the court erred, and the judgment must be reversed.

DRAVENPORT, C. J., dissenting.

This is an action of replevin instituted by the appellant against the appellee in the court below under the laws of this territory: *Vide* Laws of New Mexico, 114. The affidavit, as well as the bond required by the provisions of the statute, were both made by George Merritt. Upon the trial of this case below, said Merritt was tendered by the plaintiff as a witness, and objections were made as to his

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competency, on the ground of his signature to said bond. These objections were sustained by the court. The plaintiff proffered then to relieve said Merritt from his incompetency by substituting another person in his stead, and releasing him from said bond. To this release and substitution objection was also taken, and the court below sustained the same. The plaintiff thereupon suffered a nonsuit, whereupon the defendant obtained a judgment against the plaintiff and obligors to said bond for the value of said property taken, and double damages for the use of the same. Afterwards the plaintiffs entered a motion to set aside the nonsuit, which motion being overruled, exceptions were taken, and the case brought to this court for review.

It is insisted in argument, that this being a case of voluntary nonsuit, no appeal will lie. I do not conceive it to be a case of voluntary nonsuit; but rather, one where the plaintiff, on account of his witness being ruled to be incompetent, was constrained to such a course, considering it then as being one of rightful appeal. I shall proceed to notice only such grounds of error as those upon which I differ with the opinion delivered. Courts should ever be guarded, while expounding the laws of one country, and in too readily adopting the decisions made in others upon a like subject, against that species of adjudication which may impose those foreign laws upon the people without their legislative sanction, and especially in the United States, where each state has its separate laws, differing one from the other so much in detail, although they may pertain to the same subject-matter of legislation.

To exemplify this, I will only instance that it is a universal rule of construction, that all remedies created by statute in contravention of the common law remedies are to be construed strictly. But in some of the states statutory remedies are created, and by the laws of those very states it is expressly enacted that they shall be construed liberally. In those states where these remedial statutes exist, then, these statutory remedies are construed with reference to them. But when such remedial statutes do not exist, then the

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common law rule of strict construction prevails, and probably in almost every decision where there is a departure from the common law rule, it will be found that such departure is founded on some particular enactment which authorizes it. Is there any statute in this territory which authorizes the court to depart from the common law rule of construing all statutory remedies in contravention of common law remedies strictly? I know of none. Then, testing this case by this rule, I shall proceed to point the difference which exists between the majority of the court and myself in reference to the power of the court to release said Merritt from his bond in this case, and substitute another person in his stead, in order to render him a competent witness. The fourth section of the replevin act is as follows: "The plaintiff, or some responsible person, shall, before the execution, enter into bond with sufficient securities, to the officer to whom the writ is directed, in double the value of the property, conditioned for the prosecution of the suit with effect, and without delay; make return of the property, if return is adjudged; keep harmless the officer, and pay all costs that may accrue."

Now this section clearly points out and makes it a precedent step in this statutory form of action, that before the writ shall be served, or, in other words, before the defendant's possession to the property can be disturbed, the plaintiff, or some responsible person, shall enter into bond, etc.: *Vide* Laws of Territory, 413. Either the plaintiff or some responsible person may enter into such bond with sufficient securities. He did so. Now the question arises, what relation does Merritt, as such responsible person, bear toward the plaintiff and his own securities for the purpose of this suit? I hold that both Merritt and his securities are the securities of the plaintiff, and upon the plaintiff's failure to prosecute his suit, that judgment may be rendered against plaintiff and all the parties on the replevin bond: *Vide* seventh section of replevin act, Laws of the Territory, 413. But as between Merritt, as the responsible person in such bond, does he not stand in reference to his securities as principal? As between him and them, does

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he not stand as their principal, and they as his securities? By reference to the attachment act of the territory, Laws of Territory, p. 39, sec. 4, it will be seen that the bond there required may be entered into by the plaintiff, or some responsible person as principal, with two or more securities, etc. I refer to this clause in the attachment law, to show that there the responsible person is expressly termed principal, and that the mere omission of the word in the replevin act does not make the responsible person in a replevin bond less a principal on that account. What is meant by the term responsible person, and why is this term used in the law? It is evident that these actions, being extraordinary, created by statute in contravention of the common law remedies, and when the property of the defendant is seized, that the law intended that when any person resorted to them, the defendants should have some responsible person bound for all the damages he might suffer from the wrongfully suing out of such writs. The mere circumstance of the bond being payable to the officer amounts to nothing as a conclusion against its being for the benefit and protection of the defendant, as the tenth section of said act shows that defendant may sue upon it: *Vide* Laws of Territory, 414. The responsible person I then deem is the principal in the bond, and those who signed it with him, are, *quoad* said bond, his sureties, being his securities. Now, if another person is substituted in place of such responsible person, are not his securities released, and does not the bond wholly fail? Such seems, to my mind, the inevitable result, as the statute requires such responsible person shall enter into bond with sureties. These securities can, if that responsible person is released and another substituted, avail themselves of the plea that they never bound themselves for securities of such substituted persons. If this be so, I can not perceive how it can be considered error for the court below to refuse such release and substitution. If such substitution would amount to a release of the securities, would not that annul the bond?

Whether the plaintiff would have the right to substitute an entirely new bond, is a very different question, which is



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Points decided.

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not raised by the record before us; and I think the safer course for appellate courts is to confine themselves to the decisions of only such questions as arise upon the record. I think I have demonstrated in this case that George Merritt, *quoad* the bond, can only be regarded as a principal, and that his release, and the substitution of another person in his stead, would discharge the securities to said bond. If such be the fact, I can not perceive how the doctrine of the power of the courts to release securities in certain cases, to render them capable of testifying, can be made applicable to a principal on a bond.

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DAVID WALDO, JACOB HALL, AND WILLIAM MCCOY v. HUGH M. BECKWITH.

**AFFIDAVIT AND BOND FOR ATTACHMENT, FILING OF.**—The affidavit for an attachment, together with the bond, with the clerk's approval indorsed thereon, must be filed before issuing an attachment, or the writ will be void.

**NUNC PRO TUNC FILING OF PAPERS.**—The *nunc pro tunc* filing of papers, and the *nunc pro tunc* performance of other acts provided for by statute, must be done by the order and direction of the court, and its record must contain the order.

**BILL OF EXCEPTIONS MUST CONTAIN, WHAT.**—A party bringing to this court a bill of exceptions, must so embody his facts and points that the court may clearly know what it is called upon to decide.

**FACTS FOR BASIS OF NUNC PRO TUNC ORDER, HOW OBTAINED.**—The facts upon which to base an order for an act to be done *nunc pro tunc* should be ascertained from the records of the court and from its immediate officers, and not from evidence *alibunde*, as by the testimony of a former clerk. *Contra*, Watts, J.

**PLEA IN ABATEMENT OF ACTION PENDING IN ANOTHER COURT.**—A plea in abatement, that a suit for the same cause is pending in the courts of another state, must show that the same party is plaintiff in both suits; and if it appear that the present defendant is plaintiff in the other suit, the plea will be disallowed. Great strictness as to such a plea is required.

**DEGREE OF CARE REQUIRED OF ONE KEEPING CATTLE FOR HIRE.**—Where a party sues for services and supplies furnished in herding and feeding a band of work oxen, and it appears that nearly all the cattle died while in his charge, he is not bound to show that he exercised extraordinary care, but only that he took such care as a prudent man mindful of his own interests would take of his own property.

## Opinion of the Court—Benedict, J.

**OLD SPANISH LAW OF PASTURES.**—The old Spanish law of pastures does not apply to one who undertakes for pay to keep a band of working oxen during the winter.

**VERDICT AGAINST EVIDENCE.**—The court will not disturb a verdict merely because it is against the preponderance of evidence; but it is otherwise where there is no evidence on a point essential to the support of the verdict.

**PROOF OF JOINT LIABILITY UNDER ALLEGATION OF PARTNERSHIP.**—In an action against a number of persons, alleged to be partners under a particular firm name, to recover for the feeding of certain cattle alleged to belong to them, it is sufficient, it seems, to show a joint interest and joint liability without proving that the cattle belonged to them as a firm.

**RUMOR AS EVIDENCE OF PARTNERSHIP.**—A mere rumor of the existence of a partnership under a particular firm name, not showing who compose it, is not evidence of its existence in an action against it.

**VOLUNTARY APPEARANCE OF A DEFENDANT.**—The voluntary appearance of the defendant in a suit is a waiver of process or notice, and cures all irregularities therein; and the same rule obtains where an attempt is made to gain jurisdiction of a non-resident by attachment.

**DEFECTS IN WRIT NOT NOTICED ON MOTION TO DISMISS.**—A motion to dismiss a cause reaches only substantial defects in the petition, and defects in the writ can not be noticed thereon. *Per Watts, J.*

**FILING, WHAT IS.**—The filing of a paper is its actual delivery to the clerk, and the keeping of it by him among the papers in the case, and is not the indorsement of it by the clerk. *Per Watts, J.*

**BILL OF EXCEPTIONS, EVIDENCE NOT CONTAINED IN.**—Depositions not made a part of the bill of exceptions can not be considered on appeal. *Per Watts, J.*

**APPEAL** from the First Judicial District Court for Santa Fe county. The case is stated in the opinions of Benedict and Watts, JJ.

*Theodore D. Wheaton*, for the appellants.

*Ashurst and Smith*, for the appellee.

By Court, **BENEDICT, J.:**

This was a suit against the appellants as non-residents. On the thirtieth day of August, 1851, Beckwith filed his petition in the clerk's office of the district court, for the county of Santa Fe. On the same day an attachment was issued by the clerk, to John Jones, marshal, which was returned by him, "levied on eight mules, one wagon, three Colt's revolver pistols, one ditto rifle, one horse pistol,

four guns, two saddles and bridles, six sets of mule harness, and one Allen's revolver pistol."

The cause was continued from term to term until the June term of 1853. At this term it appears that publication to the defendants of notice that this action was pending against them had been duly made. The record shows that at this term the defendants moved the court to dismiss the case for the following reasons, viz:

1. There is no writ.

2. There is no sufficient writ.

3. There is no attachment bond filed or indorsed as required by law.

4. There is no sufficient bond.

5. There is no affidavit filed on which to base said suits, which motion was by the court overruled. Afterwards, on the same day, the plaintiff filed an affidavit and bond, each bearing date the twenty-ninth day of August, 1851. On the bond was the following indorsement: "The penalties and securities in the above bond are approved this twenty-second day of June, 1853, as of August twenty-ninth, A. D. 1851.

R. H. TOMPKINS, Clerk."

The defendants filed a plea in abatement of the cause, averring that before the commencement of this suit, to wit, on the twentieth day of June, 1851, a suit was commenced and pending in the circuit court for the county of Jackson, in the sixth judicial circuit, in the state of Missouri (said circuit court having full power and jurisdiction to try and determine the same), in which the same identical cause of action in plaintiff's declaration mentioned is in dispute and pending between the same parties to this suit, as by the records and proceedings of said circuit court will fully appear.

To this plea the plaintiff demurred, and the court sustained the demurrer. The defendants then filed their answer to the plaintiff's petition in the form of general issue in assumpsit. The issue being formed, a jury was called and the parties went to trial, and the jury found a verdict

for the plaintiff in the sum of three hundred and thirty dollars.

The defendants then moved the court to set aside the verdict and grant a new trial, also in arrest of judgment, both of which motions were overruled, and the court rendered judgment for the plaintiff for the amount of the verdict and his costs, and that the property levied on under the attachment be sold to satisfy the same. The defendants then filed their exceptions to the opinions of the court, and prayed and took their appeal to this court. The following are the errors assigned:

1. The court erred in overruling the motion to dismiss.
2. The court erred in admitting the testimony of Caleb Sherman, and the approval of the attachment bond and filing of the original papers in the suit.
3. The court erred in allowing the bond and affidavit of the plaintiff below, together with the writ, to be filed *nunc pro tunc*.
4. The court erred in sustaining the demurrer to the plea in abatement.
5. The court erred in overruling the motion for a new trial.
6. The court erred in overruling the motion in arrest of the judgment.

The three first errors assigned will be considered in the same connection. The law which authorizes and prescribes proceedings by attachment against the property of a debtor in the district courts of this territory is contained among the general provisions of Kearny's code, which have been re-enacted by the legislature held in pursuance of the organic act of September, 1850.

The second section of that portion of the code, under the head of attachments, provides that a creditor, wishing to sue his debtor by attachment, may place in the clerk's office of the circuit (district) court of any county of this territory a petition, or other lawful statement of his cause of action, and shall also file an affidavit and bond; and thereupon such creditor may sue out an original attachment against the

lands, tenements, goods, moneys, effects, and credits of the debtor in whosoever hands they may be.

The fifth section is as follows: "The clerk shall judge of the sufficiency of the penalty and security in the bond. If they be approved, he shall indorse his approval thereon, and the same, together with the affidavit and petition and other lawful statement of the cause of action, shall be filed before an attachment shall be issued."

We need no precedents to enlighten the court as to the meaning of these sections. They are clear and positive that an affidavit and bond shall be made, that the clerk shall approve the bond; that he shall indorse his approval thereon, and that these and the petition, or other lawful statement of the cause of action, shall be filed before an attachment shall be issued. Where these requirements complied with? If so, the record must show the facts, for beyond this the court will not look for evidence in the proceedings of the cause below. It shows the petition to have been duly filed August 30, 1851, stating the cause of action to be that the defendants were indebted to the plaintiff in the sum of seven hundred dollars, on account of forage, hay, corn, and fodder, and provender furnished the cattle of the defendants, etc. Nearly two years after this, at the June term, 1853, as shown by the record, the bond and affidavit were filed, and the approval of the bond then made and indorsed. It is contended that the court caused the approval and filing to be done at the June term, *nunc pro tunc*, in pursuance of the provisions of section 34 of an "Act regulating practice in the district and supreme courts of the territory of New Mexico, approved July 2, 1851," and which reads as follows:

"It shall be the duty of the clerk, when any paper is filed in his office, to enter immediately on the back thereof his certificate of the day on which it was filed in the words: 'Filed in my office this — day of —, 18—,' and sign his name as clerk to the same. But in case he should at any time neglect so to do, it may, at the discretion of the court, guided by the justice of the case, be entered *nunc pro tunc*."

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Opinion of the Court—Benedict, J.

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In like manner shall all other matters be performed *nunc pro tunc* when the ends of justice shall require it."

It will not, we think, be urged that the acts contemplated in this section are acts which may simply be "allowed" and "permitted" to be done by the clerk or other officers of the court, but acts to be done by the order and direction of the court itself, and when done, the record must show and contain such order. Does this record in this cause show any such order? If so, it is found in one of the bills of exceptions signed by the judge, though not sealed. These are the words: "Plaintiff was permitted to introduce the testimony of Caleb Sherman, formerly clerk of this court, for the purpose of showing the time of the filing of the papers and approval of the bond in this cause, and also the fact of said filing and approval to be marked and indorsed upon said papers and bond *nunc pro tunc*." The party who excepts to the acts, opinions, or ruling of the court below, and presents his exceptions to this court for review in a bill, must so embody his facts and points that this court can clearly know what it is called upon to adjudicate. The bill above referred to speaks of a time of filing of the papers and approval of the bond, and the filing and approval to be marked and indorsed upon said papers and bond *nunc pro tunc*. What these papers were is not specified, and the court will not attempt to specify by inference. against the plain and unqualified showing of the record, as neither the bill of exceptions nor the record fixes upon any other time at which the bond and affidavit were filed, other than the June term, 1853. If the bond and affidavit, before the attachment issued, were delivered to the clerk, and by him received, to be kept on file, such facts are not disclosed by the record. From this it follows that the issuing of the writ of attachment was without authority, and that all of the proceedings under it were null and void. It appears that the plaintiff was permitted to introduce Caleb Sherman, a former clerk, to prove by him the time of the actual filing of the papers and approval of the bond, to which the defendants excepted.

In the thirty-fourth section of the act herein cited, we do

not suppose that the legislature intended to confer upon the courts an unlimited power to exert their discretion *nunc pro tunc*. The rule is universal, that no act shall be done *nunc pro tunc*—as now for then—which shall work injustice to a party in court. If the practice is allowed of permitting a party to introduce witnesses to show that an act by the court should be done *nunc pro tunc*, it must also permit the adverse party to introduce counter-witnesses, and herein must result all the rules applicable to testing the credibility of oral testimony, such as impeachment, etc. In such a conflict we are of the opinion there would be great danger of violating the rule above stated, and that the ends of justice, instead of being promoted, might be thwarted. In prescribing to the courts below a rule of practice by which to obtain the facts upon which to exercise their discretion in pursuance of section 34, we think they should be confined to their own records and to the officers in immediate connection with the courts. In the present case the plaintiff appeared from term to term in his case for nearly two years, and if the old clerk had neglected to perform the official acts absolutely required by statute, the plaintiff had abundant opportunities to have learned the facts and applied in time for the correction, and had the correction clearly made a part of the record in his case.

We come now to the fourth error assigned. We see no error in the court for having sustained the demurrer to the plea in abatement. Much strictness is demanded by courts in pleas of this sort. The plea in this case was loosely drawn, and failed to aver that the plaintiff in this cause was the plaintiff also in the suit pleaded. Besides this, by reference to the record to which the plea referred, we find that the suit in Missouri was by the defendants in this cause against Beckwith. We do not see that he should be denied his right to bring a cross action against Waldo, Hall, and McCoy if he should choose to do so.

In the exceptions to the opinion of the court overruling the motion for a new trial, it seems the defendants based their motion upon these grounds, to wit: 1. The jury found against the law and the evidence. 2. The court gave

wrong instructions to the jury. 3. The court refused instructions which should have been given.

Plaintiff introduced witnesses on the trial, who testified to his keeping, during the winter of 1850 and 1851, between forty and fifty head of oxen. The testimony disclosed no person except defendant Hall, as having exercised the control over the cattle, in hiring Beckwith to winter them. One witness, Cummings, stated that he was informed by Hall, one of the defendants, that he hired Beckwith to winter his cattle; that a few days afterwards he called at plaintiff's ranch, as he had cattle of his own feeding there; that he saw the cattle coming from water, and that Beckwith remained in the house while he went out and saw said cattle fed, by the servants of Mr. Beckwith, with corn and fodder; that the winter was very hard and cold, and many of the cattle died; that same came to his house, about twelve miles from Beckwith's; he fed them with meal but they died; that he lost one or two of his cattle that year; that the cattle were in a very poor condition; that fodder and corn were very high that year; that he believed it was worth some ten or fifteen dollars a month to feed those cattle that year; that the government was wintering cattle near plaintiff's, and offering very high prices for corn and fodder; and at the time he saw said cattle fed, they were fed with the best sort of corn and fodder, cut up together and excellently cured; that of the two cattle kept for him (the witness) in the spring of the year, one was fat enough for beef, and the other in good order.

Charles Hughes, another witness, among other things, testified that in the winter of 1850 and 1851, he was living on Beckwith's ranch as a hand; that forty-four oxen were delivered to Beckwith by a person who then stated that they were sent there by defendant Hall; that they were delivered in December of that year; that he fed them well with corn and fodder during the winter, at morning and night; that they were in very bad condition when they arrived there, and that they all died by the month of May except three; that they died on an average of about three a week; that it was worth about ten or eleven dollars a head to take



care of them during the whole time they were there; that the winter was very hard, and there was much snow on the ground. In cross-examination he stated that in the month of February there were but twenty-five of said cattle, the rest having died; in the month of March there were only ten, and in the month of April but three; that Beckwith himself had fourteen cattle wintered that year on his ranch, and some one or two of them died.

Preston Beck testified that he knew by rumor of the firm of Waldo, Hall & Co., but no further. This testimony of Beck's was all that was given to the jury to prove the partnership of the defendants, the joint ownership or possession of the cattle, or any joint liability, for the keeping of the same, or of whom the firm of Waldo, Hall & Co. was constituted. There was some other testimony, but enough is here copied to enable us to see the bearing and correctness or erroneousness of the instructions of the court to the jury, and of the overruling of the motion for a new trial. The petition avers the joint indebtedness of the defendants, and describes them as trading under the name and style of Waldo, Hall & Co.

The court instructed the jury:

1. That unless the plaintiff proved the cattle in question were the cattle of David Waldo, Jacob Hall, and William McCoy, trading under the name, firm, and style of Waldo, Hall & Co., they must find for the defendants.

2. The plaintiff in this suit was bound to take as much care of the cattle as a prudent man, mindful of his own interests, would take of his own. If such care was not taken, and they died through his neglect, he would not be entitled to pay.

The court refused to give the following instructions, to wit: That in order to recover in this action, the plaintiff must show extraordinary care and diligence in feeding and herding of said cattle, and if this proof has not been made, they must find for the defendants. We think the court very properly refused this instruction, and that the old Spanish law concerning pastures, as contended by counsel, does not

apply to him who during the winter undertakes to keep for pay a body of working oxen.

All are of opinion that the second instruction given was substantially correct. The evidence disclosed touching the principle embraced in this instruction is by no means of a very satisfactory character. Of not less than forty-four head of oxen which went into the care and keeping of the plaintiff in December, 1850, only three were living by the following May. Some of these cattle strayed away the distance of twelve miles to Mr. Cummings'; he fed them with meal, and they died. No witness shows that Beckwith manifested any concern at the absence of the cattle, or made any efforts to restore them back to his ranch. Of the fourteen head of cattle belonging to himself, one or two died during the winter. The government at that time was herding cattle near plaintiff's ranch, and offering very high prices for corn and fodder. The cause of the loss of so many of Hall's or defendants' cattle is not sufficiently accounted for to relieve the plaintiff from the strong probabilities that he was guilty of gross neglect in the keeping, feeding, and securing of those cattle. But this is a matter upon which a jury has passed and rendered their verdict, and this court will not disturb the verdict of the jury upon the ground of a preponderance of the evidence being against their finding. We do not think that the first instruction was wholly correct. The jury was told that unless the plaintiff proved that the cattle in question were the cattle of the three defendants, trading under a certain name, firm, and style, they must find for the defendants. The first part of this instruction was equivalent to telling the jury that they must find the actual property and ownership of the cattle in the defendants. Any degree of interest by which they could have been found by the evidence jointly liable for the keeping of the cattle, if kept properly, would have been sufficient upon which to have based a verdict against the defendants. So a joint liability had been proven against them all. We think it was of no moment to find that the cattle were connected with and a part of the trade under the particular and arbitrary style or description of Waldo, Hall & Co. The

cattle might have been wholly without the company trade, and still the defendants be liable. The plaintiff, in his petition, adds the fanciful company description, it is true; yet if a joint interest, the keeping of the cattle, and a joint liability had been shown, that would have been sufficient upon that point. So far from showing these facts, as appears from the bill of exceptions, no proof was presented to the jury establishing any sort of a partnership, joint interest, or liability of the defendants in the cattle or their keeping. In this particular, then, the verdict of the jury was found, not contrary to evidence or to the preponderance of evidence, but absolutely without any evidence at all. Mr. Beck testified that he knew by rumor of the firm of Waldo, Hall & Co., but no further. He does not even state of what persons rumor said the firm was composed of. The judgment of the court below must therefore be reversed, the verdict of the jury set aside, and a new trial granted. From the view the court takes of the attachment proceedings in this case, as shown by the record, they must be quashed. The question arises, then, how stands this cause in court? It stands as if the plaintiff had filed his petition in an ordinary mode against the defendants; and they, by their voluntary appearance, had waived all process, and service of process, and all irregularities, and answered to the merits of the case. The books are full of adjudged causes, in which the voluntary appearance of the defendants is held a waiver of all processes of notice, and cures all irregularities. The same rule prevails in attachments as in other cases. In *Lincoln v. Tower*, 2 McLean, 473, the court said: "The attachment is a mode by which to compel the appearance of the defendants; and if he do not appear, and contest the validity of the claim, there seems to be no reason why he should not be bound in person by the judgment." So in 3 Scammon, 60, the court says, in a suit by attachment, "that appearance is as good as personal service." In this case, defendants selected to make a full appearance, and after having pleaded to the merits, and contested the validity to the plaintiff's claim, they must abide the consequences of their choice

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Opinion of Watts, J.

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and acts. We deem it unnecessary to say anything relative to the motion in arrest of judgment, and the overruling of the same by the court, as they must be fully disposed of on the other points presented.

Judgment reversed, and cause remanded to the Santa Fe district court for new trial.

Separate opinion by WATTS, J.:

Hugh M. Beckwith, on the thirtieth day of August, 1851, filed his petition in the United States district court for the first judicial district, against Waldo, Hall & Co., and caused a writ of attachment to be issued and be levied on the property of the defendants. At the March term, 1852, of said court a notice of the pendency of the suit was ordered to be published, the defendants being non-residents of the territory. At the June term, 1852, of said court, there was a motion made to set aside the publication of notice and dismiss the case, and the motion was overruled. At the September term, 1852, it appearing that publication had not been duly made, the cause was continued for publication. The cause was continued at the March term, 1853. On the application of Beckwith, the plaintiff in the court below, proof of publication as to pendency of said suit was duly made. At the June term of court, 1853, the defendants appeared and moved to dismiss the cause. The motion was overruled. The defendants then demurred to the petition. The demurrer was sustained and the plaintiff was permitted to amend his petition. The defendants then filed the following plea in abatement:

*"Hugh N. Beckwith v. Waldo, Hall & Co., attachment, and the said defendants come and defend the wrong and injury when, etc., and pray judgment of the said writ and declaration of the said plaintiff, because they say, that before the commencement of this suit, to wit, on the thirteenth day of June, A. D. 1851, a suit was commenced and pending in the circuit court for the county of Jackson, in the sixth judicial circuit, in the state of Missouri (said circuit court having full power and jurisdiction to try and determine the same), in which the same identical cause of action in plaintiff's*

declaration mentioned is in dispute and pending between the same parties to this suit, as by the records and proceedings of said circuit court will fully appear. Wherefore, by the reason of the pendency of said suit as aforesaid, the said defendants pray judgment of the writ and declaration, and that the same may be quashed."

From the record of the Jackson circuit court accompanying the plea in abatement, it appears that Waldo, Hall & Co. had instituted a suit for damages against Beckwith upon his non-compliance with a special contract for the wintering and taking care of cattle, and Beckwith was defending said action by setting up the indebtedness of Waldo, Hall & Co. to him for the keeping of said cattle. To this plea in abatement the plaintiff demurred, and the court sustained the demurrer. The defendants then pleaded *non assumpsit*. The case was tried by a jury at the June term, 1853, and a verdict rendered for the plaintiff for three hundred and thirty dollars. The defendants moved for a new trial and in arrest of judgment, both of which motions were overruled by the court, and judgment was rendered on the verdict. The defendants then appealed the case to this court.

There is a bill of exceptions on record showing the evidence given on the trial and the instructions of the court to the jury. The court below permitted Caleb Sherman, former clerk of the court, to be sworn as to whether the papers were filed by him and the attachment bond approved or not, and on his statement of the filing of the papers and the approval of the bond by him and the time when it was done, and his omission to note these facts on the papers at the time. The filing of the papers and the approval of the bond was permitted to be entered *nunc pro tunc*, to which the defendants excepted. The record in this case also shows that at the June term of court, at which the trial took place, there was also opened in court a sealed package of depositions containing the evidence of Young, Van Epps, and Martin. The record shows no motion to suppress these depositions, nor does it state whether they were read in evidence to the jury or not. In like manner the bill of exceptions does not show whether said deposi-

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Opinion of Watts, J.

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tions were read or not, but states at its conclusion "that this was all the evidence introduced in said cause by the plaintiff or defendants." The court gave the jury the following instructions:

1. That unless the plaintiff proved that the cattle in question were the cattle of David Waldo, Jacob Hall, and William McCoy, trading under the name, firm, and style of Waldo, Hall & Co., they must find for the defendants.

2. That the plaintiff in this suit was bound to take as much care of the cattle as a prudent man, mindful of his interest, would take of his own, and if such care was not taken, and they died through his neglect, he would not be entitled to pay.

The following instruction was asked for by the defendants and refused: "That in order to recover in this action the plaintiff must show extraordinary care and diligence in feeding and herding said cattle, and if this proof has not been made, they must find for the defendants."

The appellants contend that this case must be reversed, and for the reversal assign the following reasons:

1. The court erred in overruling the motion to dismiss.

2. In admitting the evidence of Caleb Sherman to the approval of the attachment bond, and filing of the original papers in this suit.

3. In allowing the bond and affidavit of the plaintiff below, together with the writ, to be filed *nunc pro tunc*.

4. In sustaining the demurrer to the plea in abatement.

5. In overruling the motion for a new trial.

6. In overruling the motion in arrest of judgment.

If any of these errors are existing in this record, the case must be reversed. We will first consider the refusal of the court to dismiss the case. On the motion of the defendants it is contended, that the writ in this case is defective and void; and for this reason the motion to dismiss the case ought to have been sustained. A motion to dismiss the cause could only reach substantial defects in the petition, for upon such a motion the writ would not come before the court, and none of its defects could be noticed. If a writ is bad, the court, on a suggestion of the defects, *amicus*

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Opinion of Watts, J.

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oier, will quash the writ, or permit the defect to be amended, if the error is of such a nature as can be amended. If there is a variance between the writ and petition, that variance can only be taken advantage of by plea in abatement. In the case of *McKenna v. Fisk*, 1 How. (U. S.) 241, also in the case of *Chiras v. Reinicker*, 11 Wheat. 280, it was decided that any mistake in the writ, or variance between the writ and the court, must be taken advantage of by a plea in abatement. The defendant can not avail himself of this objection after pleading the general issue. In the case of *Duwall v. Craig et al.*, 2 Id. 45, it was decided, that "such an exception can not even be taken advantage of upon a general demurrer to the declaration." The English courts long since adopted a rule refusing to allow oyer of the writ, and have thus wisely prevented many frivolous objections from being made, to the hindrance of and delay of justice: See 1 Tidd Pr. 502. Perhaps a party in this territory, in the sense of any rule of court, might be entitled to demand oyer of the writ in order to plead in abatement, but unless the record shows that oyer of the writ was asked and granted, the defendants would have no right to take advantage of any defects which might exist in the writ: See the case of *How v. McKinney*, 1 McLean, 319, where the law on this subject is fully stated, and the authorities cited.

In the second place it is contended, that the court below erred in permitting Caleb Sherman to testify when the original papers were filed and the attachment bond approved by him as clerk, and authorizing said filing and approval to be made now for then. The thirty-fourth section of the practice act, Laws of the Territory, page 145, reads as follows: "It shall be the duty of the clerk, whenever any paper is filed in his office, immediately to enter on the back thereof his certificate of the day on which it was filed, in the words: 'Filed in my office, this — day of —, 18—,' and sign his name as clerk to the same. But in case he should at any time neglect so to do it may, at the discretion of the court, guided by the justice of the case, be entered *nunc pro tunc*." In like manner shall all

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other matters be performed *nunc pro tunc*, when the ends of justice may require it. There is a material distinction between the actual fact of filing a paper and the written evidence of its having been filed. A paper is, in fact, filed when it is delivered to the clerk, and received by him to be kept with the papers in the cause: See Bouv. Dict., tit. File; 2 Cart. (Ind.) 91. In the case now before us it is clear that the papers were in fact filed, and the bond approved, but the clerk had omitted to notice and evidence such facts as the law directed him to do. It was no fault of the plaintiff in the court below; he had complied with the law fully, as to the affidavit and bond; and the clerical error in the case, it was fully competent for the court to correct, and the purposes of justice required such correction to be made by a *nunc pro tunc* entry on the record, showing the date at which the papers were filed and the bond approved. The court below committed no error in this particular, but it is not shown in the record that this *nunc pro tunc* entry was ever made. It was permitted to have been made. It ought to have been made, and the record ought to show the fact of its having been made, but it does not show it; it is a clerical omission, as must be clear by the reading of the bill of exceptions. But this court can not supply that omission, however ample the authority of the district court may be in the premises. If this is not the proper construction to put upon the thirty-fourth section of the practice act, then that section is in effect a nullity.

No person, except the clerk, can be expected to know whether a paper was filed with him, or a bond approved by him or not, except himself, and if it is illegal to hear his evidence and take his statements, it would be equally so to hear the evidence and take the statements of any other person. If such were the proper construction of that section, then the omission or neglect of the clerk could never be rectified by the court, and the object of the law would be wholly defeated. It was intended that the accidental omission or neglect of the clerk should not prejudice the



rights of litigants, and the construction we have given it is the only one calculated to promote that object.

In the fourth place it is contended, that the court erred in sustaining the demurrer to the plea in abatement. That the pendency of a former suit between the same parties for the same cause of action, will abate a subsequent suit, has been so repeatedly decided, that no authorities need be cited to support the position as a general rule of law. But that is not the question now before the court in the present case. Will the pendency of a suit of attachment in the Jackson circuit court for the state of Missouri, instituted by the present defendants against the present plaintiffs, defeat a suit in the United States district court for the territory of New Mexico, instituted by the plaintiff in this suit against the defendants? Whether the pendency of an attachment can in any case be pleaded in abatement, is a question about which the decisions of courts are far from being uniform. That foreign attachment or trustee process pending (though in another state) may be pleaded in abatement, was decided in the following cases: *Embree v. Hanna*, 5 Johns. 101; *Engle v. Nelson*, 1 Penn. 442; *Scott v. Coleman*, 5 Litt. 349 [S. C., 15 Am. Dec. 71]. In the case of *Winthrop v. Carlton*, 8 Mass. 456; *Morton v. Webb*, 7 Verm. 124; *Bowne v. Joy*, 9 Johns. 221; *Crawford v. Slade*, 9 Ala. 887, the contrary doctrine was decided and such pleas in abatement held bad. In the case of *Walsh v. Durkin*, 12 Johns. 99, it was decided that the "pendency of a suit in the circuit court of the United States in another state is not pleadable in abatement."

The converse of this proposition ought to be equally true—that the pendency of a suit in the circuit court of another state could not be pleaded in abatement of a suit in the United States district court of this territory, but the case of *Wadleigh v. Veazie*, 3 Sumn. 165, is more in point and decisive of the question presented in this case than any other authority we have been able to find. In that case the court says: "It is not a good plea in abatement to a suit in the circuit court of the United States for the recovery of land, that another action, in which the pres-

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ent defendant is plaintiff, the present plaintiff is defendant, is pending in the state court for the recovery of the same land." If Waldo, Hall & Co. could sue Beckwith in the Jackson circuit court of the state of Missouri, and then with their suit thus pending, abate any suit which Beckwith might institute against them here, after such abatement of the suit here they might dismiss their action in the Jackson circuit court, and thus exclude Beckwith from having his claim adjudicated upon in either court. Whether a foreign attachment pending in another state can or cannot be pleaded in abatement of a suit in the courts of this territory, under certain circumstances, is a question upon which we do not wish to be considered as having intimated any opinion. But we do decide that in this particular case, the plea in abatement now pleaded is bad, and the court below committed no error in sustaining the demurrer to said plea.

It is insisted by the appellants that the court below erred in refusing to give the jury this instruction: "That in order to recover in this action, the plaintiff must show extraordinary care and diligence in feeding and herding said cattle, and if this proof has not been made, they must find for the defendants." In support of this instruction, the appellants cite *Escriche*, 506. Even if the paragraph there cited is to be considered applicable to the present case, we think the instructions given by the court substantially cover all the duties enjoined by the civil law upon bailees for hire. A prudent man, mindful of his own interests in the management of his own stock, would be apt to comply with all the duties required of pasturers in the paragraph cited from *Escriche*.

It is also contended in this case, that the court below should have granted a new trial, because there was no evidence of the partnership of the defendants or a joint interest in the cattle wintered and taken care of by the plaintiff. The partnership is fully proved by some of the depositions on the record in this case, but it does not appear by the bill of exceptions that said depositions were introduced in evidence on the trial, and inasmuch as the bill of excep-

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Points decided.

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tions is explicit in declaring that the evidence in said bill of exceptions contained was all the evidence in the case upon the part of the plaintiff and defendant, we are bound to consider this case without regard to the facts contained in said depositions. Matters of evidence are not necessarily a part of the record, and can only be made so by a bill of exceptions setting forth the evidence. In the case of *Berry v. Hale*, 1 How. (Miss.) 315, the court explained the office of a bill of exceptions as follows: "A bill of exceptions is a method of placing upon the record, matters which do not properly belong to it, and should contain the matters so intended to be placed upon the record." The only evidence given in this case upon the subject of the partnership of the defendants is contained in a statement of Mr. Beck, "that from rumor he knew of the firm of Waldo, Hall & Co." In the case of *Earl v. Hurd*, 5 Blackf. 248, it was decided that "the existence of a partnership could not be proved by reputation." We think that the mere statement of a witness that he knew from rumor of the existence of the firm of Waldo, Hall & Co. is not sufficient evidence for the jury to infer that the defendants in the court below were liable as partners, and that the cattle kept by the plaintiff for them were partnership cattle.

The finding of the jury was not sustained by the evidence and was contrary to the instructions of the court.

The court below erred in not sustaining the motion for a new trial, and this cause must be reversed.

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### FRANCIS X. AUBRY v. JOSEPH NANGLE.

**REVERSAL BY THE LATE SUPERIOR COURT BINDING.**—A judgment of the superior court established under the "Kearny Code" reversing a decision of the circuit court in favor of the plaintiff in an attachment suit upon a preliminary issue, joined by plea to the affidavit, and granting a new trial of such issue, is binding on the territorial district court to which the cause is afterwards transferred, and such preliminary issue must be retired before the court can proceed to a trial on the merits.

**VOLUNTARY APPEARANCE, EFFECT OF.**—A voluntary appearance by a defendant cures irregularities in obtaining jurisdiction.

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Opinion of the Court—Deavenport, C. J.

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APPEAL from the first judicial district court for Santa Fe county. The opinion states the case.

*Smith and Tompkins*, for the appellant.

*Ashurst, Wheaton and Watts*, for the appellee.

By Court, DEAVENPORT, C. J.:

This was an action of attachment, instituted by F. X. Aubry against Joseph Nangle, in the circuit court of Santa Fe county, on the twenty-eighth day of June, 1849. Petition, bond, and affidavit were filed by plaintiff, and at the October term of said court, 1849, the defendant appeared, pleaded, and put in issue the truth of the affidavit upon which the writ of attachment had been sued out. Upon this issue a trial was had, which resulted in a verdict for plaintiff, which defendant sought to set aside by his motion for a new trial, which being overruled by the court, he excepted, embodied the testimony and instructions given by the court in a bill of exceptions, and prayed an appeal to the superior court of the territory, which was granted. The judgment of the court below upon the preliminary plea was by the superior court reversed, and the cause remanded, giving the defendant a new trial upon said plea. At the June term of the circuit court for Santa Fe county, 1850, an order was made changing the venue of said cause from said circuit court to the circuit court for Rio Arriba county. Afterwards, said cause, being so transferred, appears to have been dismissed in the Rio Arriba county circuit court, as evidenced by affidavits made in the district court for Rio Arriba county, at the September term there of 1851. These affidavits constituted the basis of a motion to reinstate said cause upon the docket, alleging that it had been improperly dismissed from the circuit court of Rio Arriba county. The court refused to reinstate said cause, but made an order directing the papers in said cause, with a transcript of the proceedings in that court, to be sent to the clerk of the circuit court for Santa Fe county, and further adjudged that the costs of said motion and transcript be taxed against the plaintiff. At the September term of the district court

for Santa Fe county, 1851, the plaintiff moved the court to have the papers in said cause filed and the case put upon its docket, which was accordingly done. Affidavit was also made that defendant was absent from the territory. An order of publication was made, and the case continued. At the March term of said court, 1852, defendant appeared, and moved to quash the writ of attachment, which motion the court overruled, and the cause was continued. At the next term of the court the defendant moved to set aside the order of publication, which was also overruled, and the case continued. The plaintiff, at the September term of the court, 1852, moved the court for a judgment against defendant, because the defendant had failed to plead to the merits of said action, which the court overruled, imposing terms upon the defendant to plead in a specified time. Under this ruling of the court, defendant put in these pleas: 1. The general issue; 2. That the promissory note sued on was obtained by fraud; 3. Failure of consideration—to each of which plaintiff replied, and said cause was continued.

At the March term, 1853, of said court, a trial was had upon the issues joined, and a verdict rendered for plaintiff. Whereupon the defendant moved for a new trial, and also in arrest of judgment; both of which two motions being overruled by the court, exceptions were taken, an appeal prayed for and granted, and the cause brought to this court for revision. In this court ten grounds of error are assigned, the first five of which will be treated of under one head, as they all relate to the trial of this cause upon the preliminary plea, putting in issue the truth of the affidavit in the circuit court, and before this cause was taken by appeal to the superior court, established under the Kearny code. If the district courts established under the organic law, recognized the circuit courts, deriving their existence under the Kearny code, they were equally bound to recognize the decisions of the superior court created by the same authority. This superior court did revise and reverse the judgment of the circuit court, upon the preliminary plea, remanding said cause back to the circuit court of Santa Fe county,

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Opinion of the Court—Deavenport, C. J.

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and granting a new trial to defendant upon said plea. The cause, by virtue of this reversal, stood as if such issue had never been tried. The fact of this case being transferred from the circuit court to the district court did not change its condition. It was error in the district court below not to allow the defendant a trial upon this preliminary plea, and for this reason the cause must be reversed. It is true that appeals are not often allowed from interlocutory judgments. But it is not the province of inferior tribunals to exercise appellate powers over the decisions of superior courts. There are five other grounds of error assigned, which involve the construction to be given to what is called the transfer act, passed by the territorial legislature, approved fourteenth of July, 1851. We do not conceive it important, as it is understood by the court that there are not now any cases pending in the courts of the territory which fall under the provisions, to construe it. Had not defendant appeared after publication made in the district court, the question of the legality of the transfer of this case from the circuit to the district court would have been fully discussed. But his appearance, we think, cures whatever irregularities may have occurred. By virtue of his appearance, the district court obtained jurisdiction over the case, but it was bound to receive it just as it stood in the circuit court. In the circuit court, it stood for trial on the preliminary plea, putting in issue the truth of the affidavit. That issue has never been tried, and the defendant is entitled to his trial on that before he shall be compelled to plead to the merits.

MR. JUSTICE WATTS delivered a separate opinion, favoring a reversal on the same grounds.

Judgment reversed.

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

JANUARY TERM, 1855.

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TERRITORY OF NEW MEXICO *v.* MARCELINO  
SEVAILLES.

**INDICTMENT FOR ASSAULT WITH INTENT TO KILL.**—An indictment for an assault with intent to kill is insufficient unless it avers that the assault was committed with a deadly weapon and with every ingredient necessary to have constituted the crime of murder if death had ensued.

**CAPTION OF INDICTMENT, SUFFICIENCY OF.**—Every caption of an indictment ought to show that it was found by a grand jury of the proper county; and where the indictment describes the grand jurors as "the grand jurors of the territory of New Mexico, inquiring for the county of San Miguel," etc., without showing that they were chosen, impaneled, and sworn for the county, it is insufficient. *Contra*, Brocchus, J., dissenting.

**DEFECTIVE CAPTION SUPPLIED BY THE RECORD, WHEN.**—Deficiencies in the caption of an indictment may be supplied by the record in some cases, but if the caption undertakes to describe the grand jurors, it must give a full and legal description.

**OMISSION OF AVERMENT THAT GRAND JURORS SWORN.**—Where an indictment does not state that the grand jurors were impaneled and sworn, but says that they "on their oath do present," it is sufficient. *Per* Brocchus, J., dissenting.

**STATUTABLE OFFENSE, HOW CHARGED.**—An indictment for a statutable offense need not set it out in the words of the statute, but may use equivalent words. *Per* Brocchus, J., dissenting.

**KNIFE, A DEADLY WEAPON.**—An indictment averring an assault with a knife with intent to kill is sufficient, though not stating the knife to be a deadly weapon. *Per* Brocchus, J., dissenting.

**AVERMENT THAT ASSAILANT WAS IN STRIKING DISTANCE.**—The absence of an averment in such an indictment that the assault was made within striking distance does not render it insufficient. *Per* Brocchus, J., dissenting.

APPEAL from San Miguel county. The opinions of the judges state the case.

*W. W. H. Davis, attorney-general, for the territory.*

*Watts and Ashurst, Contra.*

By the Court, DEAVENPORT, C. J.:

The only points involved in this case are in reference to the sufficiency of the indictment. In the district court of the county of San Miguel, the defendant was put upon his trial, a verdict of guilty found, and his punishment assessed at a fine of fifty dollars. Thereupon the defendant moved in arrest of judgment, which the court below sustained, and the territory, by its proper officer, prayed for, and obtained an appeal to this court. The defendant was indicted under the seventh section, third article, concerning crimes and punishments under the Kearny code, p. 63, which is as follows: "Every person who shall be convicted of shooting or stabbing another on purpose, or of assaulting or beating another with a deadly weapon, with intent to kill, maim, rob, or ravish such person, or to commit any other crime, shall be imprisoned not exceeding seven years nor less than two years." The character of the punishment inflicted by the statute constitutes the offense a felony. This offense being a felony, let us test this indictment by the law governing that class of offenses.

It is laid down by Mr. Justice Thompson in the case of *The United States v. Mills*, 7 Pet. 142, as a general rule, "that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute." Here is not that technical exactness required as to form which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes where particular words must be used, and no other words, however synonymous they may seem, can be substituted. We hold that under this statute the offense should have been charged, not only with the averment that the assault was committed with a deadly weapon,



but also with every necessary ingredient which would have constituted it murder had the assault resulted in death. In every well-regulated government punishments can only be inflicted under the law, through the instrumentality of the judicial departments. The organic law provides that no citizen of the United States shall be deprived of his life, liberty, or property in this territory except by the judgment of his peers and the law of the land. The accused had a right to be tried by the laws of the land, and according to the well-established forms of law, and we hold that neither courts nor officers of the law are authorized to overstep the one or disregard the other in order to reach offenders. The law and its well-established and long-sanctioned forms, if put into requisition, are fully adequate to reach and punish crime. The defendant, however guilty he may have been, could only have been convicted according to law. It is the province of the courts to pursue and punish offenders by the law and under the law, and if sometimes the guilty escape, it constitutes no reason for a departure from the plain path of duty. It is laid down as a rule in criminal proceedings that nothing shall be done within the discretion of the court to the prejudice of the defendant, and hence, in some instances where his interest may possibly be injuriously affected by an order, his consent is necessary. So regardful of his rights are the court that they will not encourage, or indeed suffer, him to assent to that which is manifestly to his prejudice. In some respects the courts are said to be the counsel of the prisoner; *United States v. Shoemaker*, 2 McLean, 121. These opinions, entertained and upheld by the highest authority, indicate with unerring certainty the plain path of duty marked out for the courts to tread. There is no license given to suppress crime save by legal authority. Keeping in view these principles, and being fully alive to the great abhorrence in which the benignity of the law holds the punishment of an innocent man, we can not hold ourselves authorized to punish the guilty, except the law and its well-established principles sanction it.

There is one other objection, and that is to the sufficiency

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Opinion of Brocchus, J., dissenting.

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of its caption. Every caption of an indictment ought to show that the indictors were of the precinct for which the court was holden: *Vide* 5 Bac. Abr. 93. The caption of an indictment must show with sufficient certainty the style of the court, the judge presiding, the place at which the indictment was found, and the grand jurors by whom it was found: 5 How. (Miss.) 20. This indictment only describes the grand jurors as the grand jurors of the territory of New Mexico inquiring for the county of San Miguel, etc. It does not show that they were chosen, impaneled, and sworn for the county. They may have been chosen, impaneled, and sworn in any other county, as far as the caption gives information to the defendant. It is true that the record may supply deficiencies in the caption in some cases, but it is conceived that if the caption undertakes to describe the grand jurors, that the law will require the territory to make a full and legal description. In conclusion, we will state, that the indictment should have been framed so far as the statute defines the offense under the law existing at the time the offense was committed. Let the judgment of the court below be affirmed.

**BROCCHUS, J., dissenting:**

The objections to the indictment are, first, it does not allege that the grand jurors were impaneled and sworn. The words used are "on their oath do present," and it would seem that they are sufficient. Starkie says: "It has been holden in some instances that the words 'present upon their oath' supply the place of sworn and charged. and probably this would be holden sufficient in all cases:" 1 Stark. Crim. Pl. 236-237; also in the case of *State v. Nixon*, 18 Vt. 70. The second objection is that it is not alleged that the grand jurors are for the territory of New Mexico. The caption of the indictment sets forth that the grand jurors were of the territory of New Mexico, inquiring for the county of San Miguel, which is equivalent. The setting forth of the territory of New Mexico and county of San Miguel in the margin, with allusion thereto in the body of the indictment, would have been sufficient: 1 Stark. Crim.

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Opinion of Broochus, J., dissenting.

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Pl. 237; 1 Chit. Crim. L. 1-35; 18 Vt. 70. The third objection is that there is no venue to the assault. The fallacy of that objection is so obvious that I shall pass it over without further remark than that the venue is so clearly laid that the accused, if endowed with ordinary apprehension, could not have failed to recognize it. The fourth objection is that the indictment does not charge the assault to have been made unlawfully, feloniously, or with malice aforethought. This objection I conceive to be entirely groundless, for language could not more adequately express the idea of unlawfulness, feloniousness, and malice aforethought than the words employed for that purpose in the indictment.

The fifth objection is, that the indictment does not aver that the knife with which the assault is alleged to have been made was a deadly weapon; and also that it does not allege that the assault was made within striking distance. Although the statute under which the indictment must have been framed, makes the offense an assault with intent to kill with a deadly weapon, yet, nevertheless, it is sufficient if the words of the indictment are such as, according to a reasonable intendment, would convey the idea or meaning of the statute. The gravamen of the charge is the assault with intent to kill, and the description of the instrument used in the assault, if such as to represent a deadly weapon, would undoubtedly be sufficient, inasmuch as the character of the assault and the intent of the accused were fully set forth. It is not in general necessary in an indictment for a statutable offense to follow the exact words of the statute: 2 Gall. 15. In an indictment for a statutable offense the offense need not be set out in the words of the statute. It is sufficient if the words used in the description of the offense are equivalent to those used in the statute: *State v. Bullock*, 13 Ala. 413. It is alleged in the indictment that the assault was made with a knife. As a general thing a knife is a deadly weapon, and more especially so when sought to be converted into purposes of personal violence. If the weapon used had been a dirk, or a pistol loaded with powder and ball, there can be no doubt that an allegation to that effect would have satisfied the statutes. Any knife,

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*Opinion of Brocchus, J., dissenting.*

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such as commonly in use, even such a one as a gentleman would carry in his pocket for the harmless purpose of making pens, might readily be used as a deadly weapon by the severance of the jugular vein, or by being pierced through the bosom to the heart. I can entertain no doubt of the perfect sufficiency of the words of the indictment to meet the requirements of the statute under which it was drawn. As to the objection that it was not alleged that the assault was made within striking distance, I conceive it to be entirely groundless. It was not necessary that any such allegation should have been made. The charge of assault with intent to kill raises the presumption that the assailant was within sufficient proximity to the accused to enable him to accomplish his purpose, or make him amenable to the offended law for the attempt.

While we should see that persons charged with crime are duly notified and warned of the offense with which they stand charged, in order that they may duly prepare for their defense, it is not the duty of the courts to require on their behalf a more liberal construction of the forms of proceeding against them than will fully answer that purpose. Mr. Justice Hale holds the following language in regard to the rigid construction of indictments: "In favor of life, great strictness has at all times been required in point of indictments, and the truth is that it is grown to be a blemish and inconvenience in the law and the administration thereof. More offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence; and many gross murders, burglaries, robberies, and other heinous offenses, escape by these unseemly niceties, to the reproach of the law, to the shame of the government, to the encouragement of villainy, and to the dishonor of God:" 2 Hale, 193. We should profit by the wise example of that lamented sage of jurisprudence, and while acting in the high and responsible character of guardians of the public peace, aim rather to find how the guilty shall be brought to condign punishment, than seek by lenient and charitable constructions to release them from the hands

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Points decided.

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of the law or enfeeble the administration of public justice. In this case the indictment was amply sufficient for the purpose for which it was drawn, and the court below erred in arresting the judgment.

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### JUSTO PINO ET AL. v. ALEXANDER HATCH.

**POLITICAL CHIEF, POWER OF, TO GRANT LAND.**—The political chief of the province of New Mexico, under the government of Mexico, after the separation from Spain, had no power, without express authority from the Mexican government, to grant away any part of the public domain.

**GRANT FROM POLITICAL CHIEF AS FOUNDATION OF PRESCRIPTION.**—A grant of land executed by the political chief of New Mexico in 1823, though not sufficient to pass the absolute title, for want of legal authority to make it, is nevertheless admissible in evidence as against one having no better right, to show the time and mode of gaining possession, and the point from which the adverse occupation is to be reckoned.

**EVIDENCE OF CUSTOM RESPECTING POSSESSION OF PUBLIC LAND.**—Where a plaintiff in ejectment is endeavoring to prove a prescriptive right to land of which he claims to have entered into possession in 1823, evidence is admissible to show what was the custom under the Spanish and Mexican governments with respect to getting possession of the public domain.

**DEMURRER TO EVIDENCE.**—Where a demurrer to evidence is interposed, the party demurring must admit all the facts which the evidence proves, or conduces to prove, and if there is a disagreement as to the facts, the court can not decide what facts have been proved, and compel the adverse party to join in the demurrer.

**GRANT FROM POLITICAL CHIEF PRESUMED VALID.**—A grant for a part of the public domain executed by the political chief of New Mexico in 1823, upon a petition of the grantee and with the advice and consent of the provincial deputation, and reciting the fact that it was made pursuant to legal authority, such grant and the possession taken thereunder having remained without objection from the national government for twenty-five years must be presumed to have been duly authorized and to be valid, at least so far as to confer a possessory title good against all the world except the national government. *Per Brocchus, J.*

**RIGHTS UNDER MEXICAN GRANTS PROTECTED BY TREATY.**—Property rights acquired under Mexican grants in New Mexico, prior to the cession to the United States, are fully protected by the treaty of 1848, and can not be disturbed. *Per Brocchus, J.*

**APPEAL** from Santa Fe county. The opinions of the judges state the case.

*Baird and Smith*, for the appellants.

*Ashurst and Watts*, for the appellee.

By Court, BENEDICT, J.:

This was an action of ejectment brought by the plaintiffs, in the county of San Miguel, under the law which provides that the action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises. The plaintiffs, at the October term, 1853, applied for and obtained a change of venue to the county of Santa Fe. After issue tendered, the record shows many proceedings by the respective parties in the district court, to which the cause was changed up to the June term, 1854, which are not deemed necessary to relate. At this term the cause was submitted to a jury for trial. The object of the plaintiffs was to eject Hatch from a great extent of territory lying in the county of San Miguel, which had been granted, as they claimed, to Juan Esteban Pino, the father of Justo and Manuel, and which by them, since their ancestor's decease, had been transferred to their wives. To show that the grant had been made, the plaintiff offered in evidence a document purporting to have been made to said Juan Esteban by one Bartolome Baca, as political chief *pro tem.* of the province of New Mexico, on the twenty-third of December, 1823. With this was also offered the petition of said Juan Esteban to said Baca, praying for the grant and evidence of its presentation by him to the provincial deputation of the territory and their action thereon. To the introduction of this grant by the political chief and the other documents, the defendants objected, and the court sustained the objection, and refused to permit them to go to the jury. The plaintiffs then strove to prove a prescriptive right to the premises by showing the peaceable possession and enjoyment for twenty years, and offered to ask a witness, Domingo Fernandez, a man of about ninety years of age, what was the custom under the Spanish and Mexican governments of getting possession of the public domain, and the court refused to allow said question to be asked. After the plaintiffs had closed their testimony, the defendants demurred to the evidence, and the court ruled the plaintiff to join in the demurrer on the morning thereafter, and discharged the jury.

A bill of exceptions shows, that after the court had allowed the demurrer to evidence and had ordered the joinder in demurrer, but before the joinder was made, the counsel for plaintiff could not agree with counsel for defendant as to the facts proved, and the court decided what facts had been proved, so far as the dispute was concerned and as to the facts in regard to which counsel on both sides disagreed. After the joinder was made the court found against the plaintiff, and rendered a judgment in favor of the defendant, for costs. The plaintiffs then filed their exceptions and appealed to this court, after having moved in arrest of judgment and been overruled. Among the errors which have been assigned are, that the district court erred in excluding the documentary evidence offered by plaintiffs, in compelling the plaintiff below to join in the demurrer to evidence, and in excluding the evidence as to custom. This cause is one of very great interest, not only from the immense tract of territory embraced in the plaintiffs' claim, but from the principles involved, and the adverse interests of possession and occupancy which have grown up and now exist, as appears by the evidence, upon the same tract. From the direction this case is to take as resulting from the opinion to which the court has arrived, and the peculiar manner in which the record presents the cause before us, we do not deem it necessary to enter into an elaborate discussion to fix and prescribe the principles by which such merits as the plaintiffs may have in the lands claimed, or any part of them, should finally be disposed of. We will, in reviewing the exceptions taken by the plaintiffs to the rulings of the court below, consider, first, the refusal of the court to permit the document offered, to be read as evidence to the jury. It is contended by the counsel for the defendants, that they were properly refused, because it was not shown that the sovereign Mexican authority of that nation, after the declaration of its independence of the crown of Spain, had authorized and empowered the political chief or governor of this province to grant away the public domain. The plaintiffs' counsel contends that they were not required to prove affirmatively that Bartolome Baca had authority as gov-

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Opinion of the Court—Benedict, J.

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ernor to make the grant, but such authority is to be presumed from his acts until the contrary is shown by those disputing the grant. No question seems to have been raised that the plaintiffs did not make all the preliminary proof, as to the forms and execution of the deed and documents, to entitle them to offer these in evidence. The question as to the legality of evidence offered by a plaintiff, and his right that the same shall be allowed to go to the jury, and that of the sufficiency of the evidence to make out his case, are clearly distinct. The legality must be determined by the court, the sufficiency by the jury.

It has been conceded in the argument of this cause (and the discussions have been able and luminous), that the territory in controversy was public domain, and belonged to the sovereignty of Mexico when Baca executed the documents. The court takes notice that the United States acknowledged the independence of Mexico, which had been achieved from Spain in 1821. Up to that time, the royal order of the king, by virtue of his prerogative, ruled absolutely in the disposition of the public domain, and in the separation thereof, and in the granting of parcels to individuals. Upon the assertion of these prerogatives in Mexico, the power passed to the sovereignty of the latter country. The supreme court of the United States said, in the case of *Pollard's Lessee v. Hagan et al.*, 3 How. 225, asserting the law of nations: "It can not be admitted that the king of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive, or power to exercise them. Every nation acquiring territory by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it."

It follows, then, that all power which governors of provinces, intendants, or other persons had to dispose of public domain, by virtue of authority imparted by the king of Spain, ceased upon the independence of Mexico. The sovereignty over the public domain passed from him to the sovereignty of Mexico. The title passed there, and lodged



there, and could not be divested without an authority and under a law. Neither a political chief nor a provincial governor could divest the sovereignty of the soil unless expressly authorized by the new power to do so, or his acts should be subsequently sanctioned by the political authority: See *Jones v. Borden*, 5 Tex. 410. Bartolome Baca, if he had the power to grant the title to the premises in question, derived that power from Mexico, for New Mexico at that time was governed as a part of that nation. And, as before remarked, the argument of the cause has proceeded upon the conceded ground that the sovereignty of the public domain in the province was in Mexico. No one has urged that this domain had become the property of the province, and could have been divested without the authority of Mexico.

But suppose, for the sake of the argument, the ground is assumed as invulnerable that Baca had not been empowered to grant the title to the premises, ought the court to have permitted the documents to have gone to the jury? We think it should. The rule of Spain had been driven from the country. Mexico herself was passing through tumults and revolutions. The Mexican confederation had not then been formed. The next year, after Baca's grant, the federal constitution was established. The government of this province, as proven by witness Vigil, had been turned over to the republic of Mexico in 1821. Baca describes himself as having been assisted by a provincial deputation. They doubtless had the power, and did exercise the functions to regulate (and to what extent is not now essential to inquire), the internal affairs of the province and preserve the public peace. If they had not the legal authority to grant the title and fee-simple in the public domain, we must concede to them as having had the power to regulate the possession and prescribe rules for the occupancy of the domain. The very necessity growing out of the condition of the inhabitants, their wants and welfare, presumes that power to have existed. The use of the soil for settlement, improvement, and cultivation, and for the erection of establishments for mechanical purposes, could have been properly granted: See 2

How. (U. S.) 603. The documents, to give them no other right, would have aided the plaintiffs in showing the time when and the manner in which their ancestor gained possession of any portion of the premises claimed, and the point of time from which the prescription they strive to prove, as the rancho was actually occupied, began to run as against all individuals not having a higher claim to the possession. This court is fully aware of the importance of giving full effect to the laws in this territory, which bind the courts to protect the rights of possession, improvement, and occupancy, *bona fide* and peacefully acquired. During the investigation of this case, it was in the contemplation of a majority of the court, at least to make a rigid analysis of the documents, and define from the results to which our minds have arrived the entire legal effect we think they should have in the determination of this cause by a jury. Upon more mature deliberation, however, we think it proper to refrain from embodying in this opinion our conclusions upon that point further than is necessary in disposing of the exceptions taken by the plaintiff. To go further we are not required, and, should we, it might be improperly invading the trial below, should an adjudication of the legal effects and sufficiency of the documents be had.

We turn now to the consideration of the exception to the ruling of the court in refusing the evidence as to custom; the plaintiffs now trying to prove a prescriptive right to a tract of land which Juan Esteban Pino has, as the proof showed, for a long time occupied. If there was a custom in the Spanish and Mexican governments of getting possession of the public domain, we think the plaintiffs should have been permitted to prove such custom by parol testimony. We are not aware of the rule which would have excluded that proof. At the time referred to they were foreign governments as to us. To quote no further authority, the United States supreme court say, in the case of *The United States v. Wiggins*, 14 Pet. 334, "the practice of the government in disposing of the public domain may be proven by those familiar with the custom," and this referred to the disposition made by Spain. If such practice could be proven by

parol, surely the custom of obtaining possession could be so proven. We come now to the exception to the ruling of the court in the demurrer to the evidence. This point has been very lucidly argued by the respective counsel. We are inclined to believe that the record does not show the whole of the facts as they occurred below; but, be that as it may, we are confined to it as it stands before us. On the practice of demurrers to evidence there are reported many adjudicated cases, and seldom without language of marked condemnation; yet when such course is taken by the counsel, the court has but its plain duty to perform, which is to decide all points touching such demurrers as shall be presented in such manner as it shall understand itself to be required by law. A peculiar point is presented in this bill of exceptions, and has been much dwelt upon in argument. It is important that this be disposed of. After the plaintiffs had been ruled to join in demurrer, it seems that a dispute arose between the counsel of the respective parties as to the facts proven, and, they not being able to agree, the court decided what facts had been proven. So far as the dispute was concerned, and as to the facts in regard to which counsel on both sides disagreed, the record does not inform us what the disputed facts were—neither as to number, kind, or importance; but it does show a dispute, and that it was not settled by the parties, and that the court did decide what facts were proven, and upon such decision compelled the plaintiffs to join in demurrer.

It may be proper here to inquire into the nature of a demurrer to evidence. In *Young v. Black*, 7 Cranch, 565, the supreme court say: "A demurrer to evidence is an unusual proceeding, and is allowed or denied by the court in the exercise of a sound discretion, under all the circumstances of the case. The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows that it ought never to be admitted, where the party demurring refuses to admit the facts which the other side attempts to prove." The same court says, in *The Bank of the United States v. Smith*, 11

Wheat. 171: "By this demurrer the defendant has taken the questions of fact from the jury, where they properly belonged, and has substituted the court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to is to be considered as admitted." The language of adjudged cases on this subject is very strong, to show that the court will be extremely liberal in their inferences, where the party demurring will take the question from the proper tribunal. It is a course of practice, generally speaking, that is not calculated to promote the ends of justice. In *Fowle v. Common Council of Alexandria*, 11 Wheat. 320, the court say, "that it is no part of the object of the proceedings (demurrer to evidence) to bring before the court an investigation of the facts in dispute, or to review the force of testimony or the presumptions arising from the evidence; that is the proper province of the jury. The true and proper object of such a demurrer is to refer to the court the law arising from the facts. It supposes, therefore, the facts to be admitted, and as ascertained, and that nothing remains for the court but to apply the law to the facts." This doctrine is clearly established by authorities, and is expounded in a very able manner by Lord Chief Justice Eyre, in delivering the opinion of all the judges in the case of *Gibson v. Hunter*, 2 H. Bl. 187, before the house of lords. It was there held that no party could insist upon the other party's joining in demurrer, without distinctly admitting upon the record every fact and every conclusion which the evidence given for his adversary conduced to prove. If, therefore, parol evidence is given in the case, it is loose and indeterminate, and may be applied with more or less effect to the jury as evidence of circumstances which is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of other facts. The party demurring must admit the facts of which the evidence is so loose, indeterminate, and circumstantial, before the court can compel the other side to join therein.

In this case we are compelled to regard the defendant as not admitting upon the record all the facts contended for by the plaintiffs. We are not prepared to say that the plaintiffs'

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counsel acted captiously in the dispute. It seems of so grave a nature that the court interposed and decided the facts. This decision of the court seems to be at variance with the opinions above quoted. We are unable to find an adjudged case, in which the court has in such instance exerted such power. We think it was not its province to decide what facts had been proven, and that it erred in doing so, and then compelling the joinder. It had ample power to dispose of the contumaciousness of the plaintiffs, if any existed. The exceptions do not show which party originated the disagreement, nor in whose favor the court decided the facts. It is impossible to know how differently the proof would appear in the record, had not such decision been made, nor what effect it may have had upon the final determination of the cause. It was the province of the court, not to find the facts, but to apply the law. In conclusion, we think proper to state, that we express no opinion as to the points much disputed in argument as to the evidence tending to show Hatch to be upon the actual rancho of Pino. His counsel so placed his case that all inferences which a jury could reasonably draw must be taken against him, and all that was loose, circumstantial, and indeterminate he was bound to admit against himself. Taking the whole of this case as it appears to us from the record, we think it should be sent down to the district court to be tried *de novo*. Let the judgment be reversed.

**BROCHUS, J., dissenting:**

I coincide with the reasoning of the opinion which has been read, on a majority of the points discussed, and concur fully in the judgment of the court on all the points involved, so far as it reverses the ruling of the court below and remands the cause for a new trial. I regret, however, to have to feel it my duty to deliver a separate opinion on the most important question involved in the case. I allude to the grant or deed offered by the plaintiffs in the court below as evidence to maintain their action, and by the court excluded from the jury, as complained of in the third bill of exceptions. In deciding that the court below erred in

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refusing to allow that grant to go to the jury, it seems proper that some reasons should be assigned showing that the grant, when it shall be brought to the consideration of the jury in the new trial, is to have some force and effect, and to indicate the principles which ought to govern the construction thereof when it shall come to be considered as evidence in the court below. I have to regret that in this view of the duty of this tribunal, I stand unsupported by the other members of the court.

This grant appears to have been executed by Don Bartolome Baca, as supreme political chief of the province of New Mexico, under the supreme national government of the republic of Mexico, with the consent of the national deputation of the province. It comes before us, as it was before the court below, as a duly authenticated copy of the original, bearing the appearance of genuineness, and seeming to have been executed in due accordance with the forms, ceremonies, and solemnities of the law. This document of concession grants to Don Juan E. Pino a certain extensive tract of land lying within the territory of New Mexico, the metes and bounds whereof are therein described, embracing, as it is alleged, the ranch occupied by Alexander Hatch, for the possession of which this action of ejectment was instituted in the court below. The plaintiffs in the original cause are the lawful heirs of the grantee, Don Juan E. Pino, and in the action of ejectment offered this grant as evidence of their right to recover possession. The said grant having been rejected by the court below, the plaintiffs have brought the question of its validity to this appellate tribunal. The question is one of a very delicate and important character, and in view of the importance of the principles involved, the extent of property depending on the result of this cause, and the effect which the final adjudication of this question must have upon the real estate of a large portion of the people of this territory, it is natural that I should experience some regret in differing from a majority of the court in the opinion which I entertain in reference to this most interesting and important branch of the case.

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In the investigation of the character of the grant in question, and in the application thereof to this case, we must inquire, has it emanated from a proper source? Is it duly authenticated? What is its legitimate force and effect, and is it such a grant as should command the protection of the courts of the country? It is an undisputed and admitted fact, that Don Bartolome Baca, the grantor, was at the time of the making of the said grant the duly authorized political chief of this, the then province of the republic of Mexico, to whose wisdom and care, under the advice of the provincial deputation, was confided the government and the interests of this province. It is before us upon the record, that the grantee, Don Juan E. Pino, on the sixth day of December, 1823, petitioned the said political chief for a grant of the tract of land described in the document of concession, the petitioner setting forth in the petition, the uses and purposes to which he desired to appropriate the tract of land for which he petitioned. Those uses were the cultivation of the soil, the pasturing of flocks, the promotion and encouragement of industrial pursuits, and in general such purposes as looked to the settlement of the uninhabited portions of the province, the enhancement of the value of the soil, the development of the resources of the country, and the promotion of the public good. It further appears that the said petition was referred by the said political chief, Don Bartolome Baca, to the provincial deputation of the province, for their advice and consent, it seeming clearly to have been the duty of said provincial deputation to counsel and advise with the said political chief in relation to the propriety and wisdom of making such grants. It further appears that the said provincial deputation, having duly considered the matters set forth in the petition thus referred to them, gave their agreement and assent to the concession of the lands petitioned for, and that then, and not until then, the said political chief, in the name of the supreme national government, made to the petitioner, Don Juan E. Pino, a grant of the tract of land for which he petitioned, and for the purposes for which the said grant was sought.

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It has already been remarked that the grantor, Don Bartolome Baca, was the undisputed and admitted political chief of the province of New Mexico at the time of making such grant. He held that office under the republic of Mexico and it was in that capacity that he made to Don Juan E. Pino the grant in question. It is to be presumed that all of his official acts were legitimate and in conformity to the will of the law of the sovereign power under which he exercised his authority. Such must be the rational and legal presumption, until it be shown that he transcended his powers, or acted in violation of laws bearing upon the subject. The presumption that he acted within the legitimate scope of his authority, in making the grant, derives strength from the circumstances attending the concession of the land from the incipieny to the consummation of the grant. In the first place, let us look at the petition of the party seeking the grant. It is apparent from the form of the petition, the consideration therein set forth, and the motives by which it was obviously incited, that the petitioner acted under full conviction that he was applying to the true and lawful authority for the desired grant. The reference of the petition by the political chief to the provincial deputation, indicates that the said functionary was disposed, like a faithful public officer, to proceed with due deliberation, care, and wisdom, in the discharge of a delicate and important public duty. The deliberations of the provincial deputation, and their final assent to the concession of the land in conformity to the prayer of the petitioner, the acceptance of the task devolved upon them by the reference of the petition to their investigation, deliberation, and counsel, and their response in advising the political chief to make the solicited grant, indicate that they were acting in conformity to law, and that the political chief, with whom they thus counseled and advised, acted in pursuance of legal authority, in referring the case to their consideration and in ultimately making the concession. The presumption in favor of the legality of the act of making the grant, derives additional strength from the considerations which moved the grantor



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thereto. In doing the act, he seems to have been influenced by motives that looked to the public weal, such as the population of the unsettled portions of the province, the cultivation of the soil, the enhancement of the value of the adjacent lands belonging to the public domain, the development of the resources of the country, and other benefits to the general interest of the province, which would legitimately flow from a settlement of the uninhabited portions of the territory and a spread of industrial pursuits. It is apparent that the considerations which moved the grantor in making the grant were founded in a desire to stimulate the dormant energies and develop the latent resources of the country. In this he seems to have acted the part of a faithful public officer, looking not only to the welfare of the province over which he presided, but also to the interest and aggrandizement of the supreme national government, under whose authority he held his office and in whose name he executed the grant.

These considerations go strongly to support the presumption that Don Bartolome Baca, as political chief of the province, made this grant by virtue of authority in him duly vested by the supreme national government of Mexico. This presumption is favored by the declaration in the document of concession that he made the grant by virtue of the authority upon him conferred, and in the name of the supreme national government. This grant appears from the record to have been made in the year 1823, twenty-five years before the republic of Mexico parted with the right of soil, and her political authority over this territory, wherein the land in question lies, and where the grant thereof was made. The act of granting this land was, of course, a public proceeding. The record thereof passed to the archives of the government, and it is to be presumed and admitted that such official functions, when exercised by the high public authorities of the provincial government, were not unknown to the supreme national authority. It is not to be supposed that a nation would establish within her own domains a provincial or subordinate government, appoint officers thereto, and devolve upon them the responsible duty of managing

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the affairs and superintending the interests of that subordinate government, without taking cognizance of the important acts of its functionaries.

It appears, then, that the supreme national government of Mexico acquiesced in the act of its subordinate authorities in this province, in making the grant of land here in question, for the lapse of about twenty-five years. We are to construe the silence of the supreme authority in regard to the public acts of its subordinate authorities into an affirmation or approval of those acts. It has not been shown that the supreme national government did any act, passed any law, or issued any edict disavowing grants made in this manner and by these authorities. It does not appear that anything has been done by the national government of Mexico tending to indicate that she disapproved of such proceedings; but, on the contrary, those functionaries were permitted for years to go on uninterruptedly in the exercise of such powers. By virtue thereof, countless tracts of land are now possessed by the inhabitants of this territory, who will tremble in their homes, hitherto deemed permanent and secure, when they shall have learned, from the intimation of this court, by how frail a tenure, in the opinion of this tribunal, they hold their possessions. The purposes for which such grants as the one in question were made, being such as look to the welfare of the province, the development of its resources, and consequently to the interest and greatness of the supreme government, give encouragement and strength to the idea of presumed acquiescence on the part of the superior power.

After the lapse of nearly twenty-five years from the period of this grant, this territory passed from the ownership of Mexico into that of the United States, and in the transition from the jurisdiction and authority of the old government to those of the new, the plaintiffs brought with them this grant, which had been respected and maintained inviolate for nearly a quarter of a century, and they now ask us if we will not recognize as lawful and valid an act from a high official source, which for so long a period had the unreserved acquiescence of their former sovereign. The supreme court

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of the United States, in the case of *The United States v. Arredondo et al.*, 6 Pet. 691, recognize the principle as to all public grants of lands or acts of public officers in issuing warrants, orders of survey, permission to cultivate or improve, as evidence of inceptive and nascent titles. That the public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but a legitimate authority, previously given, or subsequently ratified, which is equivalent. In that case it is said, "if it were not a legal presumption that public and responsible officers, claiming and exercising the right of disposing of the public domain, did it by order and consent of the government in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite." The same case, page 723, says: "The grants of colonial governors, before the revolution, have always been and yet are taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal revocation, or denial by the king, and his consequent acquiescence and presumed ratification, are sufficient proof, in the absence of any to the contrary (subsequent to the grant), of the royal assent to the exercise of his prerogative by his legal governors. This or no other court can require proof that there exists in any government a power to dispose of its property. In the absence of any elsewhere, we are bound to presume and consider that it exists in the officers or tribunal who exercise it by making grants, and that it is fully evidenced by occupation, enjoyment, and transfers of property, had and made under them, without disturbance by any superior power, respected by all co-ordinate and inferior officers and tribunals throughout the state, colony, or province where it lies."

The government of the United States, in all the special legislation which it has had in reference to grants by the former sovereign of portions of the domain over which she has subsequently acquired authority and jurisdiction, has always recognized the principle here insisted upon, and in the same case, *United States v. Arredondo and others*, the

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supreme court of the United States says, in allusion to such legislation by congress, that "in their whole legislation on the subject (which has been examined), there has not been found a solitary law, which directs that the authority on which a grant has been made under the Spanish government should be filed by a claimant and recorded by a public officer, or submitted to any tribunal appointed to adjudicate its validity and the title it imparted. Congress has been content that the rights of the United States should be surrendered and confirmed by patent to the claimant under a grant purporting to have emanated under all the official forms and sanctions of the legal government. This is deemed evidence of their having been issued by proper, lawful, and legitimate authority, when unimpeached by proof to the contrary."

In the same case the court say: "The judicial history of the landed controversies under the land laws of Virginia and North Carolina, as construed and acted on within those states, and in those where the land ceded by the states to the United States lie, and Pennsylvania, whose land tenures are very similar in substance, in all which the origin of titles is in very general, vague, inceptive equity, will show the universal rule that the acts of public officers, in disposing of public land by color or claim of public authority, are evidence thereof until the contrary appears by the showing of those who oppose the title set up under it, and deny the power by which it professed to be granted. Without the recognition of this principle there would be no safety in title papers and no security for the enjoyment of property under them. It is true that a grant made without authority is void under all governments: 9 Cranch, 99; 5 Wheat. 303; but, in all, the question is on whom the law throws the burden of proof of its existence or non-existence. A grant is void unless the grantor has the power to make it, but it is not void because the grantee does not prove or produce it. The law supplies this proof by legal presumption, arising from the full legal and complete execution of the official grant under all the solemnities known or proved to exist,

or to be required by the law of the country where it is made and the land is situated."

The grant in this case comes before us with all the appearances of having been executed in conformity to the solemnities and sanctions of law. In that respect it stands unimpeached. In view of the foregoing reasoning and authorities cited, it is clear to my mind that this grant must be respected as having emanated from a lawful source, such as would be recognized by congress in legislation upon the subject, and of which the courts can not be regardless. If the authority by which the grant was made is to be viewed as legitimate and binding, let us inquire what is the character and extent of the rights thereby vested in the grantee. It is obvious that the designs of the grantor were to give to the grantee, not a mere possessory right, but a permanent right to the land granted. This intention is evinced and undoubtedly indicated by the instructions or requirements of the document of concession, wherein the grantor says: "I have thought proper to grant, in the name of the supreme national government, to Don Juan E. Pino, and by this document of concession, the site which he solicits, on the river Gallinas, which shall be called Hacienda de San Juan Bautista del Ojito de las Gallinas, with the known boundaries on the north of the landmarks of the site of Don Antonio Ortiz and the mesa of the Aguage de la Yegua; on the south the river Pecos; on the east the mesa of Pajarito; on the west the points of the mesa Chapamius; in which fixed points he shall place formal and well-constructed landmarks, so that in all time the dividing lines of the lands which have been granted to him may be recognized, in order that in conformity with the laws now in force, or that may be in force, he may enjoy them for himself and his legitimate heirs."

It is not, however, necessary, in view of the bearing which this grant should have in the court below, in the action of ejectment, to determine whether the effect of the grant was to vest in the grantee a title in full property to the land therein embraced, or only the right to settle and possess. That the grant was sufficient to vest in the

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grantee the right to settle and possess, there can be no rational doubt, and there can be no more reason for uncertainty and doubt as to the quantity of land or the extent of the tract over which the right of the grantee was carried. This right of possession was to the whole of the lands within the boundaries laid down and described in the grant. The possession of a part of the tract was in legal contemplation a possession of the whole, to the effect that all other persons entering thereon without a higher and better right, derived from public authority, from the grantee himself or those holding under the grant, would be there as mere trespassers.

It appears from the evidence that the grantee did take possession of the tract of land by the erection of buildings and actual occupancy of the same. His right of possession thereby became perfected, and it was by virtue of that right that the action of ejectment was brought in the court below. Is the right thus acquired such as the courts of our country should protect? It is a humane and just principle of the law of nations that even in conquest private and individual rights of property are not disturbed in the passage of the conquered country from the old to the new sovereign. The conqueror seizes on the possession of the state and the public property, while private individuals are permitted to retain theirs. They suffer but indirectly by the war, and the conquest only subjects them to a new master: *Vat. Law of Nations*, b. 3, c. 13, sec. 200. The supreme court of the United States, in the case of *United States v. Percheman*, 7 Pet. 86, say it may not be unworthy of remark, that "it is very unusual now in cases of conquest for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world, would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relation to each other and their rights of property remain undis-

turbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of amicable cession of territory?"

But independent of this general principle, it is expressly stipulated between the United States of America and the Mexican republic in the treaty of Guadalupe Hidalgo, article 10, "that all grants of land made by the Mexican government, or by the competent authorities in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico." By the same treaty it is also stipulated that "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to move at any time to the Mexican republic, retaining the property which they possess in said territories, or disposing thereof and removing the proceeds wherever they please:" *Id.*, sec. 8. The term property here is to be taken in the most general and liberal sense, as applying to lands as well as to movable possessions. By the word property, as applied to lands, is comprehended every species of title, inchoate or perfect, embracing all those rights which lie in contract, those which are executory as well as those which are executed. In this respect the relation of the inhabitants to the government is not changed: *Smith v. The United States*, 10 Pet. 326.

The scrupulous care and fidelity which our government intended to maintain in regard to the rights of property of the inhabitants of this territory is further evinced by the duty assigned to the surveyor-general of the territory in the law creating that office, wherein it is made the duty of that officer to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico, and to make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of

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Opinion of Broochus, J., dissenting.

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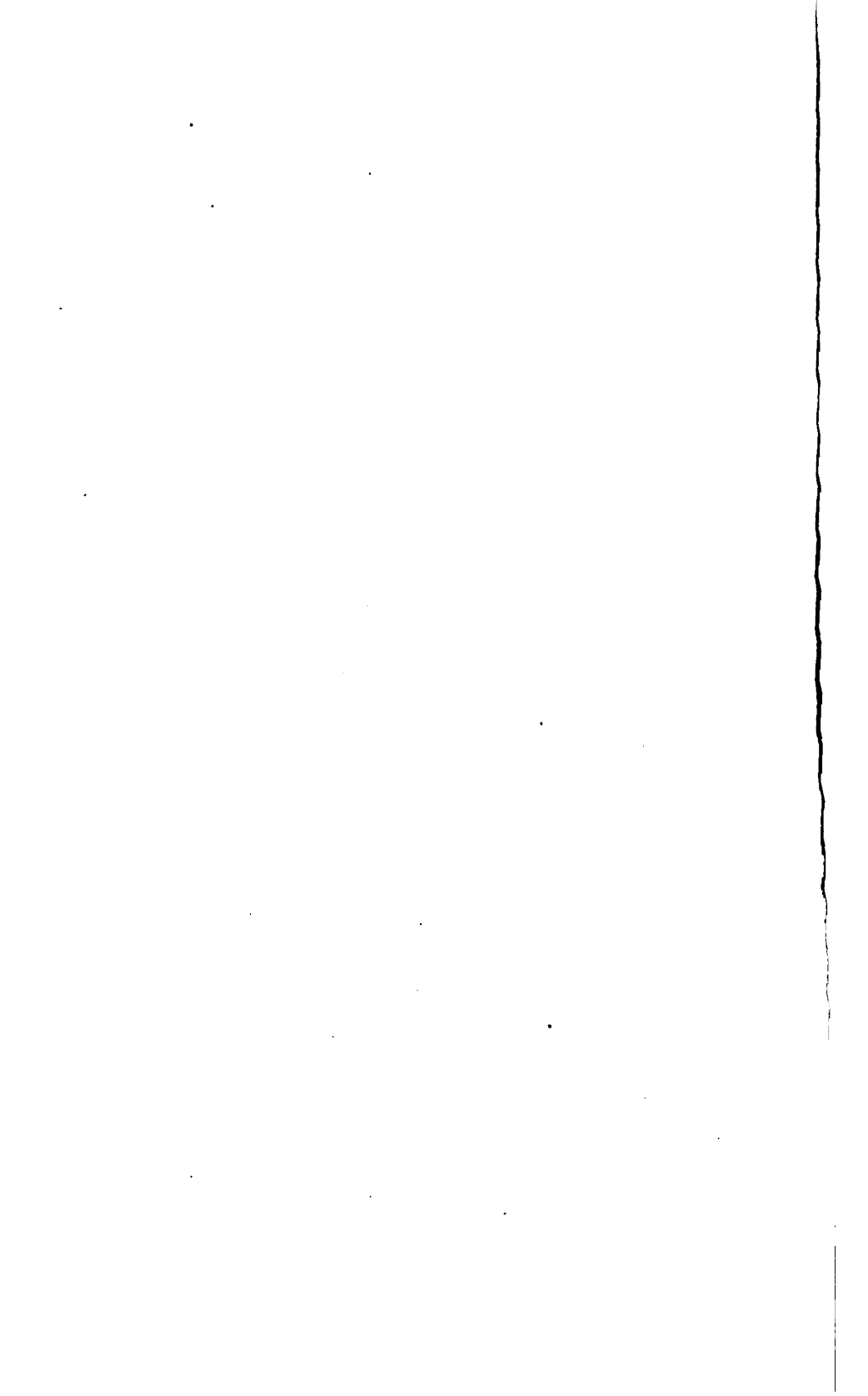
1848, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States: Statutes at Large, 1853-1854, Sheet Acts, 309.

It thus directly appears by the treaty stipulations between the United States and the republic of Mexico, and by the subsequent legislation of congress, that all rights of property of every description appertaining to the citizens or inhabitants of the territory previous to its cession to the United States, were to be sacredly respected and inviolably maintained. Thus do whatever rights were acquired by the plaintiff in this suit by virtue of the grant of the political chief of this province, stand securely panoplied against all invasion, and, although congress has thought proper to make itself the judge of the validity of such grants, it is the duty of the courts of the territory to give to the parties claiming under them such protection as the law and equity of their respective claims demand, until their rights shall have been finally determined by the government of the United States. Without deciding whether the grant in question in this case gave to the grantee a title in full property to the tract of land therein described, it is unquestionable that it invested him with a right of possession to the whole tract, which could not be defeated by any but the lawful authority in the annulment or disavowal of the grant. In the absence of any evidence of the annulment, revocation, or disavowal of the act by the supreme national government of Mexico, it must stand as evidence of the right of possession of those claiming under or by virtue of the grant. The action of ejectment is purely a possessory remedy. Its whole object is to put the party claiming possession into the enjoyment thereof. A judgment in ejectment is a recovery of the possession, without prejudice to the right, however it may appear afterwards, even between the parties: *Adams on Ejectment*, 32; *City of Cincinnati v. the Lessee of White*, 6 Pet. 431. Such was the character of the action in the court below. The plaintiffs sought to recover possession, and offered this



grant as evidence of their right of recovery. The grant distinctly defines by prominent and enduring natural objects, the metes and bounds of the tract of land which it purports to convey. These objects still exist, and are as distinctly marked now as they were at the time at which they were mentioned in the deed of concession, so that there can be no doubt as to the precise boundaries within which the grant lies.

It was proved on the trial, as appears from the evidence on record, that the ranch occupied by the defendant, Alexander Hatch, was within those metes and bounds. If the grant is worth anything more than a blank sheet of paper as an instrument, tending to clothe the plaintiffs with a possessory right; if it is sufficient to give them a right of possession to one foot of the land, it is ample for the purpose of giving possession to the whole, and sufficient to maintain the action of ejectment against all other persons entering thereon who can not show a better right. The defendant in the court below did not prove, or attempt to prove, a better right, and in the absence of such proof this grant (had it been permitted to go to the jury), aided by the other testimony adduced on behalf of the plaintiffs should have enabled them to recover.



REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

JANUARY TERM, 1857.

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MANUELA ANTONIA CHAVEZ v. WM. S. McKNIGHT  
AND JOSE MARIA GUTIERES.

**NON-JOINDER OF HUSBAND IN SUIT BY WIFE.**—Where a wife sues in her own name without joining her husband, and no objection is made on that ground in the court below, such objection cannot be made in the supreme court.

**CIVIL LAW PREVAILS IN NEW MEXICO.**—The civil law is established by legislative enactment as the rule of practice in all civil cases in this territory.

**WIFE MAY SUE HUSBAND BY CIVIL LAW.**—Although by the civil law a wife is, in general, prohibited from suing without her husband's consent, she is not thereby prohibited from instituting suits against him and other defendants, where she has a legal or equitable cause of suit.

**WIFE'S LIEN TO SECURE DOTAL PROPERTY.**—Under the civil law a wife has a tacit lien or mortgage on her husband's property, of the same efficacy as a written mortgage, to the amount of the dotal property of which he becomes possessed through her.

**EXTENT OF LIEN IN SUCH CASES.**—Such lien of the wife extends to property alienated by the husband before dissolution of the community and to that acquired by the community, as well as to the husband's property, if necessary to satisfy the lien.

**REGISTRATION OF SUCH LIEN UNNECESSARY.**—No registration of such lien is necessary, the marriage being itself sufficient notice of it.

**SUCH LIEN NOT DIVESTED BY PROCESS OF CREDITOR.**—The wife's lien in such cases is not divested by the levy of process by a creditor of the husband nor by a sale on execution.

**GANANCIAL PROPERTY, WHAT IS.**—By ganancial property is meant that which is increased or multiplied during the marriage.

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Opinion of the Court—BROCCHUS, J.

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**INJUNCTION TO ENFORCE WIFE'S DOTAL LIEN.**—An injunction lies at the suit of a wife to prevent a sale on execution of the husband's property and of that acquired by the community by one of his creditors, where the amount of such property is not sufficient to satisfy her lien for her dot brought to her husband.

**APPEAL** from the district court for the first judicial district. The opinion states the case.

*Ashurst and Watts*, for the complainant.

*Smith and Tompkins*, contra.

By Court, BROCCHUS, J.:

This was a bill in chancery before Chief Justice Deavenport, in the district court for the first judicial district, by Manuela Antonia Chavez, seeking relief against two executions upon judgments obtained by William S. McKnight against Jose Maria Gutieres, the husband of the petitioner, which executions were levied upon property in the possession of said Jose Maria Gutieres, and upon which the said Manuela Antonia Chavez claimed to have a prior lawful lien. The petitioner alleged that some time in the year 1826 she was married to one Jose Maria Gutieres, in the territory of New Mexico, and that she had lived with him as his lawful wife from the period of their marriage up to the time of the filing of her petition; that by virtue of said marriage her said husband became possessed of property belonging to her and inherited by her from her father, Francisco Chavez, to the amount of about thirty thousand dollars, and which her said husband received as her dot or jointure, and as part of her inheritance; that said property was inventoried at the time of its delivery to her husband by the representatives of her said father, in conformity to the laws and customs in force at that time in the territory of New Mexico; that her said husband, in the year 1852, became security to one William S. McKnight, on behalf of one Jose Gutieres, for a large amount; that the said William S. McKnight prosecuted suits against the said Jose Gutieres and Jose Maria Gutieres, and obtained judgments against them in the district court for the county of Santa

Ana, one for five thousand five hundred and fifty-one dollars and eighty-nine cents, and the other for one thousand nine hundred and fifty-two dollars and fifty-nine cents, and having taken out executions on the said judgments, proceeded to levy the same on the personal property of her said husband, which she alleged ought to be and of right was hers, inasmuch as her said husband had not at the time of the levying of the said executions, or at the time of her application for relief against the same, a sufficient property to pay the amount which he received from her as her dot or jointure. The petitioner further alleged that the property levied upon by the said executions was part of the produce of the property conveyed to her said husband at the time of her marriage as her dot, and set up a claim of a tacit hypothecation or mortgage upon the same, and she prayed that the said William S. McKnight and Jose Maria Gutierrez be made parties respondent to her bill; that an injunction be issued to restrain the enforcement of the said executions against the said property, and that such further relief be granted as the nature and circumstances of the case might require.

In accordance with the prayer of the petitioner a temporary injunction was granted restraining and enjoining the sale of the property under the executions aforesaid, and the said Wm. S. McKnight and the said Jose Maria Gutierrez were summoned to appear before the United States district court for the first judicial district of the territory of New Mexico, to answer the allegations made in the petition exhibited by the said complainant against them. Upon the hearing of the cause, one of the defendants, Wm. S. McKnight, the plaintiff in the executions, appeared by his counsel and demurred to the allegations as set forth in the petition of the complainant as insufficient in equity to entitle her to any relief. The court held that the matters and things contained in the bill were sufficient in equity to enable the complainant to maintain the same; therefore the demurrer was overruled, and the defendants given leave to answer the bill. The defendants declined answering, and the court thereupon adjudged and decreed that the injunc-

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Opinion of the Court—BRECHUS, J.

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tion be made perpetual, and that the plaintiff have execution against the defendants for the costs of this suit. The defendants excepted to the ruling of the court and appealed therefrom.

In the argument of this cause the counsel for the defendant have denied the right of the complainant to sue without the consent of her husband. No exception can be taken in an appeal to any proceeding in the circuit court, except such as shall have been expressly decided in that court: Act defining judicial powers, Revised Code of New Mexico, sec. 5, p. 114. The supreme court, in appeals or writs of error, shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the circuit court, or give such other judgment as to them shall seem agreeable to law: *Id.*, sec. 7, p. 116. The defendant in the court below did not contest the right of the complainant to bring the suit in her own name, without the consent of her husband, but on the contrary tacitly confessed that right and demurred to the allegations set forth in her petition as insufficient in equity to entitle her to the relief which she sought. The only question presented to the court below was as to the sufficiency of the allegations to maintain the suit. That question alone was decided by the court, and on the exception to that decision only, is this appeal founded. This court, therefore, even if its opinion inclined in favor of the proposition argued by counsel of the appellant, would seem to be precluded from the adjudication of that question by the law defining the judicial powers of the courts of this territory. We, however, have no reluctance in expressing our opinion upon that point, although our views thereupon may be regarded as *obiter dicta*.

According to the civil law, a woman, on marrying, parts with many of her civil rights, and amongst the rights alienated by the conjugal association is that of appearing generally in court as plaintiff or defendant, alone or without the consent of her husband. But she does not part with the right of prosecuting suits against her husband when causes of action against him arise. Escriche, under the head

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Opinion of the Court—Brooklyn, J.

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of *Mujer Casada*, 451, says: "The woman who marries alienates from herself the power of exercising alone the greater portion of her civil rights. The interest of the conjugal association, and the deference which she owes to her husband, require her to do nothing of importance without his sanction; therefore the wife can not, without the concurrence of her husband, make a contract, or withdraw from any that she may have made, or release parties therefrom, or make a *quasi* contract, or enter into litigation *stare in judicio*, demanding or defending by herself or attorneys. \* \* \* But the wife does not require the express permission of her husband in order to proceed against him for his civil or criminal action."

Such are the well-established principles of the civil law. Although a wife is thereby prohibited from entering alone into litigation with other persons without the consent of her husband, she is not prohibited from instituting and maintaining suits against him whenever she may have a legal or equitable cause of action. The civil law is commended to our highest admiration by the humane regard which it so justly and carefully maintains on behalf of the rights of woman. In pursuance of its wise and just policy towards the sex, it throws its panoply around the married woman to protect her against injustice, tyranny, and aggression upon her rights on the part of her husband. When her estate is imperiled by his imprudence or extravagance, she is invested with power to assume the character of complainant against him, and as such to enter the courts of the country and demand their protection. In such a character, and in such a cause, we conceive that we now find Manuela Antonia Chavez here, with her bill of rights, in the name of the law whose principles are thus commended to our admiration, asking the protection of this court against the consequence of the improvidence of her husband, Jose Maria Gutierrez.

By the allegations of the bill it appears that at the time of her marriage with him he became possessed of a large amount of property as her dot. Upon the faith of that property he became security for a large sum of money. As

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Opinion of the Court—Brocchus, J.

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such security he was sued and prosecuted to execution. The executions thus obtained were levied upon property in his possession, which she claims as equitably belonging to her by virtue of her dotal right, inasmuch as he did not then possess a sufficiency of property to enable him to make restitution to her of the amount of the dot which she brought to him at the time of their conjugal association. She prays in her petition that he be made a party respondent to her bill and summoned to answer the allegations therein contained. He stands in the attitude of a party defendant in the cause, and is constructively and virtually charged with squandering or improvidently using her dotal property, by applying it to purposes foreign from those for which it was placed in his hands; by making it liable for securityship, while its legitimate purpose was to conduce to their conjugal contentment—to secure their comfort, to protect them from want, to enable them to provide amply for their family, and to promote their general prosperity and happiness.

It is not difficult to conceive that the court below, upon a full hearing of the cause, might have decreed in behalf of the complainant, beyond the express prayer of her petition for an injunction to prevent the sale of the property levied upon by the executions. If the cause had proceeded to a final hearing upon bill, answer, and proofs, such a state of facts might have been disclosed as to have made it the duty of the court, under the prayer for general relief, to render a decree against the husband to prevent him from dissipating and wasting the property in his possession, to the prejudice of the rights of the complainant, as set forth in the allegations of her bill. Under the general prayer for relief, the court might have extended its decree beyond the specific relief prayed for by the complainant, so as to save her the trouble and expense of similar suits for the future. If the defendants had put in their answer to the bill, and the case had gone on to be heard upon the proofs, a state of facts might have been developed in reference to the extravagance and improvidence of the husband, which would have inclined the complainant to ask at the bar such a decree as would have placed her property, then in the



hands of her husband, beyond his control—beyond the reach of his improvidence and extravagance—and such a power the court could have exercised under the general prayer, if the particular relief asked for was authorized by the facts stated in the petition: Barton's Suit in Equity, 46. The allegations in this bill, it seems to us, were sufficient for that purpose. A separation of the dowry and other goods which the wife brought to her husband, and left with him on condition that he should bear the charges of the marriage, ought to be decreed in a court of justice on sufficient proof that the bad condition of the affairs of the husband and the smallness of his estate, put the property of the wife in danger: 1 Domat Civil Law, 394, 395. Such a condition of things might have been shown within the allegations of the complainant's bill if the cause had proceeded to a hearing upon the averments, the answer, and the proofs. The husband then stands in the attitude of a defendant; he is made so, not only by the special prayer that he be made a party defendant, but also by the nature of the averments contained in the petition.

This seems clearly to be a case in which the wife may sue without the consent of her husband, for it is not to be presumed that the husband would have given his consent to the institution of a suit against himself. The complainant was therefore properly in court demanding a judicial investigation of the allegations set forth in her bill. From all that appears on the record, the allegations contained in the bill, in default of the answer of defendants, are to be taken *pro confesso* as to all matters of fact therein alleged—that the complainant, Manuela Antonia Chavez, at the time of her marriage to Jose Maria Gutieres, placed in his possession property belonging to her and inherited by her from her father to the amount of about thirty thousand dollars, and that he received the same as her *dote* or jointure and as part of her inheritance. By the civil law, which is recognized and established by legislative enactment as the rule of practice in this territory, in all civil cases the wife acquires a tacit lien or mortgage upon the property of her husband to the amount of the dotal property of which he

became possessed through her: *Febrero*, vol. 3, p. 366, sec. 10; *White Recopilacion*, vol. 1, pp. 139, 140.

The recognition of this principle and the maintenance of the right of married women to such an *hipotecacion* runs through all the elementary authorities on the civil law. According to the provisions of the Spanish law, *Partidas*, 4, 11, 1, 17, the wife had a tacit mortgage on the property of her husband for the restitution of both her *dotal* and *paraphernal* effects: *Gasquet et al. v. Dimitry*, 9 La. 588; *Benj. & S. Dig.* 437. This right of the wife to a tacit mortgage is so fully and clearly maintained, both by elementary and judicial authorities, and, indeed, seems to have been so far conceded by the counsel for appellant as to render amplification upon that point entirely unnecessary, and the law being established, we will proceed to inquire into its application to this case. The complainant in her bill avers that, at the time of her marriage, her husband received as her dot or jointure, and as part of her inheritance, property to the amount of about thirty thousand dollars, and the allegation not having been denied, it stands as confessed, and therefore the law as laid down, and the facts as confessed, establish a tacit lien or mortgage upon the property of the husband, Jose Maria Gutierrez, in favor of the wife, Manuela Antonia Chavez, to the amount of her dot, as set forth in her bill. The binding force and effect of a tacit mortgage is equal to that of an express written mortgage, and attaches as strongly to the property upon which it has its lien: *Febrero*, sec. 6, p. 365; and the general mortgage of the wife for her dower extends to property alienated by her husband before the dissolution of the community and to the property acquired by the community, as well as that which belonged to her husband separately: *Chesson v. Blaque*, 3 Mart. 392; *Benj. & S. Dig.* 436. So jealous and careful does the law seem to be in the protection of the rights of the wife, that no registration or record of her mortgage is required, but the marriage alone is left to give notice of her lien upon the property of her husband. Where a husband has alienated *paraphernal* property of his wife and receives the proceeds, she has a

lien and privilege therefor on his estate, nor is it necessary that any evidence of her claim be registered: *Dreus v. Dreus's Syndics*, 8 Mart. (N. S.) 239; Benj. & S. Dig. 436. And in this respect there is no difference between her dotal and her paraphernal rights. Her mortgage arising out of her paraphernal and dotal rights stands upon the same footing as regards recording the evidence of them; her legal mortgage attaches in both cases without being recorded: *Putn v. Perret*, 10 La. 303; Benj. & S. Dig. 438.

Having seen, then, that a tacit mortgage is as highly favored by the law, and attaches as strongly as an express recorded mortgage, let us see how far it may be affected by the claims of common creditors. In the case of *Blanchard v. Blanchard et al.*, 6 La. 298, it is maintained that a sale of mortgaged property by the sheriff under execution, at the suit of another and ordinary creditor, does not extinguish a legal mortgage, *a fortiori* the levying of an attachment on it can not: Benj. & S. Dig. 447; and the principle is carried still further in favor of the mortgage of the wife in the case of *Eastin v. Eastin's Heirs*, 10 La. 198, where it is laid down, that if the legal mortgage of the wife attach to property before the sale, the court will give effect to it on the property in the hands of the vendee of the husband: Benj. & S. Dig. 437.

Such seems to be the general current of authority upon this subject in support of the principle that the lien acquired by the mortgage upon the property mortgaged can not be divested either by the levying of process upon the mortgaged property, or the sale thereof by the mortgagor, or under execution. It is alleged in the complainant's bill that the property levied upon by McKnight's executions was part of the produce of the dotal property which she brought to her husband at the time of their marriage, and in view of that averment, the counsel for appellant maintain that the property levied upon was of the character of *bienes de gananciales*, and therefore liable to the execution. By ganancial property we understand that which is increased or multiplied during marriage: White Recopilacion, 61; but in view of the allegation of the bill, that the husband had not

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Opinion of the Court—Broochus, J.

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property enough at the time of the levying of the executions to satisfy the claim or lien of his wife for her dot, the question whether the property levied upon was ganancial or not becomes immaterial, for the mortgage of the wife for her dower extends to the property acquired by the community, as well as that belonging to her husband separately: *Cassou v. Blanque*, 3 Mart. 392; Benj. & S. Dig. 437. There would be a great and glaring inconsistency in giving the wife a mortgage upon the property of the husband to the full amount of her dot, and then making property acquired by the husband liable to the debts of ordinary creditors, while the entire amount of his estate would be insufficient to enable him to make restitution of her dotal property. The proposition is entirely and palpably repugnant to the law of the tacit mortgage of the wife, as applied to this case; for it is obvious, under the averments of the bill, that to take away the property levied upon would increase an already existing insolvency of the husband to pay to his wife the amount of the dot, which she alleges having brought to him on their marriage. It was argued by counsel for the appellant, that the tacit lien or hypothecation contended for on the part of the appellee could not be enforced against creditors, but that the property hypothecated must be reduced, to be her property, by bill in chancery, or else the lien must be lost. No authorities were cited in support of the argument, and it stands in direct antagonism to all the law and reasoning which has been brought to bear upon the subject. We can not conceive that it was the duty of the appellee to seek the aid of equity, in the enforcement or protection of her lien, at any earlier period than the filing of her bill in this case, when she found a creditor of her husband about to interfere with her rights. No error appearing upon the record, the judgment of the court must be affirmed with costs.

FRANCISCO ROMERO AND JUAN BENEIDIZ v.  
FRANCISCO SILVA.

**JURISDICTION IN DEBT UNDER ONE HUNDRED DOLLARS.**—The district courts have concurrent jurisdiction with courts of justices of the peace in debt in sums less than one hundred dollars.

**COSTS ALLOWED WHERE DAMAGES UNDER ONE HUNDRED DOLLARS.**—The plaintiff in an action of debt in the district court recovering less than one hundred dollars' damages is nevertheless entitled to costs.

**FORM OF JUDGMENT AND VERDICT ON INJUNCTION BOND.**—In an action on an injunction bond, where the jury award the plaintiff damages below the penal sum, the verdict should be for the penal sum with damages assessed at the amount awarded, and the judgment should be that the plaintiff recover the penal sum to be discharged on payment of the sum awarded as damages; but a defect in this respect, being merely formal, may be corrected in the supreme court.

**APPEAL** from the district court of the first judicial district. The case is stated in the opinion.

*Wheaton*, for the appellants.

*Watts and Ashurst*, for the appellee.

By Court, DEAVENPORT, C. J.:

This case was instituted and tried in the district court of the first judicial district of this territory. Francisco Silva instituted his action of debt on an injunction bond against Francisco Romero and Juan Beneidiz. The bond is in the words and figures following: Know all men by these presents that we, Francisco Romero as principal and Juan Beneidiz as security, are held and firmly bound unto Francisco Silva in the sum of one hundred dollars, to the payment of which we bind ourselves, our heirs, executors, and administrators, forever. Sealed with our seals, and dated this May 10, 1855. The condition of the above obligation is such that whereas the above-named Francisco Romero, for himself and his associates, has sued out an injunction before his honor, J. J. Deavenport, restraining and enjoining Francisco Silva and Pedro Montoya from interfering with the said Francisco Romero and his associates from working upon and repairing a certain *acequia* mentioned in said bill

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Opinion of the Court—Deavenport, C. J.

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filed and enjoining and restraining the said Francisco Silva and Pedro Montoya from turning or directing the water from said *acequia*. Now, if the said Francisco Romero and his associates shall well and truly pay all damages that may be caused to the said Francisco Silva, on account of the wrongful suing out of said injunction, then this obligation to be null and void, otherwise to remain in full force and virtue.

Signed:

His  
FRANCISCO X ROMERO. [SEAL]  
mark.

His  
JUAN X BENEIDIZ. [SEAL]  
mark.

The defendants pleaded *nil debet*. Thereupon a trial was had, and the jury returned a verdict as follows: We, the jury, find for plaintiff and assess his damages at fifty dollars. Thereupon the following judgment was entered up: It is therefore ordered by the court that the said plaintiff recover of the said defendant the sum of fifty dollars for his damages, assessed as aforesaid, and also his costs in this behalf to be taxed. A motion was made for a new trial, which the court overruled, to the overruling of which motion defendant excepted and prayed an appeal to this court, which was granted. The error assigned in this case is that the court erred in giving judgment for the sum of fifty dollars and costs against the defendant, when it should have been for fifty dollars against defendant, and against the plaintiff for costs. In support of such error, counsel for appellant rely upon the following section of the revised code: "In all actions founded upon debt or other contract, if the plaintiff recover an amount which, exclusive of interest, is below the jurisdiction of the court, he shall recover judgment therein, but the costs shall be adjudged against him unless the plaintiff's claim, as established on the trial, shall be reduced by offset below the jurisdiction of the court." Revised Code, sec. 2, p. 198.

Under this section the only question to be settled is whether the district court had jurisdiction. The organic law provides, that the jurisdiction of the several courts

herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law, provided that justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and the said supreme and district courts respectively shall possess chancery as well as common law jurisdiction: Revised Code, sec. 10, pp. 61, 62. The territorial legislature provides the district court shall have original jurisdiction in all cases, civil and criminal, in which the jurisdiction is not specially delegated to some other court, and such appellate and supervisory jurisdiction as may be given them by law: Revised Code, sec. 21, p. 174. Let us see if the jurisdiction over this case is specially delegated to some other court. There is nothing in the organic law that ousts the district court of its jurisdiction over this case. If we examine the jurisdiction given to justices of the peace, we find that every justice of the peace shall have jurisdiction co-extensive with the county of or for which he is elected, of all actions of debt, covenant, and assumpsit, and in all actions founded on contracts, of trespass, and trespass on the case for injuries to persons, or to real or personal property, wherein the debt, or balance due, or damages shall not exceed one hundred dollars, and to take and enter judgment on the confession of any defendant when the amount of the judgment confessed does not exceed one hundred dollars: Revised Code, sec. 34, p. 142; but there is no exclusive jurisdiction specially conferred on them by the legislature. We understand by these terms, "not specially delegated to some other court," to mean a jurisdiction to be exclusively exercised. The district court has concurrent jurisdiction with the courts of the justices of the peace in debt, etc., in sums under the amount of one hundred dollars. The amount of damages not falling under the jurisdiction of the district court, there is no error in taxing the costs against defendant. The only error we perceive in the record is in the form of the verdict and judgment rendered below. The verdict should have been: We, the jury, find for the plaintiff the

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 Points decided.
 

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penal sum of the bond, and assess his damages on the same at fifty dollars. The judgment should have been: It is therefore ordered by the court that plaintiff recover of the defendant one hundred dollars, the penal sum of said bond, to be discharged by payment of fifty dollars, the damages assessed by reason of the breach of the same, and also his costs on this behalf expended, to be taxed. But as this only goes to the form and not to the substance, it may be corrected in this court. Let the judgment be affirmed, with the modification as to the form, with costs.

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### JUAN ARCHIBEQUE v. JOSE MARIA MIERA.

**DISTRICT COURTS HAVE NO STRICTLY APPELLATE JURISDICTION.**—Under the organic act no court is clothed with appellate powers except the supreme court, and the legislature can not confer upon the district courts strictly appellate and revisory jurisdiction.

**APPEAL TO DISTRICT COURT FROM JUSTICE, HOW TRIED.**—On an appeal from a justice of the peace to the district court, the case is tried *de novo* on its merits in such district court, as a court of original jurisdiction, and not as an appellate court, without regard to the previous trial, and the parties may file accounts, set-offs, etc., as if the case had originated in the district court.

**ERRORS IN TRANSCRIPT ON SUCH APPEAL.**—The transcript on appeal from a justice of the peace to the district court is to be resorted to only to ascertain that the case originated and was tried in such justice's court, a judgment rendered, and an appeal properly taken, and it is not error for the court to refuse to dismiss the case for errors apparent in the transcript.

**DISCREPANCIES IN TESTIMONY ARE FOR JURY.**—It is the province of the jury to weigh the testimony and to decide as to apparent discrepancies therein.

**NEW TRIAL BECAUSE VERDICT AGAINST EVIDENCE.**—An application for a new trial because the verdict is against evidence is addressed to the sound discretion of the court, and should be denied, unless the finding of the jury is clearly against the weight of evidence, and the ends of justice obviously require that a new trial should be had.

**APPEAL** from the district court of the first judicial district for Santa Ana county. The case appears from the opinion.

*Joab Houghton*, for the appellant.

*S. B. Elkins*, contra.



By Court, DEAVENPORT, C. J.:

This action was commenced before Vicente Romero, a justice of the peace for the county of Santa Ana, by Juan Archibeque against Jose Maria Miera, for damages done to his wheat in his wheat-field by the cattle of defendant. The said justice of the peace gave judgment against said Miera, that he should pay said Archibeque forty almudes of wheat, from which judgment said Miera prayed an appeal to the district court for the first judicial district for the county of Santa Ana. In the district court the case was tried *de novo*. Defendant Miera, in the district court, made a motion to dismiss plaintiff's action for reasons apparent on the record, which the court overruled, and allowed plaintiff to file his account. The account filed is in the following words: "To damages caused by the cattle of said Jose Maria Miera, eating and destroying the wheat of the said Juan Archibeque, of the value of fifteen dollars, being forty almudes of wheat, in the year 1855." To the overruling of said motion, and permitting said account to be filed in said cause, the appellee assigns as error, if there be error in the record, in his joinder to errors assigned by appellant. To settle the practice in cases of appeals from the courts of justices of the peace to the district courts of this territory, it is deemed necessary to notice these points. The organic act, section 10, enacts, that the judicial power of this territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The same act sums up the jurisdiction of these several courts as follows: The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of justices of the peace, shall be as limited by law, provided that justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundaries of land may be in dispute, or when the debt or sum claimed shall exceed one hundred dollars. And the said supreme and district courts respectively shall possess chancery as well as common law jurisdiction.

Under the organic act no court in this territory is clothed

with appellate powers except the supreme court. The district court, courts of probate, and of justices of the peace are courts of original jurisdiction. The jurisdiction of these several courts is thus limited by the organic law as to their appellate and original powers. It fixes their character; and that portion of the organic act which provides that the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law, provided, etc., it does not confer upon the legislature the power to bestow upon the supreme court original jurisdiction, nor appellate powers upon the other courts therein mentioned. It only provides that the jurisdiction of the supreme court, with its appellate power, shall be as limited by law, and the jurisdiction of the other courts therein mentioned as courts of original jurisdiction shall be as limited by law.

It will be seen, by reference to the revised code, sec. 101, p. 164, that it is provided, that any person aggrieved by any judgment rendered by any justice may appeal by himself, his agent, or attorney, to the district court of the county where the same was rendered, under the provisions therein specified. Section 104, on same page, provides that the case upon such appeal shall be tried *de novo*, and the same rules shall govern the district court in said trial that are prescribed for the government of justices' courts. The appeal here allowed is only a remedy prescribed by law to enable parties who may conceive themselves aggrieved by the judgments of justices of the peace, to take their cases into the district courts as courts of original jurisdiction, to have their cases there tried *de novo* upon their merits. Section 103 requires that on or before the first day of the next term of the district court for the county, the justice shall file in the office of the clerk of said court a transcript of all the entries made in his docket relating to the case, together with all the papers relating to the suit: See Revised Code, 164. The motion made by appellee, in the court below, to dismiss the action for reasons apparent on the record had reference to the transcript sent up by the justice of the peace. The district court did not sit as a court exercising

appellate powers to revise and correct such errors in law as might appear in the transcript of the justice of the peace. The case had been brought by appeal from the court below to be tried *de novo*. The only office which the transcript by law can perform in the district court is to certify to that court that a certain case had originated in the justice's court, how said case was decided, and that the appeal had been regularly prayed for and taken to the district court. And upon such appeal being taken it is the duty of the justice of the peace to send up with his transcript all the papers relating to the case. The case then is regularly in the district court, to be tried *de novo* upon its merits; in other words, the district courts, ascertaining from the justice's transcript that the case had originated in the justice's court, and there having been tried and being brought properly before it by appeal, it pays no further attention to the transcript, but proceeds to try the case upon its merits, as if no trial had ever taken place. From this point the district court proceeds unhackled to try the case *de novo*, allowing the parties, not by way of amendment, but as in a case never before tried, to file their accounts, set-offs, or to do whatever is necessary to a full, clear, and legal representation of the real merits of the issue between the parties. The case in every respect is to be tried *de novo*, without regard to the proceedings of the justice of the peace, and the district court can only look to the transcript of the justice of the peace for the purpose of ascertaining if the case appealed is the one that originated there, and, after having done so, the transcript is of no further service than that of enabling the clerk to tax the costs in the case.

In disposing of this error, as assigned by the appellee, this court only does so to settle the practice in relation to appeals from justices of the peace to the district courts, a practice which is of growing importance, inasmuch as from the imperfect manner in which justice's of the peace keep their entries, if cases had to abide the transcript made out and sent to the district courts, scarcely one in twenty could ever be tried *de novo*. In overruling said motion to dismiss plaintiff's action, and in permitting him

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Opinion of the Court—Deavenport, C. J.

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to file his account, the district court committed no error, and its course is in accordance with law and in consonance with the practice as indicated and set forth above. The case proceeded to trial in the district court below, and the jury returned a verdict in favor of the defendant, Miera, and the court rendered up a judgment in his behalf. Plaintiff below moved for a new trial, which the court overruled. To which opinion of the court, in overruling said motion for a new trial, plaintiff excepted, and prayed an appeal to this court. Two grounds of error are assigned here by appellant: 1. That the district court erred in refusing to grant the motion for a new trial; 2. The district court erred in rendering judgment for appellee when it should have been for appellant. It is necessary to examine the testimony in this case to ascertain if there be error or not. Pablo Archibeque, a witness on the part of appellant, states that on one occasion he saw eleven head of cattle, large and small, belonging to the said Jose Maria Miera, jump into the wheat-field of Juan Archibeque, and he went and drove them out. It was in June, about the first. The field was damaged about the time he drove them out. Juan Archibeque came to the field and asked whose cattle they were, and witness said they were the cattle of Jose Maria Miera, and Archibeque drove them to his corral. This was in the summer of last year. This witness, it will be observed, states that this occurred about the first of June, and that Juan Archibeque drove the cattle to his corral; and the very next witness, Juan Cermigo, introduced by plaintiff, proves that on one occasion in the same year he saw the cattle of Jose Maria Miera in the corral of Juan Archibeque, about twenty-one cows; about the last of June or the first of July. Here is a difference in point of time of a month, or nearly so, between the testimony of his first two witnesses, and as to the number of cattle, a difference of ten, the first witness stating that there were only eleven and the latter twenty-one cows.

These discrepancies between the statements of these two witnesses it was the legitimate province of the jury to weigh in connection with the other facts in the case, in making

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Opinion of the Court—Deavenport, C. J.

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up their verdict. Another fact connected with the testimony of Pablo is worthy of consideration in coming to an opinion in this case. He is the only witness who saw the cattle in the field of Juan Archibeque, and had the best opportunity to know the extent of damages done by the cattle, if any. He says the field was damaged, but does not state to what extent, or by whose cattle. Why did not the plaintiff prove by him the amount of damage done by Miera's cattle? The two witnesses, Diego Garcia and Francisco Garule, who assessed the damages of forty almudes of wheat, both state that when they went to the field they found the tracks of horses, burros, and cattle in the field, and that they assessed only the fresh damages; and Santiago Real, the witness who was directed by the justice of the peace to have the damages assessed, testifies that the ground was wet, and that in the field there were tracks of cows, horses, jackasses, and mules, and the ground being moist, all the tracks appeared fresh. The defendant introduced two witnesses, Salvador Jarmilla and Salvador Gonzales, who state that during the summer they had seen two horses of Don Miguel, and one burro, two oxen, and four mules of Juan Archibeque in the same wheat-field, and that, by the bidding of Miera, they had turned them out.

This was in substance all the testimony in the case. The jury below had the right to weigh all this testimony, and if from the fact that plaintiff's own stock had been in the wheat-field, and from the number of tracks of cows, horses, jackasses, oxen, and mules, they believed, from the fact of the ground being wet and all the tracks appearing fresh, it was impossible for fresh damages to be proved as having been done by Miera's cattle, and gave a verdict for defendant, the court below ought not to have disturbed their verdict.

It appears from the evidence in this case, that it was left to the jury to determine whether the damage complained of was done by Miera's cattle, or the cattle of plaintiff himself, or the stock of some third person. There is testimony that the cattle of plaintiff, with two horses of Don Miguel, had been driven from the same identical wheat-field. The two

## Points decided.

witnesses who assessed the damages testified to the appearance of tracks of mules, jackasses, and horses in the same field, and they say they only assessed the fresh damages. But Santiago Real testifies that he saw the same tracks, but the ground was wet, and all the tracks appeared to him fresh. Then here is testimony which it is the legitimate province of the jury to weigh and settle for themselves. Applications for new trials for verdicts against evidence are addressed to the discretion of the court, which is to be so exercised as to subserve the substantial ends of justice: *Laflin et al. v. Pomeroy*, 11 Conn. 440. If it does not clearly appear that the finding of the jury is against the weight of evidence, or that it is necessary to the justice of the cause that there should be a new trial, or that the result would or ought to be different, the court will not disturb the verdict: *Id.* The testimony in this case raises a doubt whether the damage done to the wheat of plaintiff was done by Miera's cattle or by the cattle of plaintiff, and it is clearly the province of the jury to determine the doubt.

As there is no clear preponderance of testimony against the verdict, this court will not disturb it, but the judgment must be affirmed.

### DANIEL GREEN v. CAPTAIN RICHARD S. EWELL

**DESCRIPTIVE ROLL OF SOLDIER AS EVIDENCE OF AGE.**—On a trial of the right of one enlisted as a soldier in the United States army, to be discharged on *habeas corpus*, on the ground that he was a minor when enlisted, the descriptive roll made out at his enlistment, stating his age to be over twenty-one, is important evidence of that fact.

**PRESUMPTION IN FAVOR OF MAJORITY.**—Where the descriptive roll states the recruit to have been over twenty-one, and he has since received pay, subsistence, etc., as a properly enlisted soldier, without objection, the presumption is in favor of the regularity of the proceedings of the enlisting officer, and that such recruit was of lawful age until he establishes the contrary by proof of an evident and decided character.

**OPINIONS AS TO AGE FROM PERSONAL APPEARANCE.**—Opinions of witnesses as to the age of such a person from his appearance are very uncertain and unsatisfactory evidence on that point.

**APPEAL** from the district court of the third judicial district. The opinion states the case.

*Smith and Watts*, for the appellant.

*Wheaton*, for the appellee.

By Court, BENEDICT, J.:

This was a cause before Benedict, J., of the third judicial district. On the twenty-third day of July, 1856, Hon. John S. Watts, as attorney in behalf of Green, presented to the judge a sworn petition, among other things stating that Green was unlawfully restrained of his liberty at Las Lunas, in the county of Valencia, by Captain Richard S. Ewell, commanding the military post at Las Lunas, under pretense that he was a private soldier in company G of the First Dragoons, and that he was compelled to do military duty as such soldier; that he was at the time of his supposed enlistment a minor, under the age of twenty-one years, and that his contract was not binding upon him; that at the time of said enlistment he was about the age of eighteen, and that he was about twenty-two at the time the petition was presented. Green did not himself make oath to the truth of the petition. A writ of *habeas corpus* immediately issued, and on the twenty-sixth day of said month, in the absence of Captain Ewell, Horace Randall, a lieutenant of said company, returned the writ, and with it produced the body of Green before the judge, and answered that Green was legally enlisted on the eighteenth day of January, A. D. 1853, to serve for five years. After hearing the respective proofs, the judge pronounced his judgment that Green was rightfully and lawfully detained as a private soldier in the military service of the United States at post Las Lunas, in company G of First Regiment of Dragoons, of which Ewell was captain, and that said Green be remanded back to said service and to the custody and command of the commanding officer of said company as fully as before the obtaining of the writ in this cause. A bill of exceptions was then tendered, embodying the testimony and signed by the judge, and Green appealed to this court. The only error alleged by Green's counsel is, in substance, that the testimony did not authorize the judge to remand Green to service, but that he ought

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to have been discharged from the army. Nothing more is incumbent upon this court than to examine the evidence and to render such judgment as the judge should have rendered. Green produced witnesses to prove his minority at the time of his enlistment. One McKearney testified that he was a dragoon in K company in Albuquerque and went to Carlisle barracks as an enlisted soldier in 1852. Knows Daniel Green. First saw him at Carlisle barracks in February, 1853. He came there as an enlisted soldier. Seemed to be about nineteen years old. Formed his opinion entirely from Green's looks and appearance. Thinks he has grown some since. Witness was from Ireland.

Wm. Headen testified that he was a soldier at Carlisle barracks in February, 1853, and knew Green at that time; that he came to that place as an enlisted soldier; that he then supposed Green, from his appearance, to be from eighteen to nineteen years old, but he might have been more. Seemed to be a mere boy. John Ennard swore that he is a discharged soldier. Is blacksmith in quartermaster's department. Knew Daniel Green near three years ago, at Las Lunas, when he came to the company there when witness was a soldier. Supposed, from the appearance of Green then, that he was about twenty years old. Supposes him to be about twenty-two now.

John Stewart swore: Was discharged as a soldier in February last. Knew Green when he joined the company at Las Lunas. Supposed him to be at that time under twenty-one years of age.

Thomas Henderson was then sworn for the defense, and testified: Is first sergeant in Company G, of which Green is a private. Has known him since 1853. Did not form an opinion as to his age. The descriptive roll of his enlistment was sent from the adjutant-general's office at Washington to Las Lunas. When a man is enlisted, the enlisting officer has to send a true descriptive roll of the enlistment to Washington, as his voucher for the money which he has paid the enlisted man. About one month after Green joined the company at Las Lunas, witness copied the descriptive roll sent from Washington, as to Green. The copy is in a



large book, which is now presented, and is kept for the purpose of copying such rolls. The copy made is correct from the original. This roll, which witness now exhibits to the judge trying this cause, states, "that Daniel Green was enlisted in the military service of the United States by Major Greer, at New York, in January, 1853; that his age was then twenty-two years; height, five feet seven inches; eyes blue; hair brown; town, Cavan; state, Ireland; occupation, a servant; and joined Captain Ewell's company on the seventeenth day of August, 1853," from the school of practice, Carlisle barracks. Witness further states that Green has received clothing and pay; made out his accounts; shows a receipt given by Green for clothing for April, 1854. Witness presents papers purporting to be muster roll and paymaster roll, and testifies that they are correct and true as they each purport. These show that Green has received his pay as a soldier. Witness has seen descriptive rolls, stating persons as enlisted under twenty-one years of age. Green is in the habit of truthfulness; does not know as to his trustworthiness; is rather too smart; knows too much; has got to preaching law lately.

In examination of this testimony, attention will be turned finally to that on the part of the defense. No question has been made as to the competency of the evidence derived from the descriptive roll, the book, papers, documents, etc. In our opinion the descriptive roll must be regarded as a very important document of proof in the correct determination of this cause. Green was enlisted at New York, in January, 1853, by Major Greer, of the United States army. The general regulations for the army are strict in their orders and directions to recruiting officers, and especially as to the age—the true age of a recruit. On page 134, it is said recruiting officers must be very particular in ascertaining the true age of a recruit. They are not always to take his word, but are to rely on their own judgment for the ascertainment of his probable, if not his actual age. No person under the age of twenty-one years is to be enlisted without the written consent of his parents, guardian, or master, if any he has. The officer is directed how to proceed to pre-

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vent imposition upon the public, as well as to guard himself against the penalty of the law, in cases where minors assert that they have no parents, guardians, or masters. Now it is to be presumed that the officer recruiting conforms to the regulations and fully discharges his duties. The descriptive roll is to be taken to be true and correct as made out and officially furnished the adjutant-general's office. Major Greer was bound to take all necessary means to obtain Green's true age. He doubtless did so until he became well satisfied, as a faithful officer. The age of Green was found to be twenty-two years and he entered the United States army as of such age and was placed upon the roll as having that number of years. It would not be easy to arrive at the conclusion, that Major Greer did not receive from Green's own lips a statement of his age. Green has not attempted to show that the roll is incorrectly made out from the facts as they were then found or believed to exist. No question is now made upon the accuracy of any item as it really existed, except that of age. The color of the hair, the eyes, the nativity or state, and previous occupation, etc., remain unassailed in their exactness. Neither fraud nor imposition is disclosed as having been practiced upon him. Surely he must be held upon principles of common honesty and sound legal policy committed to abide by his own acts and representations, unless his proof shall be of an evident and decided character establishing his minority. Especially must he be so held when such acts and representations induced the government, through one of its officers, to believe him in good faith and to take its steps accordingly. To his own knowledge he participated in the bounties, pay, subsistence, clothing, etc., the results of the candid and faithful conduct of the government, trusting in him and fulfilling the laws.

We now direct our investigation to the testimony introduced before the judge on the part of Green. McKearney first saw him at Carlisle barracks, and he seemed to be about nineteen years old; formed his opinion entirely from general looks and appearance; thinks he has grown some since from his appearance. Headen supposed him to be

from eighteen to nineteen years, but might have been more; seemed a mere boy. To Ennard, at Las Lunas, in 1853, he appeared about twenty years old. To Stewart, at the same time, he appeared to be under twenty-one years. This, substantially, is all the evidence produced for Green. At the merest glance its unsatisfactory nature is apparent. It amounts to nothing more than the judgment of the witnesses from Green's appearance. In weighing testimony a court or jury will take notice of the fixed laws of nature and apply the results of careful and discriminate observations. These will aid the reason in giving just weight to the declarations of any witnesses. It needs only to be suggested to awake the mind to the difficulty of fixing from appearances the true age of persons upon the confines of any two of the known and marked periods of human life. Green appeared to the witnesses as vacillating in his looks and what they term his appearance between youth and manhood. To one he seemed eighteen years; to another from eighteen to nineteen; to another about twenty, and to another under twenty-one. Now, in the judgment which these witnesses formed from the inspection, so to speak, of Green, they ranged through a period of about three years. This of itself exhibits how loose, uncertain, and indefinite are conclusions derived from the mere appearance of a young man passing between the years of youth and manhood. It is a time when witnesses of the ripest experience and keenest discrimination may often fail in their judgments as to age. Some persons develop, physically and mentally, much earlier than others, while nature will be found postponing the maturity of some to a late period. It is not uncommon to meet young men past twenty-four or more years having all the appearance of those just arriving at majority. These known facts demonstrate the unsatisfactory character of the testimony on Green's behalf, when estimated with the view of combating and overcoming the force of Green's enlistment for twenty-two years, his acts and necessary statements at the time, the conduct of the recruiting officer, and the record or descriptive roll presenting permanent evidence of the facts as understood at the time of the transaction. It

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is not unworthy of remark that Green was present in person before the judge who tried this cause below, and that he had an opportunity, equally well with the witnesses, to observe the appearance of Green after he had served over three years of his enlistment. This could not have failed to enter the judge's mind while weighing the witnesses' opinions as to Green's age from his personal appearance. It could not have been otherwise. Upon the whole, this court is unanimous in its opinion that Green utterly failed to prove his minority before the judge below, to relieve him from the consequences of his enlistment, that the cause was correctly determined below, and the judgment of the judge is hereby affirmed, with costs.

Judgment affirmed.

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GEORGE McDONALD v. BREVET MAJOR JAMES H. CARLTON.

**DURESS OF IMPRISONMENT.**—To constitute duress, an imprisonment must be tortious, and without lawful authority, or by an abuse of lawful authority.

**LAWFUL IMPRISONMENT NO DURESS.**—Imprisonment under regular and lawful process, upon probable cause and without malice, does not constitute duress so as to invalidate a contract entered into by the prisoner to procure his freedom, unless he has been induced thereto by unlawful force or privations.

**RE-ENLISTMENT BY SOLDIER LAWFULLY IMPRISONED.**—A contract of re-enlistment voluntarily entered into by a soldier while under lawful arrest for a military offense, through the friendly counsel of his guards, but without any request or solicitation of the enlisting officer, though upon his promise that the charge pending will be dismissed if the soldier's future conduct is good, is not invalid for duress.

**ENLISTMENT ON SUNDAY VALID.**—There is no law in this territory invalidating a contract of enlistment by a soldier entered into on Sunday.

**APPEAL** from the third judicial district. The case appears from the opinion.

*J. S. Watts*, for the appellant.

*H. N. Smith*, for the appellee.

By Court, **BENEDICT, J.:**

This was a cause tried before Justice Benedict, Judge of

the third judicial district, on the twenty-first day of July, 1856. McDonald, by Hon. John S. Watts, presented to the judge his sworn petition, stating, among other things, that he was illegally confined and restrained of his liberty at the guard-house in Albuquerque, by one Major James H. Carlton, commanding K company, First Dragoons, United States army, under the pretense that he was, on the eighteenth day of March, 1855, legally enlisted into the service of the United States as a soldier in said company, when in truth and in fact said enlistment was absolutely void, because it was made on Sunday. At the time of making said enlistment he was imprisoned and under duress, which also rendered void any engagements which may have been made by him, and confers no right upon the United States to restrain him of his liberty under such supposed enlistment. Upon this the judge immediately issued a writ of *habeas corpus* to said Carlton, who, on the next day, returned the writ, and produced McDonald in his proper person before the judge, and answered in substance that he detained him as an enlisted soldier in the army of the United States, and that his enlistment was made on the eighteenth day of March, 1855, and that he was restrained in the guard-house awaiting the sentence of a court-martial upon charges for which he had been tried. After hearing the cause, the judge pronounced his judgment: "That McDonald was rightfully and lawfully detained in the military service of the army of the United States, in company K, commanded by said Carlton, and said judge did order and adjudge that said McDonald be remanded to the said service, and to the custody of said Carlton, to be as before the issuing of the writ."

From this judgment McDonald appealed to this court, and assigns for error the act of the judge in rendering such judgment.

This involves an inquiry into the nature and effect of the testimony embodied in the bill of exceptions, to enable us to determine what judgment should have been rendered. The grave allegation contained in the petition is, that at the time of McDonald's enlistment as a soldier in the army

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of the United States he was imprisoned and under duress. It appears by the testimony of William McClear, that he was first sergeant of company K, United States army, and that McDonald was a private in the same. On the twenty-seventh day of March, 1855, the latter would have completed one term of service. On the twelfth of that month, he had been put in the guard-house, and witness understood that charges of a serious nature had been preferred against him, such as, if true, might stop all the pay then due McDonald, and cause him to be drummed out of the service; that on the eighteenth day of the same month he re-enlisted; that the day before, he was let out of the guard-house, and went to the company quarters and washed and cleaned himself. Previous to enlisting, he asked the witness what he had better do. Appeared to be in trouble about his case, and the charges that had been preferred against him. Witness did give his opinion, but not until after McDonald had re-enlisted. He then stated to him, that in his opinion he had done the best he could for himself. Witness knew of no practices made use of by Major Carlton, or any other person, to harass McDonald into a re-enlistment, and he was subjected to no more rigorous treatment than other prisoners in the guard-house. McDonald is a Scotchman, and first enlisted in New York, and when not in liquor was a good soldier and a good man; that since he enlisted he has been tried on charges. Does not know of Carlton using any practices, by himself or through other persons, to harass or procure men to re-enlist against their consent. Never heard Carlton speak to McDonald upon the subject of his re-enlistment. This was substantially all that this witness testified, except that he was not positive upon what day of the week the enlistment took place, but thought it was Sunday, to the best of his recollection.

Lewis, a private in the same company, testified in substance that he thought McDonald was re-enlisted on Sunday, but, owing to the lapse of time, was not positive. Was guard over him a few days previous. The guard being fellow-soldiers of his, some of them, from feelings of friendship, advised him to re-enlist, and that it would be better

for him, as it was the general impression that if he did not re-enlist he would be tried and drummed out of the service. The charges for which he was in the guard-house were for being drunk on guard and found asleep on post as a sentinel. The conversation of the guard about McDonald's case was in his presence, but does not know if any of it was addressed to him; they were talking of what would be best for him to do, as from the nature of the charges they thought it must go hard with him. Does not recollect of his being told that he would lose his pay and be drummed out. McDonald knew what would be the consequences, from the nature of the charges, if tried. The fellow-soldiers were of the opinion that it would be best for him to re-enlist. Major Carlton seems to have been himself sworn, without objection, and in substance testified that, a day or two previous to re-enlisting, McDonald solicited him to re-enlist him and to have the charges preferred against him withdrawn, and he agreed to withdraw the charges upon McDonald promising to do better and behave himself well and not get drunk. Should he do so he might leave his final papers in witness' hands and secure his money. There was due him between two hundred and fifty and three hundred dollars on his final papers. That he had several conversations with McDonald, at his own request, about the charge against him and re-enlisting. That he used no force, no violence, to induce McDonald to re-enlist. When not drinking, is a good man and a good soldier. Had he not re-enlisted, he probably would have been prosecuted on the charges against him. They were preferred by Lieutenant Daniels, and if they had been proved true, would perhaps, have cost McDonald his pay, and he would have been dishonorably discharged if found guilty. A court-martial would have sentenced him to great punishment. After he re-enlisted, witness withdrew the charges, and they were destroyed. Had he not re-enlisted after having been let out of the guard-house, he probably would have been returned to it again and tried on the charges. Witness, in good faith, carried out the agreement on his part, withdrew the charges, and re-enlisted McDonald, and

he received all the pay, bounty, etc., due him. He signed the papers and left his final papers with witness, December, 1855, and received all the bounties attending re-enlistments in this country. That it was a fair bargain, made in good faith, and no force or violence was used to induce McDonald to re-enlist. He did so because he thought it was best for him. Since he returned from the expedition to the Mescalera Apache country, after the death of Captain Stanton, McDonald has been most of the time in the guard-house on sundry offenses arising out of liquor. He has lately been tried on the following charges: 1. Desertion of his post when on guard; 2. Disobedience of orders. To the first he pleaded guilty, to the second not guilty. Is candid in admitting anything of which he is guilty. He is now confined in the guard-house awaiting sentence of a court-martial, which recently sat in his case. Witness has frequently endeavored to procure the remission of punishment inflicted on McDonald by courts-martial, and has many times succeeded. Witness had nothing but the good of this man in view in all the matter of re-enlistment. Lately sat upon a court-martial to try McDonald upon the charges for which he is now confined in the guard-house. Is under oath not to publish the sentence which the court found, that with all the proceedings of the court in the case, having been transmitted to General Garland for consideration, etc. McDonald is now kept in the guard-house awaiting the action and the publication of the sentence. Desertion is the only offense for which a soldier can be drummed out of service.

Mr. Clark testified that he was notary public and administered the oath to McDonald upon his re-enlistment. Does not know the day of the week upon which it was done, and can not say what day it was.

We have made an ample statement of the testimony given in this cause, that its bearing can be well understood when applied to the conclusion to which our minds have arrived. McDonald states that he was imprisoned and under duress when he enlisted. Duress in law books is defined to be an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract or



discharge one: See 1 Bouv. Law Dict. 493. By duress in its more extended sense is meant that degree of severity, either threatened or impending or actually inflicted, which is sufficient to overcome the mind of a person of ordinary firmness: See 2 Greenl. on Ev. 302. If the contract is entered into by means of violence offered to the will, or under the influence of undue restraint, the party may avoid it by the plea of duress, and it is requisite to the validity of every agreement that it be the result of a free and *bono fide* exercise of the will. If a person be under an arrest for improper purposes, without a just cause, or where there is an arrest for a just cause, but without lawful authority, he may be considered as under duress. The general rule is, that either the imprisonment or duress must be tortious and without lawful authority, or by an abuse of the lawful authority to arrest, to constitute duress by imprisonment: 2 Kent Com. 453. Assent must not only be mutual, but it must be freely and voluntarily given in order to create a valid contract: Story on Con., 313. The general rule of law is, that imprisonment, under regular and formal and legal process, does not constitute such duress as will invalidate the contract of the prisoner. If, therefore, a prisoner execute a deed or note, or make any other agreement, in order to obtain his freedom, it will be binding upon him if he be legally imprisoned, upon probable cause and without malice, although the plaintiff actually have no well-founded cause of action: See same, 314. If the imprisonment be lawful and the prisoner be abused by force or by unnecessary and unlawful privations, as of food, and be thereby induced to make a contract, it may be avoided by him: See same, 316. A threat to do a legal act or subject the party to the legal consequences of a refusal to make an agreement, is not duress: See same, 318. If a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or deed, this is not by duress of imprisonment, and he is not at liberty to avoid it: See 2 Jac. Law Dict. 323. That species of compulsion which does not appear in overt acts of violence or threats, but in over-persuasion

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and advantage taken by parties in peculiar relations of trust or influence over the weak and ignorant, comes within the purview of constructive fraud: See Story on Con. 321.

The mind has no severe task in applying the testimony in this cause to these plain and fixed principles of law and forming its decision correctly. At the time of McDonald's reenlistment he was lawfully a private soldier of the United States army in company K, under command of Brevet Major Carlton, at Albuquerque, still having some days to serve to complete a previous enlistment of five years. Six days before, he had been committed as a prisoner to the guard-house. That he was lawfully imprisoned, we think from the evidence is incontrovertible. Lieutenant Daniels had charged him with drunkenness on guard and being found asleep on his post as sentinel. Nothing appears in the evidence leading to a conclusion that he was falsely accused, or that he was the victim of malice or mistake. The charges were of a very serious nature in a military point of view, destructive of confidence and discipline, if true, and perhaps endangering property placed under his watch and other interests belonging to the service, though in a peaceful village. Carlton had a full lawful right, as his commanding officer, to cause his imprisonment until a court-martial could sit and try him. The guard were fellow-soldiers of McDonald, and, as appears from private Lewis' testimony, were touched with honorable sympathy for the misfortunes of their comrade in arms. They talked about the matter in his presence. Both he and they seemed to be impressed that it would go hard with him should he be tried. They were solicitous for him to do the best for himself under the circumstances. No question was made as to the charges not being true. The soldiers thought it would be best for him to re-enlist. This they advised him to do. In all this we see no improper conduct towards McDonald. They but gave him their sincere opinions, as friend might advise friend. Sergeant McClear understood that McDonald was in the guard-house under serious charges, such as, if true, might stop his pay, etc. Previous to re-enlisting he seemed to be in trouble about his case, and asked the sergeant

what he had better do. The sergeant, evidently from a high spirit of delicacy, refused to give him his opinion until after he had enlisted. He then told him he had done the best he could do for himself. The day before he re-enlisted he was let out of the guard-house, and he went to the company quarters, according to Major Carlton, who testified, without objection being made. McDonald went to him and solicited the major to re-enlist him and to have the charges withdrawn. The conduct of the major upon this application should forever preclude complaints on the part of McDonald against his commander. He seemed to have listened readily to the request of the soldier and prisoner, who was, as Sergeant McClear says, in trouble. The only conditions he asked were that McDonald should behave well and not get drunk. He promised to withdraw the charges and offered to receive and keep his final papers, so as to secure to him the money due him, which amounted to between two hundred and fifty and three hundred dollars. There is no evidence that he threatened McDonald with any of the consequences should he be tried and found guilty. The conversation was at his own request, and Carlton made use of no force or violence to induce a re-enlistment. McDonald did re-enlist, and the charges were withdrawn and destroyed. Had he been tried upon them, as he lawfully might have been, and had he been found guilty, he would have been sentenced to a loss of the pay due him and to dishonorable discharge. Subsequently he received all of his pay and all bounties attending a re-enlistment in this country.

It is not for us to say that in this matter Major Carlton, owing to his high military obligations to his government and to his superiors in command, went too far in his kindness and good will to McDonald, appealing to him in the midst of his troubles. There is, however, one thing that we will say—that we give full credit to Major Carlton's declarations in his testimony that he had nothing but McDonald's good in view in all the matter of re-enlistment, and that he thought it was best for him to re-enlist. We will not refrain from saying that in that transaction we can not

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regard Major Carlton as evincing towards McDonald any other feelings or motives than those that do him honor as a man. We deem it but justice to extend the sentiment of this remark to Sergeant McClear and to the fellow-soldiers who evinced their anxiety for McDonald's welfare. In all this affair we do not find him under any unlawful imprisonment. There was nothing that the law can pronounce duress over his will and power of free consent. This we think the evidence compels us to assert. Instead of dishonorable discharge, he has received from the government all the bounties following a re-enlistment in this country, and all the pay and clothing to which he was entitled at the expiration of his first service. It would seem as if so exact and just a fulfillment of its engagements on its part should have continually admonished this petitioner of a quick sense of good faith and obligation on his side, instead of cultivating vain hopes that the civil judicial tribunals would absolve him from his legal duties as a soldier, to the performance of which he had solemnly bound himself. These tribunals, deeply penetrated with the consciousness to what a large extent the safe-keeping of good faith, justice, and order are reposed in their hands and acts, will carefully deliberate so as to guard within the halls of justice all contracts founded in free consent, morality, and sound public policy, as not to minister to a loose and unscrupulous spirit that refuses all respect and compliance with correct principles when it opposes itself to passions intent on mischief, to present conveniences and interests. In this republic, to be a soldier of her army should inspire him with a high and inflexible spirit of honor, and duty, and he should not permit, even for a moment, the feeling to steal upon his mind that there is demerit and degradation in his profession, and that it is fair to present any class of pretenses and through them seek to escape from an enlistment. If, from faithlessness, McDonald fell under charges and incurred the dangers of military penalties, in his own want of self-control and in his intemperate habits he will easily find the cause.

His commander bears unhesitating testimony to his being a good man and good soldier when free from the

influence of liquor. To this officer he appealed for rescue from the consequences of his own alleged offenses, and it is not for us to say Carlton, owing as he did his high obligations to his government and superiors in command, went too far in his good will to this soldier in trouble. We think, however, it is but just to say that we give full credit to the major's declarations as a witness, that in the whole matter of enlistment he had nothing in view but McDonald's good, and that the latter was doing the best he could for himself. The evidence exhibits no other feelings or motives on the part of Carlton than those that do him honor as a man, and we extend the sentiment of this remark to sergeant McClear and the fellow-soldiers who evinced so commendable an anxiety for McDonald's welfare. It remains now to add, that nowhere in this affair do we find this man under any unlawful imprisonment. There was nothing that the law can pronounce duress over his will and power of free consent. This the evidence compels us to decide. It is in proof, that at the time of the issuance of the writ of *habeas corpus*, McDonald was in the guard-house awaiting the sentence of a court-martial, before which he had pleaded guilty to the charge of deserting his post when on guard. This, of itself, should have determined the cause against him, let the elements that entered into his re-enlistment have been as they may. It was over him in all its practical effects, and he was, in every point of view, a soldier in the actual service of the United States army, and subject to its law and rules. Occupying that position, he was charged with a military offense, in a matter over which a court-martial had complete power. It took jurisdiction and tried and decided the cause, and it was not for the civil arm to stretch itself within the guard-house to snatch McDonald from under the sentence he was properly confined to receive. As to the averment of the petitioner, that his re-enlistment was made on Sunday, we have only to remark that we know of no law in this territory that would invalidate the contract for such a cause, and, furthermore, the proof is insufficient to establish the fact that it was consummated on that day of the week. It is the unanimous opinion of this court

## Points decided.

that this cause was rightly determined by the judge in his district, and his judgment is hereby affirmed, with costs. Affirmed.

This cause came on to be heard upon the record and errors joined, and was submitted without argument, and the court being now fully advised in the premises, it is considered, ordered, and adjudged by the court, that the judgment by the judge below in this cause be and the same hereby is affirmed, with costs.

### WALDO, HALL & CO. v. HUGH N. BECKWITH.

**CONTINUANCE ON GROUND OF ABSENT EVIDENCE.**—A continuance will not be granted because of the absence of evidence which, if present, would be admissible. Hence, the absence of a transcript of a former recovery for the same cause of action will not authorize a continuance, where there is no plea under which such transcript would be admissible.

**EVIDENCE OF FORMER RECOVERY INADMISSIBLE, WHEN.**—Under the general issue in assumpsit, evidence of a former recovery not pleaded is inadmissible.

**DILIGENCE MUST BE SHOWN TO PROCURE CONTINUANCE.**—The absence of evidence is no ground for a continuance where the party applying for the continuance has not used reasonable diligence to procure the evidence in time for the trial.

**PROOF OF PARTNERSHIP AS AGAINST DEFENDANTS.**—A plaintiff is not required to make as strict proof of a partnership among the defendants as would be necessary to show a partnership among plaintiffs. It is sufficient to show that the defendants have acted as partners, and by the conduct, declarations, and course of dealing, have induced others to regard them as partners.

**COMMUNICATION TO ATTORNEY NOT PRIVILEGED, WHEN.**—A communication made by a client to his attorney for the purpose of being made public, is not privileged; as where the client informs his attorney of a partnership between himself and others to enable him to sue on a claim due the firm.

**SPANISH LAW OF PASTURES.**—The old Spanish law of pastures does not determine the degree of care and attention to be required of one who undertakes for hire to keep a band of work-oxen over the winter.

**EXCESSIVE DAMAGES AS GROUND OF NEW TRIAL.**—A new trial can not be granted because of excessive damages, unless the jury have mistaken the principles regulating the damages, or have been guilty of some gross error showing improper feeling or bias on their part.

**APPEAL from Santa Fe county.** The opinion states the case sufficiently.

*T. D. Wheaton*, for the appellants.

*Ashurst and Smith*, for the appellee.

By Court, BENEDICT, J.:

This cause has been more than six years in litigation. Once before it was in this court upon appeal. Beckwith had a verdict and judgment in the district court, and Waldo, Hall & Co. appealed at the term of this court in 1854. That judgment was reversed and the cause sent to Santa Fe county to be tried *de novo*. See *Waldo v. Beckwith*, *ante*, 97. A verdict and judgment was again rendered, though increased in amount in Beckwith's favor, and again an appeal was taken. The errors which the appellants, through their counsel, assign, are: 1. That the court should have granted a continuance. 2. Admitting improper testimony to go to the jury. 3. Giving improper instructions and refusing proper ones. 4. Refusing to grant a new trial.

We will examine, in the first place, the first assignment. At the term when this judgment was rendered, defendant's counsel made an affidavit for a continuance, alleging the want of a transcript of a record from the circuit court of the county of Jackson, Missouri, to prove that the same identical cause of action upon which this suit is founded, between the same identical parties to this suit, has been tried and determined at the last term of the said circuit court; and that a recovery was then had upon the same; and that the information reached here by the April mail from the United States. Applications to postpone the trial of a cause to a future day or term are addressed to the sound discretion of the court, and the territorial statute provides that they shall be supported by oath, unless the facts be within the knowledge of the court.

The affidavit in this cause is very guarded and indefinite as to which party had been instituting the suit and carrying it to a conclusion, or who had recovered. For the purposes of the motion the court had the whole record before it, as well as the affidavits. Before the first trial in the court below, the defendants filed a plea in abatement, set-

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ting up the then pendency of the suit for the same cause between the same parties in the Jackson circuit court of Missouri. The plea was demurred to and the demurrer sustained, and on appeal to this court, the ruling of the court below was affirmed. To its opinion upon that point this court still adheres. A copy of the record was set forth by averment in the plea, and is still in the files of this cause, and the court was authorized to regard it as being a portion, at least, of the transcript upon which the plea in abatement had been founded. We are of opinion that the cause did not stand in such situation that the transcript could have been admissible if present at the trial; and the rule is well laid down in *Warburton and King v. Allen and Little*, 1 McLean O. C. 460, that upon a motion for continuance for the want of testimony, if the facts stated would not be admissible in evidence, the motion must be overruled. Now, in this cause, no answer or plea stood upon which issue had been joined, except the general answer or issue as in assumpsit. No plea of former recovery during the continuance of this suit had been set up. There was no issue upon which the record could have been admissible as evidence, and hence upon this ground alone the court did well in overruling the motion. It is the duty of all courts, under the circumstances of each case, to take care that in their determination of motions for continuances injustice is not done, either by precipitate trials or wanton delays. Diligence should appear upon the part of the party moving for a postponement, or a reasonable excuse why it has not been exerted. In this case the information came to the counsel by the April mail, and the cause was tried in the latter part of June. For years this suit had been in progress. The defendants well knew, or should have known, how it stood in court, and when it would come on for trial. Why did they not, by the April mail, send the transcript along with the information that it existed? Why did they let May pass? If it was important, did they not know it? The whole history of this cause proves that the defendants could not have been ignorant of the steps proper for their own defense. It would have been great injustice.



after so long a delay, for the court to have compelled the plaintiff still to postpone it to give the defendants and their counsel more time for correspondence about a matter in which they had failed in diligence by not sending the transcript, as they might have done, had they deemed it of importance in their defense.

We shall now direct our attention to the error assigned in refusing a new trial, and shall consider the other two assignments under this head.

Beckwith brought this action to recover pay for the wintering of a stock of working oxen. It became necessary for him to prove the partnership of the defendants as a joint liability to pay for the keeping of the cattle. He had averred the firm of Waldo, Hall & Co., to consist of Jacob Hall, David Waldo, and Wm. McCoy. Defendants' counsel insists in argument, that this averment is not sustained by the proof, and that for this cause the plaintiff is not entitled to a verdict and judgment against them. The courts do not require the proof of the partnership of defendants to be so strictly made as that of such relation between plaintiffs. Mr. Greenleaf, in his treatise on evidence, says that it is sufficient to prove that defendants have acted as partners, and that by their habit and course of dealing, conduct and declarations, they have induced those with whom they have dealt, to consider them as partners.

Patten, a witness, swore that he knew a firm of Waldo, Hall & Co., who contracted to carry the mail that year from Independence to Santa Fe, and that they hired at the former place, and their names were David Waldo, Jacob Hall, and Wm. McCoy, but did not know that they were engaged in the freighting business. This testimony, standing in no manner contradicted nor its credibility assailed, establishes the fact that at Independence these defendants, by their firm name, were a partnership, and that they all resided at the very place where they did business as the firm of Waldo, Hall & Co. The witness does not pretend to give the extent in various kinds of business; that they held themselves out to the world as partners, but that that year they had contracted to carry the mail from that place to this. **Hugh**

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N. Smith, an attorney of this court and counsel for plaintiff, was called to be sworn on part of Beckwith to prove the partnership, and the defendants objected on the ground that his information was derived from defendants by confidential communications made by them to him while he was their attorney. It was for the court and not the witness to determine as to the competency of the testimony, and it overruled the objection. Smith testified that he had been employed by defendants at one time to bring some suits for them as a firm, and that he thinks he must have been informed by Hall that the firm consisted of David Waldo, Jacob Hall, and William McCoy. He also thought he had learned it from some other source. The suits were concluded, and no objections were made to the manner in which they were brought. Now we cannot regard this testimony as such confidential communications as were protested against being given in evidence. Smith was informed of the names of the members of the firm, for what purpose? For the express purpose of being published. He was to institute suits for them, and the publication, in legal form, was to enable them to prosecute them. These had been ended. What, then, had transpired? These parties by their own acts had imparted the fact of their existence, not only to third persons, but had averred, insisted, and succeeded upon the fact in courts, upon records, before judges and other officers, and in the face of the world. This must have been, for Smith says he was employed to bring some suits for the firm, and that they were concluded, and that the business met no objection upon the ground that it was prosecuted in the names of these defendants. We know what is meant by the institution, carrying on, and terminating a suit. It is impossible that it could have been done, as Smith says, without such publication of the members of the firm as to make it an act of the parties far beyond any principle of law or practice of courts, that would protect it as a confidential communication to an attorney. It was made known to the attorney and at the same time, in the same acts, to third persons, courts, and the public. It was not in its nature private, and could in no sense

be termed the subject of a confidential communication, and we see no error that the court committed in permitting Smith to testify to the facts done by the defendants, disclosing and showing their partnership. Therefore by his testimony, with that of Patten, we must consider the point established, that these men, now defendants, were partners, transacting business as such in acts of the most public and permanent character. From this point we may proceed to say that the existence of the firm, as shown by the evidence, became notorious and widely known. McOutcheon swears that Hall was in Santa Fe in 1850, and did business in the name of the firm; stated that it consisted of himself, David Waldo, and Wm. McCoy, and that he was its agent. Hunt swears, referring to the same time in Santa Fe, Hall told him the same thing as to who were the members of the firm. Goods were delivered and the bills were in the name of the firm, and Hall signed bills in its name. Preston Beck speaks of the train of Waldo, Hall & Co. Stevens, sheriff, received a letter from Wm. McCoy requesting him to collect money for Waldo, Hall & Co. Hall told witness Cummings that the cattle in question were the company's oxen. We feel bound to say that for all the purposes of this suit the proof of the partnership was amply made out, and the jury should have found as they did as to that fact. It is worthy of notice, also, that defendants offered no evidence to disprove the testimony as to partnership, nor to lessen its weight. All the other points will now be considered in connection with the refusal to grant a new trial. Counsel for appellants insist that the old Spanish law as to pastures should be applied to Beckwith in defining the care and attention which he should have bestowed upon the keeping of the cattle. This court decided against such application in this same cause before, and it now adheres to the decision then announced with increased confidence as to its correctness. The court then did right in refusing the instructions the appellants asked for upon that point. We think that all of the instructions given were substantially correct, and therefore no ground for new trial touching them is to be found. The damages found by the jury were five hundred dollars, and

it is contended that they were excessive. It is laid down in 5 Mason C. C. 497, and we think substantially correct, that a new trial can not be granted on account of excessive damages unless the jury have mistaken the principles of law which ought to regulate damages, or have been guilty of some gross error which shows an improper feeling or bias on their part. It seems the cattle in question were working oxen that had been worked from the states and arrived with a train late in the fall. All the witnesses who saw them describe them as having been very poor and in bad condition. It also appears that the winter of that year was very cold, hard, and severe; that the majority of the cattle that came that year from the states were very poor when they reached here; and one witness, McCutcheon, swore that those in best order were most apt to die. Hunt says the cattle in question remained after they arrived several days in Santa Fe, and sheltered themselves under the portals of the houses. Dr. Cummings swore that he resided about twelve miles from Beckwith's ranch, where the oxen were driven to winter; saw the cattle, in number about fifty or sixty, in charge of one Martin, pass his house about the fourth of December. They were on the way to Beckwith's, and some died on the way. He was at Beckwith's afterwards, and saw the cattle, which he describes as being well fed with a plenty of good fodder and corn and carefully tended. Beckwith wintered for him with these cattle some for witness, and when spring came they were in good condition. Corn and fodder were very high that year, and it was worth from twenty to twenty-five dollars per head to winter cattle that year. He saw Hall a short time after he had been to Beckwith's, and Hall told witness that he had sent Martin with his cattle down to Beckwith's.

Charles Hughes swore that he was Beckwith's herder. That about the fourth of December Martin brought the cattle. Forty-four were receipted for. They were in very bad condition and three or four died the first night they arrived. His testimony shows them to have been well fed, with a plenty of good corn and fodder, and with the horses and mules of Beckwith and cattle of Cummings. Noth-

ing appears in his statements to show that the cattle were not well taken care of under the circumstances. Beckwith had fodder still left in the spring, yet they continued on dying until, when April came, only one or two were living. Witness thought it was worth twelve dollars per head to feed them and take care of them during the winter.

In view of the loss of these cattle, so nearly complete in its character, at the end of four months, a violent distrust springs involuntarily into the mind that Beckwith grossly neglected or ill-treated the property of the company committed to his keeping. The mind ponders with much anxiety over this testimony, to see if a place can be found upon which justly to rest this distrust upon Beckwith's faultiness. We then find that the cattle were brought to this territory upon the verge of a winter of extraordinary severity; that they had doubtless been worked the long and wearisome route on the plains from the states. They arrived here poor and in bad condition, unused to this climate and country. They had to encounter all the rigors of the unusual winter with their vital energies so exhausted that they could not recruit sufficiently to bear up against the wastings of the cold and the storm. Some of them died by the way while being driven to the ranch; some of them died the first night they were delivered there. The loss of these can in no way be attributed to Beckwith. We can not refuse to give credit to the testimony of Cummings and Hughes. They both acquit him of any culpable neglect or ill-treatment, and no witness appears against them. None was attempted to be introduced. Beckwith stands in the affair as treating the oxen as he treated his own beasts or the cattle of Cummings, and as a prudent, careful man would treat his oxen in this country. The loss and misfortune was heavy upon the company, but that does not exonerate them from paying the appellee. The damages found by the jury seem large, and doubtless they are; but are they so much so as to require this court to send the cause back to be again tried, tested by the rules hereinbefore incorporated? We think not. It was a matter peculiarly fitted for a jury to determine. Two juries have found

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Points decided.

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in Beckwith's favor. The corn and fodder was of great price that winter. The anxiety and trouble to him must have been very great, and if the damages are somewhat excessive, they are not so as to justify this court in reversing the judgment of the court below. The appellants upon the trial in the district court offered no evidence to reduce the damages, but let the cause go to the jury upon a second trial with no other testimony than Beckwith produced. The presumptions now are all in favor of the verdict, and the defendants below must abide by the judgment of the district court.

Judgment affirmed with costs.

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### MARIANA JAREMILLO v. JOSE DE LA CRUZ ROMERO.

**ABSENCE OF RETURN OF SERVICE, PRESUMPTION FROM.**—Where no return of service of process appears in a cause in a justice's court, the presumption is that there was no service, though the justice states in his transcript on appeal, that the summons was returned served.

**WANT OF SERVICE, OBJECTION TO, IN APPELLATE COURT.**—The objection that the defendant was not served with process can not be raised in the appellate court, after a trial on the merits in the court below.

**PEONS, WHO ARE.**—Strictly speaking, peons are a class of servants in New Mexico, bound to personal service for the payment of debts due their masters, but there seems to be no law regulating their rights and duties under that specific denomination, and the term "peon" is now used as synonymous with "servant."

**MASTER AND SERVANT, LAW OF, DISCUSSED.**—The history of the law of master and servant in New Mexico is very fully given in the opinion of Benedict, J.

**RELATION OF MASTER AND SERVANT, MATTER OF CONTRACT.**—The relation of master and servant in this territory is a matter of mutual contract, and such contract may be entered into by any free persons, where there is no legal impediment.

**ALCALDE, JURISDICTION OF, UNDER KEARNY CODE.**—Alcaldes, under the Kearny code, were substantially justices of the peace, having no powers beyond those expressly conferred upon them.

**ALCALDE COULD NOT PROCEED SUMMARILY AGAINST FUGITIVE SERVANT.**—Under the Kearny code, an alcalde had not power to issue summary process to compel the return of a peon or other servant who had left his master's service while in debt to him; but the master was left to recover his debt from his servant in the same way as from an ordinary debtor.

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Opinion of the Court—Benedict, J.

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**PREFECT'S JURISDICTION AS TO MASTER AND SERVANT.**—The jurisdiction given to prefects by the Kearny code extended to all controversies between masters and servants.

**PREFECTS EX PARTE ADJUDICATION NOT BINDING.**—Under the Kearny code, a prefect had no power upon an *ex parte* application, without notice to the adverse party to adjudge or certify that the latter was a fugitive servant, indebted to his master in a certain sum, which he was bound to pay by his services, or in money, and such certificate, if given, is no evidence of the facts therein contained.

**CHILD NOT BOUND TO SERVE FOR FATHER'S DEBT.**—A child can not be held bound, without his own consent, to serve a third person in payment of his father's debt beyond his minority.

**REMEDY FOR SERVANT'S VIOLATION OF CONTRACT.**—Under the law of 1852, a servant refusing to comply with his contract may be punished by fine and imprisonment, and judgment, in due course of law, may be rendered against him for any indebtedness due his master, and his services may be sold on execution to the highest bidder, to satisfy said judgment.

**JUDGMENT THAT DEFENDANT SERVE AS A PEON, VOID.**—In such a case, upon giving the master judgment for his debt, a further judgment, that the defendant serve the plaintiff as a peon till the debt be paid, is void.

**APPEAL** from the first judicial district. The opinion states the case.

*M. Ashurst*, for the appellant.

*H. N. Smith*, for the appellee.

By Court, BENEDICT, J.:

This is an appeal from a justice of the peace to the district court in the first district, and from thence to this court. It has become our duty for the first time in this tribunal to examine and construe the laws of this territory, declaring the rights and defining the relations of masters and servants. Like all questions arising out of a domestic relation, the present involves interests important and delicate. It includes what is commonly called the peon system of this country. It is that system to which we so frequently see reference (and sometimes in high places in our republic) as maintaining here similar relations between masters and servants as are found to be established between the master and his slave in different states of the union. It will be expected, perhaps, that the action of this court in this cause will elucidate what this system really is, and we may be

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permitted to remark, that each member of this bench has heard and investigated this case with a deep solicitude not to lessen nor render insecure any law or remedy that by just authority exists amongst the inhabitants of this territory in behalf of either master or servant. This solicitude has been more keenly felt as we have reviewed the present condition of the laws, the courts, and the administration of justice in New Mexico, and called to mind a period under a former government in this country when no degree of tolerable certainty existed in judicial forms, proceedings, and decisions, and when the laws and their just benefits were so often set aside or crushed under foot by prejudice, corruption, or passion—by interest, power, and despotism. We are fully aware how naturally and easily in the minds of many then and now living, have come down from that period notions greatly rigorous as to the power of the master over his-servant, and how quickly the former is alarmed as to the retention of his supposed power. These and other obvious considerations will, we doubt not, serve to suggest an explanation for the length of this opinion in this peculiar cause, and the endeavor to illustrate the matters brought within its scope.

This suit seems to have been commenced by summons in the ordinary form. Yet the justice describes Mariana as a servant who had abandoned the work or service of her master while owing the sum of fifty-one dollars and seventy-five cents, before advanced to her. The transcript shows that at the time of trial Mariana did not appear, and that, upon the motion of the plaintiff, the justice rendered judgment against Mariana for twenty-six months of work as a servant, *o el equivalente*, fifty-one dollars and seventy-five cents, *en dinero* (or for fifty-one dollars and seventy-five cents, the equivalent in money), as also for interest and all costs. In the district court the case was tried *de novo*, and the court adjudged "that the plaintiff recover of the said defendant, Mariana Jaremillo, and of Domingo Fernandez Luz Jaremillo and Juan Miguel Ortego, the securities on her appeal bond, the sum of fifty-six dollars and twenty-one cents; and also the costs of this suit to be taxed, and in default of pay-



ment hereof that she be held to serve her said master, Jose de la Cruz Romero, as a peon until said sum of money is paid." The error assigned by the appellant is this judgment, to reverse which she has appealed to this court. Her counsel have insisted in argument that no service of process was made upon her in the suit before the justice, and that she was not brought within his jurisdiction. He states in his transcript that the summons was returned as served, but it does not appear that the serving officer made any return. The statute provides that "any constable or sheriff serving any process authorized by this act shall return thereon, in writing, the time and manner of service, and shall put his name to such return." This was the positive duty of the officer in this case. No such thing seems to have been done, and the presumption of law is that he would have made such return had he served the process. His return would be better evidence of the facts than the justice's minutes. From the unscrupulous disregard which too often prevails in justices' courts in this country as to the legal rights of the unfortunate, the peon and the feeble, when contesting with the influential and more wealthy, as well as the circumstances which appear to have attended this cause before the justice, the painful but reluctant conviction is forced upon our minds that no service of process or notice was made upon Mariana; that the proceedings were wholly *ex parte*, an outrage upon law, and a premeditated injustice; and we derive gratification in marking from this high place, and in this authoritative manner, with the seal of judicial condemnation, such gross violations of the rights of those who are feeble in their own defense. But let the fact have been as it may, as to the service of process, it can avail the appellant nothing here in the determination of her cause. The record does not show that she availed herself of her first opportunity in the district court, to require its judgment upon this point. Had she done so, as the case stood, the court doubtless would have dismissed the suit. She appeared by counsel and contested the merits of the cause. No exhibition of exception to the rulings of the court appears in the record, and it is now too late for her to

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Opinion of the Court—Benedict, J.

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ask any favor at the hands of this court, growing out of the defective proceedings of the justice.

Upon the entry of the power of the United States within this territory in 1846, and establishing their rule and government, there was found a large class of persons commonly designated in the language of the country by the name of peons. They were not of any particular color, race, or caste of the inhabitants. They appeared as servants, menials, or domestics, "bound" to some kind of "service" to their masters. Generally they had none or small amounts of property. The most wealthy and powerful families were flattered in their pride in displaying their retinues of these dependants. Many had been raised from childhood within the households of such families. One fact existed universally: all were indebted to their masters. This was the cord by which they seemed bound to their masters' service. It was an invariable rule, that the peon could discharge himself from this service by the payment of his indebtedness to his master, and the latter never supposed he had any right to refuse to receive his pay from his peon, and still hold him to service. It was common for persons desiring to engage in their employ as servants those owing, as peons, their masters, to advance to them the amounts due, and upon payment to the satisfaction of the old master, the peon left him and went to the service of the new; and these, as by voluntary contract, regarded the labor of him who had the peon's position as pledged for the payment of the money which had been advanced to pay his former master, as also for any other advancement. Upon entering the new service, or while continuing therein, the peon was held rigorously to fulfill his pledge and render his labor so long as his debts remained, or an additional one was incurred. He could not abandon the service; and if he did, his master pursued, reclaimed, and reduced him to obedience and labor again; and the alcaldes of the country, in the most summary manner, aided the master in bringing back his fugitive. Both male and female became peons, and the price of their labor was variously estimated at from one to six dollars per month.

We turn now to inquire for the legislative act which established these rules between peon and master. Vassals and vassalage had ceased to exist under the Spanish monarchy, and had not been restored by the Mexican government. The cortes of Spain, on the sixth of August, 1811, decreed that "the titles of vassals and vassalage are abolished, and also the grants, as well real as personal, which have taken their origin from this title of jurisdiction, except those proceeding from voluntary contracts, in the free exercise of the sacred use of property." In the same manner all contracts, agreements, and conventions which may have been made in consideration of advantage, rents, or annuities of land, or others of this kind, entered into between the so-called lords and their vassals, ought in future to be considered as contracts made between private individuals. Upon careful examination of all the authorities within our present reach, we have been unable to find any law creating and defining the duties and rights, the civil and domestic relations, under the specific denomination of peon, while the Spanish and Mexican laws and authorities are replete with rules clearly marking out the legal rights and duties of masters and servants. If we turn to the lexicographers, we find Mr. Webster, in his dictionary, defines the word peon to mean, in Hindoostan, a foot soldier; in France, a common man; in chess, written and called pawn. From him we learn nothing as to its meaning in Spain or Mexico. In the Spanish and English dictionary by Velasquez, peon is defined variously; such as, pedestrian, day laborer, foot soldier, pawn in chess, anything that is whirled round in play, hive of bees, servant, menial, and groom. It also says that the word, as used in America, means an Indian hired to work by the day. From the last definition of "an Indian hired to work," it is suggested that the condition of a peon originated in Mexico, in the workings of the system of *repartimientos*, or distributions of certain sections of country, including the native inhabitants, made by the early Spanish conquerors among their comrades and followers.

Escriche, in his *Diccionario Legislativo*, understood to

be received throughout Spain and all the nations upon this continent speaking the Spanish language, as of the very highest authority, says, in the Madrid edition, published in 1847, in vol. 1, p. 184, "that the rights and duties attached to the condition of master and servant, depend entirely upon contract." The obligation of the respective parties to abide faithfully by the agreement, will be found under the head *Amo* (master) to be lucidly and accurately defined. It will be seen that without lawful cause the servant could not leave his master during the time the contract was to endure, and if he should, he might be compelled to return, or pay the damages caused by his abandonment. Under the head of *arrendamiento* it is said, that hiring to personal service is a contract which obligates one of the parties to do something for another, in consideration of a certain price. The most frequent contracts of hiring and leasing of personal labor are those made with persons in the character of servants, domestics, or dependants, who obligate themselves at day labor; that is to say, at so much per day, and for that reason they are called day laborers, such as reapers, workers in vineyards, load carriers, diggers, etc.

In White's Recopilacion, vol. 1, pp. 201, 202, it is said: "The second onerous contract is that of renting, by which one person lets or grants to another person the service of his person or beast, or the use or enjoyments of a thing for a certain time." This contract, then, consists in three things: in the consent of the parties; in the thing or labor which is rented or let; and in the price. Renting derives its perfection from consent. The renter is obliged to perform the labor stipulated. Any one may rent who can sell and buy, the agreement being for a certain time, or for the life of either of the contracting parties. This contract admits every covenant or part that may not be opposed to the laws and good customs.

Schmidt's Civil Law of Spain and Mexico designates unlawful objects of contracts to be such as murder, robbery, adultery, etc., and acts contrary to decency and good morals, as the going naked in the streets, and also the sale of a man's liberty, although he may sell his services for a limited

time: pp. 113, 114. As to the hiring and letting of work and labor, page 170, he says: "The object of this contract extends only to such work as is not considered liberal industry. No one is permitted to hire his personal industry, except for a fixed object and determinate period. The obligation of a workman to furnish his labor expires on his death, and his heirs are not bound to continue it or to finish the work he may have begun."

These quotations are sufficient to manifest the general principles upon which the conditions of master and servant were formed where the Spanish law prevailed. It will not be denied that they extended to Mexico when she achieved her independence. It is seen that the consent of the parties was invariably the foundation upon which a servant became bound to service. When Mexico became an organized republic of states, some of them legislated upon this relation, especially detailing the legal consequences which should flow therefrom, and also prescribing the modes by which the agreement might be perfected. This legislation serves to illustrate the Mexican spirit upon this subject, discloses the state of menial service then existing, and will aid in strengthening our views when we come to examine the act of the assembly of this territory upon the same matters.

On the thirtieth of September, 1828, the congress of Coahuila and Texas passed a decree, clear and pointed. It begins by assuming that the relations of masters and servants were existing within those two states and says: "Debts contracted by hired servants with their masters previous to the publication of this law, shall be paid in the same manner and form they have bargained." White Recopilacion, 525. We see in this how carefully the congress guarded against the violation of the obligations of previous contracts. All was preserved in manner and form as bargained. The decree then proceeds to regulate for the future: "In future when a servant obtains employment, the contract he makes with his master shall be set down at the head of the account, wherein shall be manifested the manner he is to pay the debt he contracts. The agreement shall be authenticated by two witnesses and signed by

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the same, the master, the servant, if he can write, or another person in his name. Amounts ministered to servants in part payment for their labor shall be in money or effects, not exceeding the ordinary prices of the market, and both master and servant shall be entirely free, the one to accept and the other to furnish. In future no payment shall be made in advance to exceed what the servant can obtain as the reward of labor with the whole of one year's wages. The master shall show the servant his account as often as requested; and the latter may sue the former before the alcalde when he thinks himself aggrieved by illegality or any other cause.

"In haciendas, agricultural ranches, or any other establishments situated out of towns, masters, superintendents, and stewards are hereby authorized to punish servants who fail in the faithful fulfillment of their duties or disobey their superiors, by arrest not exceeding four days, or with shackles for the same length of time. When the master enters a complaint to the alcalde on account of the incorrigibility of the servant, the alcalde may punish him with shackles or other correctional penalties to cause him to return to his duty."

Such were the chief articles of that decree, and without doubt were based in the main upon the general custom and practice then prevailing. The makers of the decree clearly manifest that they intended, among other things, carefully to provide to the master's hands, the legal means by which he could compel the servant, under pains and chastisements, to remain in his master's service, obey him, and render him his labor. The use of the whip for correcting servants was forever prohibited, and the servant could sue the master for excessive chastisement. When we turn to the legislative acts of this territory, we find that the assembly held in 1851, under the organic act, made a law, very full in its provisions, upon the subject of the relations of masters and servants. It says, "that all contracts celebrated between two or more persons, the one binding himself to labor in certain and determined employments, or all those contracted for, and the other offering his money in determined daily,

monthly, or yearly salary, shall be respected and enforced by the civil law according to the agreements made by their own free and voluntary will. Fathers of families are permitted to bind out their children to serve only when their poverty demands it, devoting what they draw on account of their salaries to the support of their own legal families. They can not do so when the amount is more than that which is due them at the end of one year. If the servant does not wish to continue in service for any cause, such as the ill-treatment of the master, and receiving better pay from another, or from any other cause that he may assign, on the payment of the amount yet due he can not be bound to continue in service; but if he does not pay, he shall be bound. All free men and women not embarrassed by law or other reasonable causes preventing the fulfillment thereof, may celebrate this species of contract. The prefects, alcaldes, and justices of the peace shall indiscriminately authenticate the books of accounts between masters and servants, according to their jurisdiction. All persons having servants may advance them on account, when they may demand it, two thirds of their salary in order to support their families." With these there are many other provisions defining the legal consequences which flow from the contract when the parties have entered upon its performance. There is also a section in these words: "When a servant runs off, his master may present himself before any authority and take out a warrant of his debt (or, as it is in the Spanish, in which this law was written, *a sacar testimonio de la deuda*), and with it may proceed in person or otherwise to any part of the territory and make his claim, which shall be attended to according to law."

At this point we turn to an examination of the record in this cause, and the matters to be especially determined. There is no bill of exceptions embodying the evidence before the court below, but it has been conceded by the counsel for both parties in this court that the cause was submitted on two certain documents now found transcribed in the record, and which in this court are treated by both parties as the only evidence upon which the judgment of the

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court below was based and the decision of this tribunal is now asked. As to the sufficiency of the evidence to sustain the judgment appealed from, these documents, carefully translated, are as follows:

"Territory of New Mexico, County of Santa Fe.

"The citizen, Francisco Ortiz y Delgado, prefect of the county of Santa Fe, do certify, as fully as I am permitted by law, that the citizen, Jose de la Cruz Romero, of the county of Bernalillo, has personally appeared before me, claiming a servant of his who was taken from his service by her father, Jose Jaremillo, without his consent. The servant's name is Mariana Jaremillo, and the sum claimed by her master is fifty-one dollars and seventy-five cents (\$51.75), and in order that the party interested may demand his servant or his money from her father, who is the person who brought her away, I give him the present document.

"In Santa Fe, May 21, 1849.

"(Signed)

FRANCISCO ORTIZ Y DELGADO."

"Territory of New Mexico, county of Bernalillo.

"To the Hon. Prefect and Hon. Alcaldes of the county of Santa Fe: Jose de la Cruz Romero has represented in this office that his servant, Mariana Jaremillo, has abandoned his service, owing him the sum of fifty-one dollars and seventy-five cents, and that he is credibly informed that said servant is in Santa Fe, and the party interested asks of the undersigned justice of the peace letters requisitorial (*ex horto*) for the apprehension of said servant, which the present judge extends, requesting all authorities to be pleased to order that the said servant be delivered to her master, or return to him the amount she owes him. In so doing I will remain obliged to do the same when I receive a similar request from you.

"Ranchos, June 5, 1849.

"[SEAL]

(Signed)

AMBROSIO ARMIJO."

Now these documents were issued more than two years before the master and servant act of July, 1851, became a law. They are supposed to have been regarded at the time as writs carrying authority with them, but it does not



seem they were ever executed. Do the writs or documents amount to proof establishing the contract binding Mariana to service, the terms and her indebtedness?

In 1846, the political relations of this country were changed from Mexico to the United States. The president of the latter, by virtue of a power well settled as existing in him, assumed the exercise of political authority over this territory. Through General Kearny he proclaimed laws, established offices, prescribed their functions, and appointed officers to fill and perform the duties of the offices. Their powers and jurisdiction were defined, and he directed the manner these should be exerted. Among the grades of officers were *alcaldes*. These were officers previously well known in the country; though called *alcaldes*, they were, under the Kearny code, substantially justices of the peace. It is a rule of construction applicable to such officers that they have no power beyond that expressly conferred upon them. They derive no general jurisdiction. The acts creating them and clothing them with authority fix and limit the bounds, beyond which an *alcalde's* acts are null. In the well-defined powers given him in the code, there was nothing special as to master and servant. The same course of proceeding was left a master to recover his debt from his servant or peon, as in the ordinary way from another debtor, nor was any summary process provided, when the peon had left his master's service, to compel him to return. The mode of summoning a debtor was plainly marked out, as also every succeeding step to be taken in the cause, and the *alcaldes* were bound to conform thereto. There was no *fuero* left to them to adopt and exert old Mexican processes against one class of debtors when the political system then in force had imposed upon them a new, different, and less harsh system of judicial proceedings. It conformed to the design and spirit of our government, when she possessed herself of this region and created her courts, to so arrange their practice as to secure the inhabitants against all arbitrary will and judicial despotism.

Appreciating this fact, it is hardly fair to conclude that it was intended that there should be left in the hands of the

alcaldes the faculty of using the cast-off and summary processes of a superseded government alone against him whose fate was that of an indebted laborer and servant, and that, too, when the Kearny code had made no discrimination against him. The jurisdiction given to the prefects was different. It extended to all controversies between masters and those bound to them, and he had the power of binding out apprentices. Whether the controversies mentioned included those which might arise between masters and bound apprentices only, or also between master and servant, seems to be unimportant in this inquiry. The prefect of Santa Fe, as it appears by the certificate made by him, stated that Romero had presented himself before him claiming a servant, that her name was Mariana, and that her father had taken her from his service, and that there was due him the sum of fifty-one dollars and seventy-five cents. The purpose of the process or document was to assist Romero in demanding the money or girl of her father. Nothing shows that either the girl or her father was ever before the prefect to adjust the accounts or claims with Romero, or that any notice had been given either to appear. By what practice, then, principle or law, could Mariana be bound by the prefect's proceedings? Had he formally rendered a judgment against her, could it be introduced to establish a debt against her? She was no party to the transaction, had no opportunity to defend against the demand, and, neither expressly nor constructively, had been brought within the prefect's jurisdiction. To hold that such judgment possessed any force, that it proved anything against Mariana or her father, would be setting at open defiance the known and long-observed rules of evidence and opening the doors to irresistible and measureless wrongs and frauds.

If, then, the judgment itself could not be received as evidence, how could a mere certificate upon the same amount to proof of her indebtedness, her being bound to service by her own or her parent's consent, and the terms, in a suit commenced against her several years afterwards? If the going to the prefect by Romero and making his *ex parte*

representations, adjudicated Mariana's case with him, proved her a debtor and bound to service, and has given a master a right to reclaim or reduce her to bondage, it is easy to perceive how any person whosoever within the territory may be made a debtor and sent into servitude, should an unscrupulous man and an ignorant and faithless prefect or probate judge devise mischief together. But it is said that prefects, alcaldes, or justices of the peace shall indiscriminately authenticate the books of accounts between masters and servants. This is a section before quoted, and dates in 1851. The provision is a wise one, and in the hands of competent and honest officers promotes fairness and justice. By authentication here is meant the giving of legal faith to some act or thing, a formal attestation, the giving authority by necessary formalities. What is essential to enable the officer to do this, as to master and servant? The parties must be present by themselves or agents. It is not a trial; it is a mutual agreement of the parties as to the contract or account. The magistrate is the official witness and he attests the facts agreed upon. He affixes thereto his legal formalities, and authenticates and gives faith to the transaction. This furnishes proof of the contract or account, subject to be attacked and overcome by showing fraud, error, mistake, force, or any of the facts which vitiate and make void or voidable contracts and accounts, or relieve parties from the legal consequences of their own admissions. In the cause at bar there is no proof of any mutual adjustment between the parties before any magistrate, nor does any certify to the correctness of any accounts owned by Mariana. Nothing appears beyond the representations made by Romero. The paper issued by the prefect says that Mariana's father had brought her away, and the document was given in order that Romero might demand his servant or money from her father. So far as this shows anything, it suggests strongly that the debt, if any, was due by the father, and not the girl. He took control of his daughter, and Romero obtained the action of the prefect against him. The inference is patent that the girl was a minor, and, if held for a debt, it was her father's. How

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could a girl, able to work as a servant, become indebted to Romero fifty-one dollars and seventy-five cents beyond the fair value of her services? Should it likely be on her own account? It is nearly eight years since the prefect issued his document. If the debt was made upon her own account, it must have originated when she was not much more than a child, and for what consideration could she have bound herself at such an age for such a sum? If it was upon her father's account, as doubtless it was, she has passed, it may be well inferred, beyond her minority, and if so, can not, against her own consent, be held bound to service by reason of her father's indebtedness.

We think proper, in this place, to notice the further legislation of this territory upon the subject of master and servant. In 1852 an act provided as follows:

Section 1. All contracts, voluntarily entered into between masters and servants, agreeing and designating the kind of service, the salary, and the time such service shall continue, whether any money shall have been given or received in advance or not, both parties shall be compelled to comply with the contract without power to rescind it, except in the following cases: 1. By mutual consent; 2. For sufficient motive having been given by one party to the other, such as having grievously injured him; 3. If the master keeps the accounts in an ambiguous manner, so that the servant can not understand them. In these three cases the contract may be rescinded by paying the amount due from one party to the other, as the case may be; but if such motives should not be proven, the contract shall be complied with, and the judge or court of any precinct shall order it to be carried into effect, imposing upon the party failing to comply with the contract, and who shall persevere in doing so, that he indemnify the other party for the injuries resulting therefrom, or which may follow; and all resistance shall be punished by fine or imprisonment, as the gravity or circumstances of the resistance in the case may require; the party, furthermore, being obliged to pay the costs of the trial in the case.

Sec. 2. If a servant shall refuse to comply with the

contract, and he should owe any part of the money to the master, and he refuses or can not pay it, the justice of the peace, judge of probate, or district court will compel him to pay *numerata pecunia* the entire principal and legal interest for all the time it may remain unpaid, it being the duty of the judge or court, in case of difficulty, to order the sheriff to contract the services of said person to the highest bidder for the purpose of recovering the debt. The same proceeding shall be had when the master owes the servant any sum of money for services rendered, and shall refuse to pay him for the same.

Sec. 3. Those offenses committed by servants maltreating their masters or mistresses shall be punished for the same by the justices of the peace or court in which the suit may be brought, with imprisonment for a time demanded by the gravity of the offense.

We see in this section the exertions of the legislature to make more strict and multiply the remedies for the enforcement of these descriptions of contracts. They modify in some respect the act of 1851. By that the servant could leave his master whenever he willed by paying his debt. By this he must abide by and fulfill his agreement according to its terms, whether he owes or does not owe, pays or does not pay. Unless he can get his master's consent to rescind or prove some one of the causes specified to procure a cancellation, he may be prosecuted for a failure, and so may the master, and the servant compelled to a compliance by a fine and imprisonment. It seems strange the act fixed no limits to the power of the magistrate in unmistakable terms, and that so much discretion should be conferred upon the court or judge. It appears clear that the legislators were determined that by no means should either of the parties escape the consequences of their own voluntary engagements. Again, the act follows the servant with other measures, more rigid and direct upon his person, if he refuses a compliance with his contract and owes his master any sum and refuses to pay, or is even unable to pay it. It defines how he may be sued for the debt and judgment obtained in the course of a legal proceeding, and, in

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pursuance of an execution, his services sold by the sheriff to the highest bidder to raise the means to pay the debt. No authority is given the tribunal in this course to adjudicate the servant to the master upon giving the latter judgment for his debt.

We find here no support to that portion of the judgment of the district court which adjudged Mariana to the service of Romero as a peon, in default of her or her securities paying the money. The compulsory process of fine and imprisonment in case the servant refuses to perform his agreement, and the extent to which it may be exerted, to enforce obedience, would seem to furnish ample means to secure him to service. A still further remedy is added in the proceeding. The master may proceed in the ordinary form for the collection of his debt, and in the execution for the sale of the servant's services. The act is in some respects loose and indefinite in its language, yet not so much so that an intelligent court can not find the rule for its guidance.

The great importance which attaches to the subject-matter we have considered, has, among other things, induced a general reference to the laws and enactments which authorize, regulate, and enforce, and to the authorities that illustrate the system of service between masters and servants in this territory. This system we find to be the peon system of the country, yet in all our searches we see nowhere the term peon in any of the legislation touching the party bound to service. In all instances where we might expect to find it we invariably find servant. In the common use of language the term peon is now used in this country as synonymous with servant. Personal interests to a wide extent have been and still continue interwoven with this system. It is seen to be carefully regulated by the legislature; that the relation of master and servant is formed by mutual contract only; that all free men and women, when no legal impediment exists, may celebrate this species of contracts; that parents can not contract away the services of their children, except in certain specified cases; that the parties, in the first place, may agree upon the kind of serv-

ice, the duration, and the pay; that the service of the servant becomes bound to his master for an indebtedness founded upon an advancement made in consideration of service; that the servant can not leave his master's service during the time embraced in the contract, unless he proves some one of the two causes to exist, mentioned in the statute, or shall obtain his master's consent, and shall pay what he owes him; that if he shall refuse to serve in conformity with the contract, he may be compelled to its fulfillment by the magistrate with the chastisements of fine and imprisonment; that the master may procure summary proceedings before the judicial officer to enforce compliance; if the servant is a parent, and dies, the children are not compelled to serve in his stead; that the contract may be entered into before judges of probate or justices of the peace, who shall authenticate or attest the same, as they also may accounts between the parties. A peon or servant loses none of his rights as a citizen by contracting with a master to serve him. He is under no political disqualifications; he votes at all elections if otherwise legally qualified; his servitude does not render him under our laws ineligible to the offices of the precinct, the county, the legislature, or delegate in congress.

Such are some of the features which the peon system (as commonly called) presents in this territory. In pronouncing upon the testimony in the cause we are required to determine, we are of the opinion that the writ *exhorto*, or letters requisitorial, possessed no legal force as evidence of indebtedness from Mariana to Romero. It was issued by Don Ambrosio Armijo, as alcalde, after the government of the United States had defined and limited the jurisdiction of alcaldes, and prescribed to them their modes of procedure, and before the passage of the master and servants act of July, 1851. No debt was established against Mariana by the *ex parte* action of Romero before the alcalde. The process or certificate of the prefect of Santa Fe can not prove her bound to service, nor her indebtedness. It professes to certify that Romero represented that Mariana, or her father, was owing him. No notice or summons was

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given the girl, neither actual nor constructive. She seems in no form to have been brought within the prefect's jurisdiction. All was *ex parte*. These two writs, certificates, or documents were the only evidence offered or considered in the district court. Their utter insufficiency to prove Mariana's contract of service or any indebtedness to Romero, on her part, obligates this court to reverse the judgment of the court below, with costs against Romero.

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### MARIANA MANUELA MARTINEZ v. TOMAS LUCERO.

**COMMISSIONER'S AUTHORITY TO TAKE DEPOSITIONS NOT EXCLUSIVE**—Notwithstanding the appointment of a commissioner to take the testimony in a cause, depositions may be taken before the chancellor, upon legal notice to the adverse party, and used upon the trial.

**DECREE NECESSARY TO SEPARATION OF HUSBAND AND WIFE**—According to the principles of the civil law, a separation from bed and board, or a dissolution of the conjugal association, must be decreed by a competent tribunal, and the consent of the parties is not enough.

**WIFE'S RIGHT TO RECOVER DOTAL PROPERTY**.—Without a decree of dissolution of the conjugal association, a wife can not recover from her husband, or resume the administration of her separate dotal property without showing waste or dissipation of it by the husband, especially where she has voluntarily abandoned him without cause, and is living in adultery with another.

**DOTAL PROPERTY, WHAT IS**.—Dotal property is the capital given to the husband by the wife, or some one for her, before or after the marriage, for the purpose of supporting the matrimonial expenses.

**COSTS ON BILL TO RECOVER DOTAL PROPERTY**.—On the dismissal of a bill filed by a wife to recover her dotal property, because the conjugal association still continues, the costs must be decreed against the husband, he being the lawful custodian and administrator of the wife's estate, and therefore liable for expenses which she may incur.

APPEAL from the district court of the second judicial district for the county of Taos. The opinion states the case.

*M. Ashurst*, for the appellant.

*H. N. Smith*, for the appellee.

By Court, BROCCUS, J.:

This bill was a bill in chancery in the district court of the



second judicial district, for the county of Taos, by Mariana Manuela Martinez against her husband, Tomas Lucero. The complainant alleges that on or about the thirtieth day of September, 1828, she intermarried with Tomas Lucero, and that at the time of said marriage and afterwards, a large amount of money, property, chattels, and real estate, the absolute property and inheritance of the said complainant, was delivered to the said Tomas Lucero as her husband, in trust for her use and benefit, and for the use and benefit of both, while they should live together as man and wife. The bill further alleges that they lived together as man and wife for the space of eight years, and that then, from various causes, a separation between them took place; that a few years afterwards, in the year 1847, they were reunited and lived together in the matrimonial relation for the space of eleven months; that at the expiration of that eleven months, they again separated, without issue, and have never since lived together. The complainant further alleges that her said husband has for years past been living in open adultery with another woman, by whom he has two children, and that he has been wasting and dissipating the property and effects of said complainant for the benefit of his said paramour and her two children, and she has good reason to believe that he will continue to waste, dissipate, and so convert the same until the whole amount thereof shall have been consumed. The petitioner therefore prays that the said Tomas Lucero be enjoined from further waste and dissipation of her estate; that he be compelled to answer the allegations of her bill; that he be compelled to account with her for the full amount of her property and estate, as well as the rents and profits thereof, since their last separation, and that such further relief may be granted as the nature of the case may require.

The respondent, Tomas Lucero, in his answer, admits that he intermarried with the complainant as alleged in her bill, and that they lived together for some seven or eight years. He avers that about seven or eight years after their marriage, he discovered that his said wife had proved faithless to him by the commission of adultery with one Mariano

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Martinez, and that she then, of her own accord, left her house and lived with the said Mariano Martinez in different houses; that in the year 1839, he went to California to escape the infamy and injuries his wife was heaping upon him; that at the time of his departure, she was living with the said Mariano Martinez; that upon his return to New Mexico, in 1842, he found her living in adultery with Mariano Lucero, a priest of the holy Catholic church, and first cousin to him, the respondent; and that she continued to live in adultery with said Mariano Lucero until the year 1846, when, through the solicitations of the respondent and the intercession of one Jose Antonio Martinez, she returned to her house and promised to live a reformed life and continue to live with the respondent. About nine or ten months after, she presented herself before Jose Maria Valdez, an alcalde of the county of Taos, and before him they separated by mutual consent, and the complainant at the time of separation released the respondent from any claim whatever that she might have had against him. And he further avers that immediately after their last separation his said wife returned to the house of the said priest, Mariano Lucero, and continued to live in open adultery with him up to the period of the filing of his answer to the complainant's bill. He also avers that in order to comply with his conjugal duties and his religious obligations, he made many sacrifices to induce her to return to him, and discontinued his effort only when all hope of reformation had gone.

The respondent admits that he had at the time of his answer a woman living in his house to aid and assist him in his household duties, and that the said woman has two children, but avers that he does not know whether he is the father of said children or not. He denies the allegation that he is wasting and dissipating the property of the complainant upon the said woman, and avers that he never took the said woman or any other into his house until he had made several efforts to induce his wife to live with him; and that as late as the year 1854 he requested said complainant to return to her home and perform the duties of a wife towards him, and that she refused so to do. The re-

spondent further avers that he has paid to his said wife the full amount of property which he received as her separate estate.

Upon the final hearing of this cause upon bill, answer and proofs, it was ordered and decreed that complainant take nothing by her bill, but that the same be dismissed with costs against her, to which degree the council for complainant excepted and appealed therefrom. In the progress of this cause in the court below an order was made appointing George Long a special commissioner to take depositions in the cause upon the giving of twenty days' notice to the respective parties or their attorneys, and afterwards while the said order continued in force. Depositions were taken on behalf of the respondent before the chancellor in vacation at the court-house in Fernandez de Taos. Eighteen days' notice was given to the solicitor of the adverse party at his residence in Fernandez de Taos, setting forth the time and place at which such depositions were to be taken. Upon the final hearing of the cause the solicitor for the complainant moved to quash the depositions, because they were not taken in conformity to the order of the court appointing George Long a commissioner for that purpose. The motion was overruled. The council for the complainant excepted to the said ruling.

The errors assigned in this cause are, that the district court erred in overruling the motion to quash the respondent's depositions; that the court erred in decreeing against the complainant and for the respondent, and that the court erred in adjudging costs against the complainant. From an inspection of the record it appears that the depositions to which the council for complainant objected, and the motion to suppress which was overruled, were taken in due form, and that the most ample notice was served upon the complainant, through her counsel, by the sheriff, eighteen days before the period thereof, in which notice the time and place at which the depositions were to be taken were distinctly set forth.

This court cannot perceive the reasonableness or force of an objection to the taking of testimony between the

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parties to a cause in chancery before the chancellor at any time, providing that due notice be given to the adverse party of the time and place of taking the same, although an order may have previously been made and still be in force. appointing a commissioner before whom the parties might take their testimony. It is to be presumed that the order was made for the convenience of the chancellor or the accommodation of the parties to the cause, and not with a view of giving exclusive authority to the commissioner to take depositions between the parties. It is not to be supposed that it was designed as an abrogation or annulment of the authority of the chancellor to take depositions to be used in the hearing of the cause. The order was standing at the time at which the depositions were taken, and either party had a right to take testimony in pursuance thereof at any time upon a compliance with the requirements thereof, by giving due notice of the time and place of taking the same; but the parties were not so far bound by that order as to be divested of their right to resort to any other mode of taking their testimony which the law might have prescribed, or which equity would have sanctioned. Furthermore, as the chancellor must be presumed to possess greater fitness for the taking of testimony in a cause pending before him, and the issues of which it is his province to determine, it would seem to be an enlargement of the equitable advantages of the parties, and a promotion of the ends of justice, to have the witnesses in the cause examined before him. From this reasoning it follows that no error was committed in the court below in overruling the motion to quash the depositions complained of in the assignment of errors.

The view taken by this court of the questions and principles involved in the merits of this cause, and by which it must be determined, renders it unnecessary and irrelevant to inquire whether the respondent, Tomas Lucero, had in his possession the estate and property of Mariana Manuela Martinez, the complainant, as alleged in her bill, or not. The important questions of fact for our inquiry are, whether the complainant and respondent were legally married, and

if so, have they continued in the conjugal association up to the period of the institution of this suit? The first fact is established by the allegation of the complainant and the concurrent averment of the respondent. It appears from the bill of the complainant that she intermarried with the respondent in the year 1828; that she lived with him as his wife for the period of eight years, and that then, from various causes, a separation between them took place; that a few years afterwards, in the year 1847, they again united and lived together as man and wife; and that about eleven months thereafter they again separated by mutual consent, not having had any children, and have never since lived together. She also alleges that the respondent had received a large amount of property and money belonging to her as her inheritance, a portion of which he had returned to her, and the balance of which he was wasting and dissipating upon a woman with whom he was living in adultery, and by whom he had two children. The respondent, in his answer, affirms the allegation of marriage between the complainant and himself, and charges adultery on her part as the cause of their separation. He admits the adulterous cohabitation against himself, but denies that he is wasting and dissipating the property of complainant as alleged in her bill.

Both of the parties present themselves in court, repulsive to every sentiment and feeling that arises from a due appreciation of the honorable and sacred relation of matrimony. The wife alleges that she separated from her husband, and thus did violence to the obligations which she had solemnly and sacredly assumed, without assigning any cause for such separation. She again separates from him without the assignment of a cause, and then alleges as a ground for the restitution to her of her estate, that he is wasting and dissipating her property, in an adulterous cohabitation with another woman. The husband, in return, avers that she left her house on account of adulterous infidelity to him, and that she was, at the time of the filing of her bill, living in open adultery with a priest of the holy Catholic church, who stood in the near relation of first cousin to her husband; and this averment is sufficiently

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well established by the proof to deepen the sense of mortification which this court feels in seeing a party with hands thus stained entering a court of equity and asking that relief which none but those having a pure heart and a clear conscience have a right to demand. And the shamelessness of the complainant appears in a stronger light when we behold her, not content with coming into court and revealing her own disregard for her matrimonial obligations, but also dragging her husband before the public, and compelling him to make disclosures and confessions of guilt to his own dishonor, into which he alleges he was driven by her own heartless infidelity towards him, in the commission of adultery, and the abandonment of his house.

From all that appears on the record, the complainant and respondent stand toward each other in the relation of man and wife. The separations alleged in the complaint and answer have no legal effect in the dissolution of the conjugal relations, and they were at the time of the commencement of this suit, as firmly bound, for all legal purposes, in the bonds of matrimony, as they were on the day of their marriage, or in the palmiest and most concordant hour of their conjugal association.

According to the principles of the civil law, a separation from bed and board, or a dissolution of the conjugal association, must be decreed by a competent tribunal and not by the consent of the parties: Civil Law of Spain and Mexico. p. 10, art. 33. It does not appear from the record that any separation had been decreed by a competent tribunal; but the separation which took place between the parties appears to have been voluntary, against the policy of matrimonial law, without legal sanction, and therefore powerless for the purpose of dissolving the conjugal tie. The complainant, in her bill, did not even allege, as a cause of separation from her husband, any one of the causes which would have availed her in a prayer for separation before a competent tribunal. It is true that in entering the court below, which had power to decree a divorce, she alleged adultery against her husband as an auxiliary to the establishment of the waste and dissipation of her property, and,

if she had appeared with clean hands, the court, upon proof of her allegations, might, under the general prayer for relief, have decreed a separation in order to place her in a legal attitude to resume the administration of her property; but the answer of the respondent, while it affirmed the allegation of adultery against himself, also averred a recrimination of the same degree of conjugal infidelity on her part, and, unfortunately for her, the proof in the cause gave too strong a coloring to the truth of the averment to entitle her to that relief which a court of equity will grant to those alone who are able to show that they have done equity. In this instance, the parties appeared in a character too impure, with guilt too equal and too deep, to allow the chancellor to decree a separation. If the complainant, standing spotless and guiltless in the court below, had proved the allegation of adultery against the respondent, and the court had failed to decree a separation in order to place her in an attitude for the restitution of her dower, this court might now adjudge such an omission as error in the court below; but we find in the record no such cause, no such favorable character for the complainant.

We are, then, to view the complainant in the character of the lawful wife of the respondent, and it is a principle of the civil law which has been too often asserted by this court to render repetition necessary, that a wife can not, during the conjugal association, recover from her husband her separate dotal property, or resume the administration thereof, without showing waste or dissipation of the same on the part of her husband; for the administration of the dotal property, whether appraised or not, belongs exclusively to the husband during the existence of the marriage: Civil Law of Spain and Mexico, p. 77, art. 349. The husband, at the request of the wife, may be deprived of the administration of the dower, whether it consist of money, movables, or immovables, whenever he wastes or dissipates the same improperly, either by play or other irregularities. *Id.*, p. 78, art. 354. The dowry and other goods which the wife may have brought to her husband, are left with him on condition that he bear the charges of the marriage, and she can not demand a sep-

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aration of goods except when the disorder of the husband's affairs puts him out of the condition of being able to bear the said charges, and when the goods which he has of his wife's are in danger: Domat Civil Law, 394. The property claimed by the complainant is described in her bill as dotal property. Dower is the capital which the wife, or some one for her, gives the husband for the purpose of supporting the matrimonial expenses. The dower may be given or increased after the celebration of the marriage, and the dotal property thus given is subject to the same rules as that given before celebration: Civil Law of Spain and Mexico, p. 75, arts. 337, 338. The bill of the complainant alleges that at the time of her marriage and since, a large amount of money, property, chattels, and real estate of her absolute property and inheritance, was delivered to the respondent as her husband, in trust for her use and benefit, and for the use and benefit of both while they lived together as husband and wife.

The property sued for by the complainant is, therefore, according to her own allegation, dotal property, and consequently of such a nature as to bring her within the law, in reference thereto, which denies to the wife the right to resume the administration of her dower during the existence of the marriage. Upon the subject of the equity of the wife to a maintenance out of her own equitable estate, we find, in Story's Equity Jurisprudence, the same principles laid down as are established by the authorities on the civil law. That author says that such separate maintenance is generally confined to cases where the husband abandons or deserts his wife, or where he refuses to maintain her, or where, by reason of insolvency, he is unable to afford a suitable maintenance for her. Unless some of these ingredients exist, courts of equity will decline to interfere. If, therefore, the separation of the wife from her husband is voluntary on her part, and is caused by no cruelty or ill-treatment, or if he is *bona fide* ready, willing, and able to maintain her, and she, without good cause, chooses to separate from him, or if she has already a competent maintenance; in all such cases courts of equity will afford no aid



whatsoever in accomplishing a purpose which is deemed subversive of the true policy of the matrimonial law, and destructive of the best interests of society. *A fortiori*, where the wife has eloped and is living in a state of adultery, they withhold all countenance to such grossly immoral conduct, and they will leave the wife to bear as she may the ordinary results of her own infamous abandonment of duty: 2 Story Eq. Jur. 880.

This case, as it appears upon the record, falls too clearly within these principles. The complainant, according to her own allegations, separated from the respondent as his wife without the assignment of any cause which would have justified her in so doing. She lived thus in separation from him for years, and her husband avers that during the period of their separation she was living in open adultery, and from the testimony adduced during the progress of the suit, this court is left under the painful conviction that the respondent had reason enough to justify him in making the averment. While thus derelict to her conjugal obligations, thus recreant to the duties enjoined upon her by the matrimonial bond, thus sullied by the unrefuted charge of guilt, she presents herself before a court of chancery, and asks that relief which, even if she had presented herself pure and spotless, the court could not have granted; for the marriage tie between her and the respondent still existed; the conjugal association had not been dissolved. She still stood in the eye of the law related to the respondent as his lawful wife, and as such the court could not grant to her the administration of the property, which she claimed without proof of waste and dissipation of the same on the part of the respondent. The bill of the complainant alleges waste and dissipation; but the respondent in his answer denies the charge, and no testimony is introduced to establish the truth of the allegation.

From the view taken by this court of the law of this case, in reference to the incompetency of the wife to resume the administration of her dotal property during the existence of the marriage, it follows that the costs in this cause were erroneously taxed in the court below against the complain-

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Points decided.

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ant upon the dismissal of her bill; for she was still the wife of the respondent, and he as her husband was still the custodian and administrator of her estate. The husband alone administers the property of the conjugal partnership during the entire existence of the marriage relation, unless the same be taken from him by due course of law, and he is, therefore, while he thus continues to administer the estate of his wife, presumed to be alone able and liable to defray such expenses as she may incur. The court below should have dismissed the bill without prejudice to the parties, and the costs should have been taxed against the respondent. The decree of the district court is therefore affirmed as to the dismissal of the bill, and reversed as to the taxing of the costs.

Order: This cause came on to be heard upon the transcript of the record from the district court for the second judicial district, in the county of Taos, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged, that the decree of the said district court in this cause be, and the same is hereby affirmed as to the dismissal of the complainant's bill, and the decree of said court be reversed so far as it taxes the cost against the complainant, and that the same be taxed against the respondent.

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### JESUS DURAN v. THE TERRITORY OF NEW MEXICO.

**MURDER IN FIFTH DEGREE.**—Evidence that there was ill-will, existing at the time of a homicide, between the prisoner and the deceased, and that the parties being about thirty-five varas apart, the deceased took his gun from his shoulder as if to offend the prisoner; but did not present or point it at him, when the latter stepped back a few steps and fired the fatal shot, is sufficient to support a conviction for murder in the fifth degree.

**APPEAL** from the district court of the second judicial district, for the county of San Miguel. The case is stated in the opinion.

*M. Ashurst*, for the appellant.

*R. H. Tompkins*, attorney-general, for the appellee.

By Court, DEAVENPORT, C. J.:

This case is an appeal to this court from the district court of the United States for the second judicial district, sitting in the county of San Miguel. Jesus Duran was indicted and arraigned upon the charge of the murder of Calloway James, and he pleaded not guilty. Upon this issue a trial was had, and the jury returned a verdict of guilty of murder in the fifth degree, and assessed his punishment at three years' imprisonment in the territorial prison. A motion was made for a new trial, which the court overruled. There are two grounds of error assigned: 1. That the district court erred in refusing to grant a new trial to appellant in the case; 2. The district court erred in rendering judgment in said cause. We have examined the evidence contained in the bill of exceptions, and find nothing in the same which conducts our minds to the conclusion that the district court erred in refusing the new trial. All the witnesses concur in their testimony touching a state of ill-feeling existing between the deceased and appellant, and one of the witnesses, Jose Duran, testified that after some conversation between deceased and Jesus Duran, deceased was walking with his gun on his shoulder, and Duran with his gun in a trailing position, and being about thirty-five varas from the door, he saw deceased take his gun from his shoulder, as if to offend Duran, and at that moment Jesus Duran stepped back a step or so, shot, and deceased fell. This is the testimony of a witness who saw the transaction. The deceased was walking with his gun on his shoulder, and Duran with his in a trailing position, and at the moment he takes his gun from his shoulder he is shot and falls dead. There is no evidence that deceased presented his gun at Duran, nor does the testimony show that deceased pointed it at him. There is other testimony in the case, but none shows that Duran was justified in killing deceased at the time he shot. Having disposed of this ground of error, the other assigned is also virtually disposed of. The judgment below is affirmed with costs.

**PUEBLO OF LAGUNA v. PUEBLO OF ACOMA.**

**FAILURE TO PLEAD STATUTE OF LIMITATIONS.**—Where a party fails to plead the statute of limitations in the court below, he can not rely upon that defense in the appellate court, but will be deemed to have waived it.

**OBJECTION TO PLAINTIFF'S RIGHT TO SUE.**—The objection that a suit is not instituted in the name of the proper plaintiff can not be first raised in the appellate court.

**OIL PAINTING OF SAN JOSE, OWNERSHIP OF.**—The oil painting of San Jose, the patron saint of the pueblo of Acoma, left with them by the early conquerors, belongs to that pueblo, and not to the parish priest for the time being, nor to the pueblo of Laguna, and the former pueblo being deprived of its possession by the latter, are entitled to a decree restoring it to them, and need not sue in the name of the parish priest.

**APPEAL** from the district court of the second judicial district for the county of Valencia. The facts appear from the opinion.

*Baird and Smith*, for the appellants.

*M. Ashurst*, for the appellee.

By Court, DEAVENPORT, C. J.:

This interesting and novel case originated in the district court of the second judicial district of this territory, in the county of Valencia, and was tried before the Hon. Kirby Benedict, associate justice of this court, and judge of said district, sitting on the chancery side of said court. The pueblo of Acoma filed their bill in chancery against the pueblo of Laguna, setting forth that in years past, but how long is unknown, the pueblo of Acoma was established, and had been hitherto known by that name; that on the establishment of said pueblo, San Jose (St. Joseph) was constituted patron saint, and has for many years so continued; that after the establishment of said pueblo and the dedication thereof to San Jose, a full life-size oil painting upon cloth or linen, was placed in the Catholic church erected and dedicated to God, and the holy Catholic church, and San Jose as aforesaid; that said painting is an object of peculiar affection to the people of said pueblo, and by their religion rendered almost indispensable in their worship of almighty God, and, in fact, of such peculiar interest that it

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can not be compensated for in any other way; that the pueblo of Laguna some years past, but within the memory of persons now living, under pretense of a loan, borrowed said painting of the pueblo of Acoma for the purpose of celebrating holy week (*semana santa*), then approaching; that the said pueblo of Laguna having so obtained possession of said painting, they set up a claim to it, and refused to return the same to them. The pueblo of Acoma aver that said pretended claim was false, and that their pretended borrowing of the painting was a fraud practiced upon them to cheat them out of said painting; that the pueblo of Acoma thereupon sought relief from the ecclesiastical authorities in the premises, who were conceived at that time to have authority and jurisdiction over the subject-matter. Thereupon the priest or *cura* in charge of the spiritual welfare of the pueblo of Acoma at that time, directed the painting to be returned to the pueblo of Acoma, and cited or caused the two pueblos to appear before him at Acoma, and that for the final settlement of the question as to the right and possession of said painting, he proposed to said pueblos that they in prayer fervently and earnestly call on God and the saint, that they cause right and justice to prevail in the matter. To which proposition the two pueblos most cordially agreed, and having worshiped God and the saint as aforesaid in accordance with their agreement, under the direction and supervision of the *cura*, they cast lots for said painting, and, as complainants were induced to believe, God and the saint decided that said painting did, and should, belong to the pueblo of Acoma. In which said decision complainants allege that the said *cura* also concurred, with which decision they hoped all parties would remain satisfied, but that the pueblo of Laguna, wholly disregarding the decision thus solemnly made and sanctioned by the priest, returned the same day in strong numbers, and with arms in hand approached the door of the church and threatened to break it down if the said painting was not given to them; that the pueblo of Acoma, being weak and powerless against the strength of the Lagunians, were induced by the threats of the pueblo of Laguna, un-

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der the advice of the *cura*, to avoid bloodshed, to deliver the said painting to the said Lagunians, who have hitherto retained it against the wishes and consent of complainants.

The above embrace all the allegations useful to a full understanding of the case, so far as the action of this court is involved. The other allegations as to the apostasy of the pueblo of Laguna from the true Catholic faith and their revilement of the saints were charged to base a prayer to the chancellor that he should appoint a receiver to take charge of the painting until the cause should be finally adjudged and decreed. The pueblo of Laguna say that they know nothing of the origin of said painting of San Jose except from the tradition of their old men, handed down for several generations past, and such tradition clearly and conclusively establishes the right of said pueblo of Laguna to said painting of San Jose, and manifests clearly that the same is the property of the pueblo of Laguna and rightfully belongs to them. It is said and universally believed that, after the conquest of this country by Spain, a bishop gave the painting of San Jose to the pueblo of Laguna, and that said painting was by the pueblo of Acoma clandestinely taken from them, and they went peaceably to reclaim it, and the pueblo of Acoma refused to surrender it, and thereupon a Catholic priest proposed they should draw lots for it, to which proposition the pueblo of Acoma consented, but they refused, and, knowing their title to said painting, took it from the said pueblo, as they had a right to do, and have ever since that time continued to keep, use, and claim it as their own up to the institution of this suit.

This is deemed a sufficient statement of the answer, as the balance of it contains denials of the allegations of the bill. At a subsequent day this cause was set for hearing on bill, answer, and proofs in the court below. The chancellor, after having heard both parties, entered up a decree in favor of the complainants in the premises, from which decree the defendants prayed an appeal to this court, which was allowed. The appellants assign only one ground of error in this case, that the district court erred in rendering a decree for the appellees when the same should

have been rendered for the appellants. Counsel for appellants in this court does not contend that upon the evidence the decree is not sustained, but virtually admits its correctness so far as the proofs in the case are concerned. But questions of law are here raised in argument which were not made nor relied upon in the court below. It is contended in argument that complainants are barred by the statute of limitations, and for that reason the decree should not have been for complainants. On this point it is laid down in Angell on Limitations, p. 313, that "if the defendant intends to insist upon the statute of limitations, (though he may waive it if he chooses), he should plead it to prevent surprise, and if he does not do so, it is presumed he intends to waive it." In this case no such plea was made. It is also contended that said decree was improperly rendered, because the pueblo of Acoma were not the proper parties to the bill; but that the suit should have been instituted and carried on in the name of the parish priest for the time being. In the court below no objections were made to the parties suing, neither were there any suggestions made that there was any parish priest interested in the said painting.

Apart from the statute of this territory, which provides that no exception shall be taken in an appeal to any proceeding in the circuit court, except such as have been expressly decided in that court (Rev. Code, p. 114, sec. 5), it can be abundantly shown from the evidence in this case, that this painting was not the property of any priest. The first witness, Quanico, introduced by the complainants, proves conclusively that Vicario Ortiz recognized the San Jose as belonging to the pueblo of Acoma. He also testifies that priest Lopez, in company with Margarita Herdandez, went to the pueblo of Acoma and the next day the principal men of Laguna arrived there, Luis Saraceno also being with them. That the priest ordered the governor of Acoma to be called, with the chiefs, to hear the subject of the saint. He (the priest) ordered all the families to worship and hear mass. He then ordered the principal men of both pueblos to meet together in a room, and after they

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had gone, the priest then left for another room, in company with Luis Saraceno and Margarita; but they returned shortly afterwards to where the others were. The priest then proposed that after breakfast they should draw lots for San Jose. They then went to the temple, where a vessel was placed in which were the lots, covered with a white cloth. Two little girls were then placed on the table, on each side of the vessel, and then Luis Saraceno and Margarita acted for Laguna and the priest for Acoma. The girls then commenced drawing out the lots. There were twelve lots, all blank but one, and that one had on it the picture of San Jose. The priest called the lots. The first, second, third, and fourth tickets were blank, and on the fifth the ticket with the picture of San Jose on it was drawn by Acoma. and then the priest declared that God had decided the case. and the Lagunians proposed returning to Laguna.

There is sufficient evidence that said painting was in controversy between these two pueblos, and instead of the priest setting up any claim to it, he declares that God had decided the case, and that it belonged to the pueblo of Acoma. The same witness continues: The Lagunians then, left, but most of them remained. At that time the Lagunians were encamped at the Agua Escuridad, and from thence they came the same day to attack Acoma. Francisco P——, a member of the pueblo of Acoma, and witness, were at the church door when they came, and asked them their business, and they said they had come for the saint, and threatened to break the door if it was not delivered. The priest then asked what was to be done, and advised the Acomas to give up the saint. The priest was afraid of the Lagunians and delivered the saint to them. and the Lagunians took it away. The priest, after the Lagunians took the saint away, said to them not to mourn for the saint, that he would get another from Mexico. In another portion of his testimony the witness says: The saint was left by the early conquerors to the pueblo of Acoma, and is of great value to them, is the patron saint of Acoma, and he believes in the saint as the guardian and patron saint of Acoma, and its place can not be supplied



with another one, and he believes that in order to prevail with God it is necessary to have San Jose in Acoma. Another witness, Antonio Casique, says that the saint was brought to Acoma by a king, Vicente; that it was placed in the church at the time of the second conquest.

From the above testimony it is clearly deducible that said painting is an object of great veneration to the pueblo of Acoma, as well from its supposed spiritual protecting patronage, as its high antiquity among them. That it belonged to them as a pueblo is also clearly deducible from the evidence. That it did not belong to any parish priest is demonstrable from the circumstance that no such claim was ever set up, or pretended to be set up, in all the controversies touching the painting between the two pueblos. The priest interfered only to compromise the dispute between the two contending pueblos concerning it, and on one occasion at the drawing of the lots, declared that God had directed that San Jose belonged to Acoma. Then it is clear that the court below committed no error in not requiring the Spanish priest for the time being to be made a party to this suit.

Having disposed of all the points which counsel for appellants raised in argument against the decree below, the court deems it not improper to indulge in some reflections on this interesting case. The history of this painting, its obscure origin, its age, and the fierce contest which these two Indian pueblos have carried on, bespeak the inappreciable value which was placed upon it. The intrinsic value of the oil, paint, and cloth upon which San Jose is represented to the senses, it has been admitted in argument, probably would not amount to two bits; but this seemingly worthless painting has well-nigh cost these two pueblos a bloody and cruel struggle, and had it not been for weakness on the part of one of the pueblos, its history might have been written in blood. Such is his appreciative value, that one witness swore that unless San Jose is in Acoma the people thereof can not prevail with God. All these supposed virtues and attributes appertaining to this saint, in the belief of these people, and the belief that the

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throne of God can only be successfully approached through San Jose, have contributed to make this a case of deep interest, involving a portraiture of the feelings, passions, and character of these peculiar people.

Let the decree below be affirmed.

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### VICTOR DE LA O v. THE PUEBLO OF ACOMA.

**ANSWER TAKEN AS TRUE, WHEN.**—When a cause is set down for hearing on the bill, answer, and exhibits, the answer must be taken as true, but may be dissected by the court to determine what it admits or proves.

**FINDER OF LOST PUBLIC DOCUMENT, RIGHTS OF.**—The finder or other person casually coming to the possession of a public document, paper, or record, gains no such property in it as to authorize him to estimate its value to one having an interest in it, and to withhold the same from the rightful owner or lawful custodian until the estimated sum is paid.

**PROMISE BY OWNER TO PAY FOR POSSESSION OF DOCUMENT.**—Where the finder of a document or title deed refuses to deliver it to the owner until a promise is made by the latter to pay a certain sum therefor, such promise is without consideration and void, and gives the finder no lien upon the document.

**APPEAL** from the district court of the third judicial district for the county of Socorro. The opinion states the case.

*T. D. Wheaton*, for the appellant.

*H. N. Smith*, for the appellee.

By Court, **BENEDICT, J.:**

This cause comes by appeal from the chancery side of the United States district court for the county of Socorro, third district. An enactment of the territory authorizes the inhabitants known by the name of pueblo Indians, and living on lands granted to such Indians by the laws of Spain or Mexico, to sue and defend as an incorporation. By virtue of this authority the pueblo of Acoma, by their governor, Juan Jose Lovato, filed their petition in the district court, alleging that the pueblo was the owner of a certain tract of land and possessed of the same situated in the county of Valencia, and known as the lands upon which

the pueblo is built; that the same was granted to them by the king of Spain or his viceroy; that the titles thereto were made out in due form and deposited with the archives at Santa Fe; that, by some means unknown to the petitioners, said titles had come to the hands and possession of one Vicente Ariluead, Victor de la O, and Ramon Sanchez; that neither had any right to detain or withhold them from the possession of the pueblo; that said persons were made defendants, and were of the county of Socorro; that they fraudulently refused to deliver up said titles to the pueblo unless they would pay the sum of six hundred dollars; that without the possession and without access to said titles the pueblo could not defend their rights to their lands in controversy with the pueblo of Laguna, and that defendants threatened to put the titles beyond the reach of the pueblo unless they would shortly pay the said sum of six hundred dollars. The pueblo prayed immediate relief and a final decree of the titles to them.

The judge at chambers enjoined the defendants from destroying or in any wise disposing of the documents to the prejudice of the pueblo. At the November term, 1854, the defendants filed their separate answers, and after some intermediate steps having been taken, and some points which were made having been decided by the court, the cause, by the agreement of the parties, was set down for hearing on the bill, answers, and exhibits. Upon the hearing the court dismissed the bill as to Ariluead and Sanchez, and as to De la O, decreed that the documents be surrendered to the pueblo of Acoma, their authorities or agents, and that a copy of the same be spread upon the records of the court, and that it also be recorded in the county of Valencia, where the lands of Acoma are situated. From this decree, which taxed the cost against De la O, he appealed to this court. In his answer he admitted that he had possession of the documents, and made exhibits of the same.

Its antiquity, and its connection with the history of the pueblo and their rights to their lands, will justify a more particular reference to its contents. It is entitled, "Privi-

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lege of the pueblo of Acoma and of Guadalupe of the Paso del Norte, on the twenty-eighth day of September, one thousand six hundred and sixty-nine." It then proceeded to narrate, that the governor and captain-general, D. Domingo Jerouse Petrez de Conzate said, that, "whereas by the victory obtained in New Mexico, Quentonese nations and apostates of that kingdom, and over the Lagunas, and all the other pueblos in which I directed that with much particularity they should make known the boundaries which the Indians of the pueblo of Acoma were subject, which at the time of this rebellion they showed and made known, with all the pueblos of that kingdom, and in the first place with the pueblo of Tia, and that of Moqui, and with the pueblo of Zuni, and these are of the Queres nations, and are at war with all the other pueblos, which was all placed in my knowledge concerning this pueblo of Acoma of the province of New Mexico." The document then states that an Indian of Acoma, and whose name was Bartoleme de Ojedas, was wounded with a ball and arrow; was intelligent and could read and write; that he understood the Castilian language; that he was one of the most distinguished in the war, and had great influence among all the Indians, and particularly among the apostates, and was obeyed by all the pueblos, though only about twenty-two years of age; that being wounded and disabled, he surrendered, and was then put under oath by order of the captain-general, and disclosed the situation of Acoma, and the boundaries, their wars with the Lagunas, their moving to the Penol Rock, where they now are, and other parts of interest to their history. The captain-general then, in conformity with the authority in him vested, granted to Acoma the boundaries which Ojedas had described. The document was then signed by the governor and captain-general, by the Indian and by the civil and military secretary, as affirming and making the grant perfect. Its importance to Acoma is apparent.

Having embodied so much of the nature of the subject-matter claimed by the pueblo, it becomes necessary to turn our examination to De la O's answer, to enlighten ourselves as to the equity, justice, and legality of the decree below.

Many things are contained in this answer, which, though curious in themselves, when regarded as true, yet can not weigh with great force in favor of the respondent, when taken in connection with the entire response. We will examine the most important averment. De la O claims not only the right to detain said original papers from said pueblo, but also to refuse them a copy of the same, by virtue of a contract made with said pueblo of Acoma, under and by virtue of which contract, the said pueblo promised and agreed to pay the sum of six hundred dollars in money, or property at prices then agreed upon between the said pueblo and this defendant, and which said contract was made in 1850. He declares as his opinion that a copy of the document was given to the pueblo when the grant was made, and then, with much complacency, asserts, that if they, by negligence and want of care, have lost the copy, it now affords to the pueblo no valid right to take from him, without compensation, the original document, which by the care and diligence of himself and ancestors has been preserved from loss and destruction until one hundred and sixty-six years after its execution.

This was placed in the answer with a view to suggest, doubtless, or show some consideration upon which to justify the claim of six hundred dollars from the Indians, for putting into their hands that which was their own property and of right had been theirs for over a century and a half of time, let the possession have been where it may. He evidently intended to inform the chancellor that through a long series of years his ancestors had done highly meritorious deeds in favor of the pueblo in relation to the document; that a debt had ensued in their favor against the pueblo, and that by some peculiar process the legal and equitable claims of this long line of ancestry against Acoma had concentrated in his person, as their only living representative, and that he had become the self-appointed executor to collect their interest and wind up their estate so far as the Acoma Indians were concerned.

It has been a graphic and expressive figure, not infrequently used to denote chancery powers, that the "arm of

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the chancellor is long." The expression is imposingly true in its meaning, if his arm can stretch itself through the long line of ancestral ranks of this defendant, and lay his hand upon the tomb of him who somewhere in the close of the seventeenth century, became the custodian of this document, and founded by his care and diligence, a pecuniary debt against Acoma, and handed the debt, the document and its custody, down from sire to son; the claim increasing from new services rendered by each succeeding generation, until at last this defendant becomes the lucky recipient of so many ancient merits. As the chancellor's arm rolls the various and steady accumulations of so many years, amounting to six hundred dollars, from the property of the Indians of the Penol or Rock of Acoma, into the hands of Victor de la O, impressed with the consciousness that seriousness adds dignity to judicial deliberations, we will follow the defendant in his relation of the circumstances under which he became the possessor and keeper of the document.

According to the account rendered by himself, and this with the view of weighing the merit of the consideration set up for the promise of the six hundred dollars, he calls his narrative "shedding further light upon this ancient document." He states his age to be fifty-four years, birth-place Chihuahua, and that he is the only child of his father, Gregorio de la O, who died in the year 1810, near Corralitos, in said state, at the age of sixty-four years; that his father was lieutenant of the dragoons of Spain; that he was a man of education and reading, and at his death had many papers and books; that defendant, by reason of his inability to read or write, did not know the value or nature of the books and papers, so he sold and squandered the most of them; that in 1833 he left Chihuahua and came to New Mexico, and in 1836 his wife also came hither, and that then the document and other papers were brought here by her, and that they have since then been here and in his possession; that the papers and documents were in his father's possession at the time of his death, but at what time or under what circumstances they came to his possession

is wholly unknown to respondent, but he presumes his father came honestly by them as "waifs floating upon the boisterous ocean of some of the revolutions of his day."

Such is the light defendant throws upon the ancient document. When we consider the rank of the defendant's father as a military officer under the Spanish monarchy, the son appears to have been the victim of misfortune. The father not only had rank, and it is to be presumed was one of the hidalgos of his time, but he had that which was still more meritorious, he was a man of education and reading, and had many papers and books. All this indicates a cultivated man, and one whose mind and moral senses were not only awakened, but likewise tutored and enlightened. We can not refrain from doing him the justice to presume that his only child, Victor, deeply interested and moved his heart and hopes. Especially must this have been so, as Victor makes no disclosures as to his mother in relation to this highly important portion of his biography. It seems unaccountable, therefore, why so literary and improved a Spanish officer should so cruelly have neglected the education of his only son, "sole heir of his house and heart." The child soon to be left an orphan was not by this literary father even taught to read and write. This was only a portion of his ill fortune. His father died, leaving the son when he was about ten years of age. It is saddening when we infer, as surely we must, that when so noted a personage left no one that would look after the interests of the estate, the large amount of papers and books fell into the hands of the boy, Victor, to sell and squander. It is a relief to the mind to believe that it rarely occurred in those days that such an estate and such an orphan could find no one to look after them. An administrator would have examined the papers and books, made an inventory, and brought to the attention of the probate the unclaimed waifs. The magistrate would have known quickly where those titled and public documents belonged, and taken steps for their restoration. The son, not taught to read by the literary father, was left in the midst of waifs and papers, documents and books, and in his childishness and utter ignorance of

their value, was permitted to sell and squander them at his will and fancy. At what time he learned that he had the title to the pueblo of Acoma defendant has not given exact information. In one instance he seems not to have been so blighted by his evil luck as at these points of his life which we have reviewed. 1836, his wife brought to New Mexico the documents and papers which had been omitted by him. These have remained in his possession ever since. This statement in the answer seems carefully worded, and shows with a great degree of pointedness, certainly, that he had all the papers and documents at the time of making his answer, including the one in question, that were brought to him when his wife came.

We pause here to inquire from what source he obtained the title to the pueblo of Laguna, and which he swears he sold to General Armijo for the sum of two hundred dollars, and Armijo sold to Savacerio, and the latter to Laguna? From whence was this waif picked up and thrown into the market when the titles to both Laguna and Acoma became of great moment and value from the controversies that existed between them as to those respective boundaries? From De la O's own showing it was not found by his father as one of the floating unreclaimed waifs in his day. He came in 1833, ignorant of their contents. Three years afterwards his wife followed and brought them, as he says, and they were in his possession at the very moment of making his answer. Not a paper or document had departed from him. His answer authorizes this position. Yet he was in the trade of pueblo titles, and made his appearance, with documents in hand, when the wants of the Indians were rendering them liable to fall victims to extortions, and when their property could be wrung from them upon grounds wholly indefensible upon any principles of common honesty and equity.

We notice that part of De la O's answer relating to his and his ancestors' care and diligence in preserving the document from destruction and loss until the end of one hundred and sixty-six years after its execution, and that portion professing to "throw further light" upon it. In the latter he goes no further than one ancestor, and that



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was his father, and then swears that at what time or under what circumstances it came to his possession is wholly unknown to defendant. From whom did he learn that his father ever had it? His father did not tell him, for he asserts ignorance of its existence among the papers the father left. He did not learn it himself, for he could neither read or write. He shadows forth no knowledge of it until after the arrival of his wife in 1836. How did he then gain the knowledge of his father's possession, twenty-six years previous, when he died? Were the links of facts supplied by the wife following the chain up to the aged lieutenant's possession? The possession of the Laguna document and its disposition will present itself, with all the force of the attending circumstances, full upon the mind, whilst examining this answer and weighing its credibility in the midst of its inconsistencies and extravagances. We can not avoid reflecting, too, that De la O admits substantially that he did speculate in pueblo Indian documents.

This court adheres, as it must, to the rule, that when a cause is set down for hearing upon bill, answer, and exhibits, the answer is to be taken as true. It must, however, as to its statements, submit to a dissection by the court to ascertain what it admits or proves. As it stands, no further testimony can be introduced by the plaintiff to attack, nor by the defendant to sustain it. Both bill and answer are before the court, and legal principles aid the chancellor as he dissects them, both to see what is proven and established. The complainants allege that the titles in question were made out in due form and deposited with the archives in Santa Fe. The defendant's answer to this portion of the bill is worthy of notice. He does not admit that they were so deposited, but avers his disbelief, and offers a short argument to the court to sustain his position. His argument is "that they were never deposited there, or their existence would have been known to some one, and the manner in which they were taken away or lost out of said archives, would be accounted for."

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It is but fair to apply such force as there is in this reasoning to one of the grounds stated in the answer, and insisted upon by a positive averment. "That defendant had a right to withhold and detain said papers from the pueblo and from the secretary's office of this territory, because said paper, upon its face, purporting to have been executed at El Paso, a place now and always heretofore without the limits of the United States, and the jurisdiction of this court, would properly belong to the archives of that city, and not to the archives of the secretary's office of this territory, at Santa Fe; and that by the Spanish law, the originals of all public documents and papers remained in the archives of the place of their execution." Now defendant has sufficiently committed his conscience, that the document was deposited with the archives at El Paso. How does he account for the manner it was taken away or lost from among those archives? How did it escape from there and become a waif unclaimed? How and when did it desert its secure abode among the archives of El Paso, and, separating itself from its companions upon the shelf, wander like a bird from the ark of her safety, to be found lost and floating upon the revolutionary ocean which the imagination of defendant has pictured in his answer? His mind moved boldly around to imagine how the document as a waif, floating unclaimed, was found, snatched from destruction, and preserved; but his spirit tired and drooped from the effort in its flight, his fancy retained no power to disclose how the document left the custody of its custodian on shore; to venture out at sea to endure so many perils, to be picked up by the literary lieutenant, and finally rescued by his illiterate son, as a profitable article of traffic in his trade in pueblo documents in New Mexico.

De la O avers that he had a right to withhold and detain the document in question, upon the ground that it belonged to the archives of El Paso. This averment deserves attention, with the view of seeing with what degree of cleanness he shows his hands to the chancellor, after admitting that he had the document and that it pertained to the rights of Acoma. If upon such ground he had the right to withhold

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it from its owners, it was because it was a public document, belonging to a public office, to be kept by a public officer for public ends, and that being found in his hands, it was under legal protection even against its owners. For what purpose, then, was he protected in guarding the title? We answer, evidently it was that he might discharge the duty which he plainly manifests himself as having felt himself to have been under; that duty was without delay to have done all in his power to have restored the document to the public custodian. How, then, did he venture to make it a matter of traffic? How did he have the boldness to propose to sell the possession of a public document to the pueblo of Acoma, when it belonged to the custodian of the archives at El Paso? How does he assume the effrontery to come before the chancellor and defend his action in detaining the document from the Indians, because a public duty is in effect upon him, which the pueblo can not compel him to violate, while in the same breath he prays the court to compel the Indians to pay him six hundred dollars, while he violates it on his part? In what posture does he conceive himself to stand before the court while he asks it to sanction what he avers to be a contract with the pueblo, while in the same connection, in his answer he swears in substance that he had no right or power to make such contracts?

In view of all this, as if to make a parody of the recklessness of his conduct, he openly avers, when, too, the avowal was in no wise required from anything appearing in the cause, that he had had the title to the pueblo of Laguna; that he had sold the same, not, however, to Laguna, to whom it rightfully belonged, but to one unconnected with the pueblo, for the sum of two hundred dollars, in direct contradiction to the position he assumed for himself. He saw nothing wrong in turning a document of a public archive into the field of trade and profit for himself. It will not be said that the title to Laguna belonged any less to the public archives than did that of Acoma. Let the defendant have regarded his duty as he may have done, he certainly never made any efforts to lodge back into the

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hands of the public custodian the Acoma title. And yet he declares it has been so long a time in his possession. We do not deem it irrelevant to remark, that the abstraction from the archives of this territory to pueblo titles at a period not very remote has become a matter of general notoriety from their nature and importance, and from their diffusion throughout the territory, and the frequent attempts at extorting money from the pueblos by means of these documents. We feel authorized to allude to the fact as one that has assumed the dignity of an historical event. Perhaps personal acts at a period when the political power of Mexico passed to the United States, in this country, and before the archives were possessed by the new power, could fully explain how the pueblo titles became floating upon the revolution of that day. Enough has been said to indicate our opinion as to the contracts De la O has attempted to set up.

Upon a dissection of the whole answer, we can not perceive that it establishes even a conscientious and equitable ground upon which to base a consideration for the promise to pay the six hundred dollars. Upon giving to the defendant the fullest benefit of his answer as to his personal case, and his preservation of the document, the time was not very long during which he had the slightest knowledge that he had the title in keeping. The guardianship was wholly without cost, and he was not conscious of any trouble. Had he done equitably, he would have immediately imparted the fact to its owners that he had the title, or restored it to the public custodian. We can not admit that whoever comes into possession of a public document, paper, or record, by finding or otherwise, thereby gains such a property in the same as to authorize him to estimate the value the record or other writing may be to him to whom it may belong, or who may have an interest therein, and to withhold the same from the rightful owner, or lawful custodian, until the sum estimated or demanded for the picking up and keeping shall be paid. The wrongs that might be perpetrated where such a doctrine should be recognized and enforced can neither be counted nor measured. Every man's titles and all documents would become

the prey to insecurity. The fraudulent man would riot in this species of plunder, and the extortionist revel in his iniquity.

We can not regard the means used to obtain the promise of six hundred dollars other than as an unconscionable attempt at extortion from the Indians. We look upon the promise made without any just or equitable consideration, although the defendant swears that the pueblo is legally, equitably, and honorably bound to pay the six hundred dollars. Upon his own showing, the contract insisted upon was opposed to sound public policy. He avers the title in question to belong to the custody of the public officer, but we are satisfied that it is the property of the pueblo, and that De la O has no right to withhold from them the possession; that he has no lien upon the thing in controversy; that, from the light thrown upon this case by the answer, he has been amply paid with the eight dollars he received for any meritorious services rendered by him towards the pueblo, in relation to this title. His answer, when passed under dissection of scrutiny, is found worthy to be only slightly valued. It plainly manifests that his hands, in times passed, were stained in doing wrong to Indian pueblos, relative to their titles; and by his defense he but deepens their discoloration to a repulsive blackness.

Having closed our review of the merits of this case, we may be indulged in reflecting, that of the highly interesting causes we have had to consider and determine during the present session, this is the second in which this pueblo has been the party complainant. The first keenly touched the religious affections of these children of the Rock of Acoma. They had been deprived by a neighboring pueblo of the ancient likeness in full painting of their patron or guardian saint, San Jose. However much the philosopher or more enlightened Christian may smile at the simple faith of this people in their supposed immediate and entire guardian of the pueblo, to them it was a pillar of fire by night and a pillar of cloud by day, the withdrawal of whose light and shade crushed the hopes of these sons of Montezuma, and left them victims to doubt, to gloom, and

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Points decided.

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to fear. The cherished object of the veneration of their long line of ancestry, this court permanently restores, and by this decree confirms to them, and throws around them the shield of the law's protection in their enjoyment of their religious love, piety, and confidence. In this case, the title that Spain had given this people, confirming to them the possession and ownership of their lands, and the rock upon which they have so long lived, was found in the hands of one professing to be of a better-instructed and more civilized race, and turned by him into the means of extortion and money-gathering from the unoffending inhabitants.

It is gratifying to us to be the judicial agents through which an object of their faith and devotion, as well as the ancient manuscripts, that is the written evidence that established their ancient rights in their soil and their rock, are more safely restored and confirmed to their possession and keeping.

The decree of the district court is affirmed, with costs.

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### FRANCISCO SANCHEZ v. RAMON LUNA.

**AMENDMENTS ON APPEALS FROM JUSTICES' COURTS.**—The district court has a discretion to grant leave to amend the pleadings on an appeal from a justice of the peace, if it appears that the justice had jurisdiction of the subject-matter and of the parties.

**COMPLAINT IN FORCIBLE ENTRY AND DETAINER.**—In a complaint for forcible entry and detainer, the property should be particularly described, so as to enable the sheriff to give possession, and the mode in which the defendant unlawfully got possession should be specified.

**OBJECTIONS NOT TAKEN BELOW, DEEMED WAIVED.**—A motion in the district court, on an appeal from a justice of the peace, to dismiss the suit because the complaint is not sworn to, and is defective in other particulars, when no objection on that ground was made before the justice, and the plaintiff offers to correct the defects, may be denied, and the plaintiff given leave to amend.

**AMENDMENT BY STRIKING OUT DEFENDANTS.**—On an appeal from a justice the plaintiff may amend by striking out some of the defendants, if the subject-matter of the controversy remain the same.

**AMENDED CAUSE OF ACTION, WHAT SUFFICIENT AS.**—A petition in the district court, on an appeal from a justice's court, filed under a grant of leave to amend the cause of action, will be deemed sufficient, notwith-

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standing informalities, if it contains all the substantial elements to place fully and clearly before the court the cause of action which leave was granted to amend.

**NOTE—SUBSEQUENT VERIFICATION.**—The district court has the same power in such a case, to permit the petition filed as an amended cause of action to be sworn to on a subsequent day, where such verification was omitted when it was first filed, as it had to permit the amendment.

**APPEAL** from the district court of Socorro county. The case appears from the opinion.

*Smith and Baird*, for the appellant.

*Hubbell and Watts*, for the appellee.

By Court, BENEDICT, J.:

The record in this case shows that Luna complained before a justice of the peace against Sanchez and two others of an action of forcible entry and detainer under the statute for such purpose. In the justice's court judgment was rendered against the defendants, and they appealed to the district court. Then the cause appeared in the district court, and various motions seem to have been made by the parties. The appealing party moved for and obtained leave to file an amended and perfect appeal bond. The same party also moved to dismiss the suit itself, and thereupon the plaintiff obtained leave of the court to amend his cause of action, and the court then overruled the motion to dismiss the suit. The cause was then continued to a later term.

When a subsequent term arrived, the defendant, Sanchez, again moved to dismiss the suit, stating as his grounds, that various causes of action were contained in the petition which had been filed as the amended cause of action, and that the same had not been sworn to, and for various other causes. The court then permitted Luna in open court to swear to the petition, and then the motion to dismiss was overruled and the defendant excepted to the ruling of the court. A change of venue was then prayed for, and the court, upon this prayer of Luna, ordered the cause to Socorro for trial. It was afterwards tried in that county, and the jury found a verdict against Sanchez, and thereupon his counsel moved the court to set aside the verdict, and

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grant a new trial; which motion was overruled, and the court rendered judgment upon the verdict, and defendant excepted, and appealed to this court.

The errors assigned are:

1. In not dismissing the cause for want of an affidavit;
2. In allowing the amended petition to be filed;
3. In refusing a new trial.

The statute upon this subject provides that the complaint of the plaintiff shall be sworn to. There is no direct command that the oath shall be in the affidavit form. It is clear, however, that the truth of the complaints shall be supported by oath. It is true that it does not clearly appear by the justice's transcript, that the complaint was made under oath. It does state that the agent of Luna reclaims and complains against Sanchez and the two others, that they had possession of lands against the will of Luna. It becomes necessary to inquire somewhat as to the power of the district courts to allow amendments in causes removed by appeal from justices of the peace.

It is not unuseful to turn to the legislation of congress to examine the spirit which is intended to pervade the United States courts upon the subject of amendments. It will be seen that the rule of proceeding is of the most liberal character for the futherance of justice. Section 32 of the act of 1789, in volume 1, page 99, of the United States statutes at large, provides: "That no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes in any of the courts of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration or other pleading, return, process, judgment, or cause of proceedings whatsoever, except those only in case of demurrer, which the party demurring shall especially set down and express, together with his demurrer, as the cause thereof. And the said courts respectively shall and may, by virtue of this act, from time to time,



amend all and every such imperfections, defects, and wants of form, other than those only which the party demurring shall express as aforesaid, and may at any time permit either of the parties to amend any defects in the process or pleadings, upon such conditions as the said courts respectively shall, in their discretion and by their rules, prescribe."

In the notes upon the same page, reference is made to a number of cases adjudicated in the United States courts under this statute. One says, "that the thirty-second section, allowing amendments, is sufficiently comprehensive to embrace causes of appellate as well as original jurisdiction; and there is nothing in the nature of an appellate jurisdiction proceeding, according to the common law, which forbids the granting of amendments."

It would be an easy matter to show by an abundance of reported cases, that in all courts of the United States possessing original jurisdiction, the ample and liberal section 82 has ever been liberally construed in practice for the "furtherance of justice," and to prevent delay. These authorities are entitled to, and must impose, great weight upon this court, and the section itself "is of a general nature, and not locally inapplicable to the courts in this territory." The legislature of New Mexico, in prescribing a system of practice for the district courts in causes arising under the laws of the territory, says, in the twenty-seventh section of the practice act: "Each party, by leave of the court, shall have leave to amend upon such terms as the court may think proper at any time before verdict, judgment, or decree."

This act follows in the same liberal path marked out by the law of congress. The discretion given to the courts is full and complete over amendments, but it is urged that this discretion is more limited over cases that are brought in the district courts by way of appeals from justices of the peace. It is not easy to support this position by satisfactory reasons. Power is given by law to the district courts to try and determine causes appealed from justices' courts; appellate power to this extent is lodged in the district courts. They hear and try the appeals *de novo*. By this we under-

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stand that the cause shall be tried upon its merits, as if it was a new action in the court. The court is to be in no wise trammelled in its mode of proceeding by the irregular and untechnical act of the justice of the peace. It would indeed be a very hard rule to deny the court its power and discretion in allowing amendments to place a cause appealed from the justice in such manner before the court, as to be triable, when the whole trial is to be *de novo*. To forbid the courts this power to amend in this class of cases, when the power is so general and broad in all other civil suits, would in this country amount to almost a denial of justice through the means of appeals. The justices of the peace are, for the most part, unskilled, if not uninstructed, in legal forms and technical proceedings. The records in appealed causes in the courts manifest how defective and inartificial the business in the precinct tribunals is transacted. The dockets are rare that can exhibit strict regularity. If, where a litigant presents himself before the district bench with his appeal in hand, the court is powerless in granting to the parties the privilege to correct and perfect what unskillfulness or ignorance has defectively done, the result must be that suitors will be turned from the court with heavy bills of costs, and confidence in legal justice be destroyed.

A narrow and dwarfish policy will usurp the bench in direct conflict with the wise and liberal spirit, intent, and provisions of the congressional and legislative enactments before mentioned. Besides working ruin to litigants, it would disgrace the jurisprudence of this country. We are of the opinion that the power of the district court to exercise its discretion in giving leave to amend should not be withheld in cases of appeals, when it shall appear that the justice of the peace had jurisdiction of the subject-matter in controversy, and of the parties in the case. Should these two facts not exist, the proceedings would be a nullity. If these facts do exist, the rule for the court should be the furtherance of justice. The purpose of all amendments looks to this end. This reason supports, and the law sanctions and assists.

Counsel for Sanchez insists that the court should have dismissed the suit upon the first motion. The transcript was not clear as to the complaint having been sworn to, yet it did state that the party complained. It was alleged that Sanchez and others possessed or occupied lands against Luna, but it was not shown by which one of the unlawful modes specified in the statute they had got possession. Again, the lands were only described by a general reference and not by any particular designation. Upon a judgment the court would have been at a loss to so issue its mandate as to inform the sheriff what possession he should restore to Luna. Now, it is a rule in all dilatory movements of defendants, such as pleas that abate motions, that dismiss a cause for the want of compliance with some material form, or anything which merely delays the prosecution of the suit, that the party, if he intends availing himself of his right, shall do so at the first opportunity. These defenses, as a general rule, are not regarded with peculiar favor by the law, and so the party asking their benefit is held to great strictness in their use. Now, Sanchez went to trial before the justice; many steps were had before trial, but it does not seem that he at any time objected that the complaint was not sworn to. In every respect, he treated it as complete in that part. If it was not, he should have raised his objection then, and moved for a dismissal of the suit. Then, if he had been refused, he might have stood before the district court as having waived no rights by omission or delays. But he seems to have fully acquiesced, and the district court had the right to presume that the complaint before the justice was perfect in all its parts, or that he had waived, by his appearance and silence, any defect that may have existed. He was unsuccessful before the justice and then appealed to the district court, and then for the first time moved to dismiss the suit. He did not then stand in an attitude to entitle him to that advantage, if the plaintiff would correct the defects. The latter asked leave, the court granted it, and thereupon overruled the motion to dismiss, and we think correctly. It is contended that the petition filed, which has been treated as the amended cause of action,

presented new and various causes of action, and that its form was that of an original petition in forcible entry and detainer; that the court had not jurisdiction of the case and ought not to have permitted it to be filed. The suit evidently was in forcible entry and detainer before the justice. It was for the restitution of the possession of lands, but they were not separated by designation from out of the general body of lands. The new complaint supplied this deficiency, denoting distinctly their locality. It is true the description presents them as parcels, and that upon one was a building, but in all this we do not see a new action, but an exact identification of the old, and no pretension has ever been made that Sanchez was taken by any surprise in all this. He did demand before the justice that the unlawful mode in which he had entered upon the possession should be specified. This the new and amended petition avers: "It was by stealth and fraud."

Courts have decided, "that a declaration so defective that it would exhibit no cause of action, may be cured by an amendment, without introducing any new cause of action. The intended cause of action, when defectively set forth, may be as clearly distinguished and perceived from another cause as it would be if the declaration had been perfect." Again: "Plaintiffs may be allowed to amend by striking out the names of a part of the defendants."

This was done in this case. Sanchez only was retained. It does not make a new and different cause of action because one or more defendants are dismissed, while the subject-matter in controversy remains. No order appears dismissing the other two defendants in the district court. Yet they were effectually discharged from the cause by the plaintiff, though by some omission the former order of court on that point does not stand in the record. But they have made no complaint, and this court has full power to make such order, in that respect, as the district court might have made. It is not a matter to affect Sanchez' rights or legal responsibilities.

Much stress has been laid by defendant upon the fact, that the petition in its form presented a complete action in

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all its parts, and addressed itself to the judge of the district court. We are not disposed to criticise with great minuteness the mere formalities of this paper, if it contained all the substantial elements to place fully, clearly, and definitely before the court and the opposing party, the cause of action, to amend which the court had granted leave. It was offered as the act done by the plaintiff under the leave which he had, and if there was anything excessive in its address, the court had a right to treat the excess as surplusage. When the paper was produced in the cause, there was enough in the record to enable the court to fix its place, nature, and intent in the proceedings, without any further averments. All parties to the trial knew well the office of the amended cause of action.

Enough has been said to dispose of the objection to the court allowing the petition to be sworn to. If it had the power to grant the leave to amend in the first instance, this power ran down through every step essential to be taken by the party to enable him to realize, under the discretion of the court, all the benefit which the leave imparted. The oath was necessary and it was permitted to be made.

The points raised and determined in this cause are of the first importance in the practice of our courts, and in their practical effects conform to the opinion before delivered, at the present term, in the case of *Archibeque v. Miera*, ante, 160. The court acknowledges the able and lucid manner in which these points were treated by counsel in their arguments at the bar. The court is unanimous in its opinion, that in all the rulings of the court below which we have examined, as presented by the record, and objected to by appellant, no error was committed. We are also unanimous in prescribing to the district courts in cases of appeals the rule of practice which we lay down in this opinion.

One other matter requires our attention. Should the court have granted the defendant a new trial? My brothers upon the bench, who did not hear the cause tried below, are decisive in their conclusions that the new trial should have been awarded, and this must determine the destiny of this cause. Here the record only is the test of what evidence

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was before the court below. The mere circumstantial recollections of the judge who tried the cause should not, as they will not, influence those who are dedicated to this bench for a season to dispense justice as the laws have provided. Bills of exceptions are, as all connected with the details of the court-house well know, often, in embodying testimony, hurriedly and imperfectly prepared. Not seldom the bill agreed upon by counsel is fragmentary in its character. The judge below sees the witnesses and their manner, and mental and moral formation. He hears them testify, and derives full opportunity to weigh what degree of credibility should attach to each. These things the paper can but faintly exhibit. I make no reference to such testimony as may not appear in this record, as it appeared to the court on the trial.

The points upon which this court passes are the possession of the lands by Luna and the stealthy and fraudulent entry of Sanchez. Let what influences prevail as properly may as to the conduct of Juan Gaveldon, it is thought that there is an absence of sufficient proof to carry to Sanchez a knowledge and participation of Gaveldon's fraud upon Luna. The evidence is that Juan had the keys and put Sanchez in possession; that the latter took possession publicly and in the day-time and under color of right, by purchase from heirs of the land. From the manner in which the testimony appears in the record, I am not disposed to contend against the convictions of my brother judges, by a dissenting opinion in this cause. It is the judgment of this court that the judgment of the court below be reversed, and the cause remanded to the district court of the third judicial district for a new trial.

**Reversed and remanded.**

**HENRY RUHE v. SANTIAGO ABREN.**

**NEW TRIAL, NEWLY DISCOVERED EVIDENCE AS GROUND FOR.**—In order to obtain a new trial on the ground of newly discovered evidence, a party must show that the failure to produce the evidence at the former trial was not owing to a want of due diligence on his part, and that, if produced, it would probably have changed the result.

**EVIDENCE OF IDENTITY OF WATCH.**—The testimony of witnesses who have examined and written down, or seen others write down, the number of a watch, is evidence of a more satisfactory character, and of a higher grade as to its identity, than that of witnesses who testify merely from the general appearance of the watch.

**IDEM—TESTIMONY OF WATCHMAKER.**—The testimony of a watchmaker who has repaired the watch and can identify the particular repairs made by him, is especially valuable in such a case.

**PREPONDERANCE OF EVIDENCE AS GROUND FOR NEW TRIAL.**—A new trial will be granted by an appellate court, where the evidence greatly preponderates against the verdict, and it appears that the merits of the case have not been fully and fairly tried, and that justice has not been done.

APPEAL from the district court of the first judicial district for Santa Fe county. The opinion states the case.

*Ashurst and Hopkins*, for the appellant.

*Hugh N. Smith*, for the appellee.

By Court, BROOCHUS, J.:

This was an action of replevin, by Henry Ruhe against Santiago Abren, for a gold watch and chain. The suit was commenced before a justice of the peace for the county of Santa Fe, and judgment having gone in favor of the defendant, the plaintiff appealed to the district court for the first judicial district, and the case was tried *de novo* before Chief Justice Deavenport with the same result. The plaintiff moved the court to set aside the verdict of the jury, and grant a new trial on the grounds that new testimony, material on his behalf, had been discovered since the trial, and that the verdict was contrary to the law and the evidence. Motion overruled.

In the trial of this cause, the plaintiff proved by James E. Sabine, that the watch in question was brought by him from St. Louis in the year 1852, and by him sold to D. Berry in the same year, and that he knew the watch by its

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number, which was recorded in his invoice book. He also proved, by Jules Jeannerett, that a man by the name of Wood afterwards paid the watch in litigation to him, as agent for Charles Spencer, for a debt which he owed the said Spencer; that he knew the watch well by its general appearance, as also from the fact that he had put some teeth in one of the cog-wheels thereof, which he offered to show by taking the watch apart, and that the same watch was put up in a raffle at the Exchange in the city of Santa Fe, about Christmas, in the year 1852, and that the same was won in the raffle by the plaintiff.

He also proved, by Wendell Debus, that he knew the watch in question then shown to him; that he had seen the plaintiff wearing it for some length of time after he had won it at the raffle; that a short time after the plaintiff won it, he tried to persuade him (the plaintiff) to make him (the witness) a present of it, saying that he might get drunk some time or other and lose it, or some one would steal it from him. The plaintiff replied that he would take down the number of the watch, so that in case he should lose it, he could recover it by the number. The plaintiff took from his pocket a memorandum book, and in the presence of him (the witness) put down the number of the watch by the side of the place where the number of his pistol was put down, and that the book shown him at the time of the trial was the book in which the number of the watch was registered, and that the number, 34,547, was the same as put down in the book, and also the number on the watch.

He also proved, by T. Bunker, that he knew the watch in question, and he had seen it in possession of the plaintiff for some time after the raffle; that plaintiff took down the number of the watch and put it in his memorandum-book in his presence, and that the book shown upon the trial was the same book, and the number 34,547, as there put down, was the same as that of the watch in litigation.

Other witnesses were examined on behalf of the plaintiff, the design of whose testimony was to show that the plaintiff lost a watch and chain some time in the year 1853, but



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their testimony was of such a character as to entitle it to little, if any, importance.

The defendant introduced as a witness Jesus Maria Baca, who testified that he purchased the watch in question from an American, in El Paso, in December, 1852; that he had possession of the watch from that time until shortly before the commencement of this suit, when he gave the watch to defendant, Abren, having won another and finer watch in a raffle, and having promised the said Abren that if he should win it, he would give him the one he then wore, which was the one in controversy. He also testified that Abren was not interested with him in the raffle, and that he had no interest in the result of the suit. He further testified, that on one occasion, while he had the watch, he showed it to Ruhe, the plaintiff, and asked him what it was worth, and Ruhe did not make any claim of it as being his.

The defendant also proved, by Luis Alarid, that on one occasion he was present when Jesus Maria Baca showed the watch in question to Ruhe, the plaintiff, and Ruhe made no claim to the watch as being his.

Upon this testimony the case went to the jury, and they found for the defendant, whereupon the plaintiff moved for a new trial on the grounds of newly discovered evidence and the verdict being contrary to the law and the evidence. The plaintiff in support of his motion for a new trial, on the ground of newly discovered evidence, made an affidavit in which he alleges, that since the trial of the cause he has discovered testimony to show that Jesus Maria Baca, the principal witness for defendant on the trial of said cause, was legally interested in the result of the case tried; that he believes that he can prove by C. D. Scofield, Francisco Ortiz, and Weinheim, that the defendant and the witness Jesus Maria Baca were equally interested in the two watches, the one which was won by the said Baca in the raffle, and the watch sued for. The plaintiff then produced S. Weinheim and Francisco Ortiz, each of whom made affidavit that he heard the defendant Abren say, in the presence of Jesus Maria Baca, that he owned an interest in a watch which had been won by said Baca; that he and said Baca

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had each paid five dollars for a chance in said raffle; that he the said Abren received the watch sued for as his part of the interest in the watch won by said Baca, and that Baca did not deny the statement made by Abren.

A party, in order to obtain a new trial on the ground of newly discovered evidence, must show that the testimony on which he relies has been discovered since the trial of the cause; that his failure to produce the same on the former trial was not owing to the want of due diligence; and that the newly discovered evidence would probably have produced a different result from that to which the jury came. In one of these prerequisites the showing of the plaintiff is fatally defective, for he makes no attempt to show that his failure to produce the newly discovered evidence on the trial of the cause, was not owing to a want of due diligence, and the court therefore, for that reason alone, in pursuance of a sound and well-established rule of practice, would have been free from error in overruling the motion for a new trial on the ground of newly discovered evidence.

The rule in regard to granting new trials in cases of a preponderance of evidence against the verdict is, that a mere or slight preponderance against the finding of the jury will not be sufficient to set the verdict aside. The weight of evidence must be clearly and palpably contrary to the verdict, and a new trial will only be granted where it is manifest to a reasonable certainty that justice has not been done.

In this case the defendant relied principally upon the testimony of Jesus Maria Baca, who testified that he purchased the watch in litigation, in El Paso, in December, 1852, about two years before the commencement of this suit; that he had possession thereof until a short time previous to the institution of this suit, and that he gave the same to Abren, the defendant. This witness does not identify the watch by any peculiar or special marks, signs, or characteristics, and the reasonable presumption is that his identification was influenced solely by the general appearance thereof. A watch is an article which is very difficult of identification when its general appearance alone is

relied upon, and when there are no peculiar marks or characteristics to guide the eye and control the mind in the recognition. So numerous are the watches of the same metal, the same mold, the same workmanship, the same movement, size, and general exterior, that a reliance for identification or recognition upon the contour or external appearance of such articles must be regarded as very uncertain and precarious. In this case the witness might have felt fully assured that the watch in question was the one which he purchased, which he wore for some time or had in his possession for about two years, and which he gave to Abren; and yet, as he seems to have relied upon the general appearance for his recognition thereof after it had passed from his possession, it is not impossible, or even improbable, that he might have been mistaken as to its identity. The testimony of the witnesses for the plaintiff leaves no doubt upon the mind of a majority of this court, that he was in error.

Wendell Debus testifies that he knew the watch well, and that he had seen the plaintiff wearing it for some length of time; that the plaintiff, in his presence, took down the number of the watch in a memorandum book; that the book shown to him on the trial was the one in which the number of the watch was registered; that the number 34,547 was the same put down in the book, and also the number on the watch.

The testimony of T. Bunker was identical with that of Debus. Both of these witnesses identify the watch as the one belonging to the plaintiff, not only by the imperfect and precarious test of its general appearance, but also by a particular mark which the article bore, the number thereof, and that number was testified to in such manner as to leave no doubt that the number as proved was correct, for the witnesses had both seen the plaintiff write it down in a memorandum book and had compared the number there written down with the number which the watch bore.

But the most important testimony adduced in the trial on behalf of the plaintiff was that of Jules Jeanerett. That witness testified that he knew the watch well by its general appearance, and from the fact that he had put some teeth

into one of the cog-wheels, and the same watch was put up in a raffle and won by Henry Ruhe at the Exchange in the city of Santa Fe in the year 1852. Such was the testimony of a witness, whose business seems to have been that of a watchmaker or repairer, going to identify the watch as the one belonging to the plaintiff, not only by its general appearance, but also by some teeth which he had put into one of the cog-wheels, and which he proposed to show by taking it apart in the presence of the jury. The test of identity which this witness proposed, and which seems to have been declined always by the defendant, was one of the best modes of identification that could have been adopted, for a repair such as the witness testified to having done on a delicate portion of the machinery of the watch would be recognized by the artisan by whom it was done, with a degree of confidence and certainty which could not be attained in a recognition from mere general appearance. It was a specific and striking mark of identity, and should have far outweighed with the jury an identification by the familiarity which the eye had acquired from looking at the watch, without any specific mark to fix the identity.

The witnesses for the defendant, Jesus Maria Baca and Luis Alarid, testified that the watch in question was shown by Baca to the plaintiff, and that the plaintiff made no claim of it as being his property. This testimony serves no purpose but to confirm the proposition herein laid down, that the general appearance of the watch is but a precarious and unreliable medium of recognition or identification. The witness does not testify that the plaintiff made an examination of the watch when it was shown to him. It does not appear that he looked at the number of the watch. It is to be presumed that the witnesses, testifying without any apparent reluctance, would have stated that the plaintiff gave the watch a careful examination when it was shown to him, if such had been the case, and that the defendant would have obtained such testimony from his witnesses, if they could have testified to that effect. The failure of the plaintiff to recognize the watch as his property, by its general appearance, seems to us but reasonable, and favors

the rule which we have applied to the testimony of Baca, and by which we discern the uncertainty and infirmity of his evidence in the identification of the watch.

In illustration of the view we have taken of the uncertainty and precariousness of the identification of a watch by its general appearance, without a resort to special marks or signs, the plaintiff failed to recognize the watch as belonging to him by its superficial general appearance. But when he came to ascertain the number, that designation, together with its general appearance, enabled him to identify and claim it as his property. If Baca had stated in his testimony that he retained the watch in his possession from the time at which he alleges having purchased the same, up to the period at which he testified, then his testimony would have been of a very different character, and would have borne more strongly upon the issue; for then the jury, without an impeachment of his veracity in the face of the testimony adduced on the adverse side, would have been brought irresistibly to the conclusion, that the watch in question was not the property of the plaintiff. But such was not the certain character of Baca's testimony. He testifies that the watch was in his possession for a considerable length of time, that it passed from him to the defendant, and when he saw it on the trial he testified that it was the same watch that he purchased and gave to the defendant. His testimony, therefore, becomes that of identity, and is liable to be refuted by stronger testimony, going to prove the identity of the watch as the one which belonged to the plaintiff, and not the one which he gave to the defendant.

We are well aware that it is the peculiar province of the jury in case of a conflict of evidence of an equal grade and dignity to weigh the evidence and find the truth of the contested fact. But the testimony of any one of the three witnesses who testifies to the identity of the watch as the one which belonged to the plaintiff must be regarded as of a higher grade than that of Baca, inasmuch as they testified by certain marks which the watch bore in addition to its general appearance, while he mentions no characteristics

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and assigns no specific reasons for his identification. The testimony of Jeanerett, by virtue of his occupation and the facts, is eminently of a higher grade than that of Baca. He appeared before the jury as an artisan whose business was to work upon watches, and as such testified that he had done certain repairs to the movement of the watch, by which he recognized it as one which belonged to the plaintiff, and which he had seen at the raffle. His testimony, together with that of Debus and Bunker, shows such a preponderance against the verdict as to convince us that the merits of the case were not fully and fairly tried in the court below.

This court will not disturb a verdict upon a refusal to grant a new trial where the evidence slightly preponderates against the verdict, or where there is such a conflict or counterpoise as merely to raise a doubt whether justice has been done. But it is a sound rule, and recognized by the best authorities, that a new trial will be granted where the weight of evidence is clearly in favor of the applicant, and it appears that justice has not been done, to induce the granting of new trial by an appellate court. There should be strong probable grounds to believe that the merits of the case were not fully and fairly tried and that injustice has been done. Such seems to have been the principle maintained by the general current of authorities upon this subject, and the testimony in this case, as it appears upon the records, brings this cause clearly within the scope of that principle. We are of the opinion that the court below erred in refusing a new trial, and therefore reverse its judgment and recommend the cause to be tried again.

Ordered:

This cause came on to be heard on the transcript of the record of the district court for the county of Santa Fe in the first judicial district, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged that the judgment of the said district court be reversed, and that this cause be, and the same is hereby remanded to the district court, with directions to award a *venire facias de novo*.

**MARCELLINA BUSTAMENTO v. JUANA ANALLA.**

**HABEAS CORPUS FOR CHILD, WHAT CONSIDERED ON.**—On *habeas corpus* brought for the purpose of transferring a minor child from one custody to another, the welfare of the child is considered, as well as the rights of the respective parties to its custody.

**SERVANT'S GIFT OF HER CHILD TO HER MASTER.**—A gift, in consideration of the release of a debt, made in 1847, by a servant to her master of her illegitimate child, of which he was the father, that he might maintain and educate such child "as a legitimate father," gave him no right to treat the child as a peon.

**MOTHER'S UNFITNESS FOR CUSTODY OF CHILD IMMATERIAL, WHEN.**—Where a mother sues out a writ of *habeas corpus* to obtain the custody of her minor child, illegally held as a peon or servant by a stranger, the rejection of evidence of the plaintiff's unfitness to have the custody of such child is not error as against the defendant, such evidence not being material to the issue between the parties.

**WILLINGNESS OF CHILD TO REMAIN IN SERVICE.**—The testimony of the child in such a case, that she is willing to remain in the defendants service, is not satisfactory evidence.

**ILLEGITIMATE CHILD, MOTHER'S RIGHT TO CUSTODY OF.**—The mother of an illegitimate child is its natural guardian, and entitled to its custody until deprived of that right by the appointment of a lawful guardian.

APPEAL from the first judicial district. The opinion states the case.

*M. Ashurst*, for the appellant.

*T. D. Wheaton*, for the appellee.

By Court, DEAVENPORT, C. J.:

Juana Analla sued out a writ of *habeas corpus* against Marcellina Bustamento, before Chief Justice Deavenport, and district judge of the first judicial district. Petitioner for the writ alleged that she was the mother and natural guardian of Catalina Bustamento, a minor, under the age of twenty-one years; that as such mother and guardian she was entitled to the assistance and services of said child, and that said Catalina Bustamento was illegally detained from her by Marcellina Bustamento in her house in the city of Santa Fe, under a pretended claim of holding her as a peon or a servant. The above allegations were set forth in a petition for the writ, subscribed and sworn to in

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accordance with the provisions of our statute. On the return of the writ on the day fixed for its return, all the parties appeared, and the body of Catalina Bustamento was produced, in pursuance to the requirements of said writ. Marcellina Bustamento filed the following return to said writ alleging that Catalina Bustamento was not illegally detained by her, but of her own free will and accord remained with her, having been raised since she was a small girl until her present age by her in her house. She further averred that said Catalina was the child of one Carpio Bustamento and Juana Analla, and that after her birth the said petitioner parted with and surrendered the care and custody of the said child to Carpio Bustamento, as would more fully appear by reference to document marked Exhibit A, thereby made a part of her return. And she further averred, that said Carpio Bustamento, the father of Catalina, gave the child to her; and that with the consent and at the request of the said Carpio Bustamento, she kept and detained the said child; and she further averred that Juana Analla was a woman of immoral habits and conduct, and unfit to have the care and custody of the said Catalina. After hearing the testimony in the case, the district judge decreed that said Catalina Bustamento be discharged out of the custody of the said Marcellina Bustamento, and delivered to the said Juana Analla, from which decree Marcellina prayed an appeal to this court, which was allowed.

As this case was tried by me in the court below, I have felt a deep anxiety and much interest in arriving at just legal conclusions in the investigation of the principles which should conduct the mind to a correct opinion. Probably there is no class of cases which exercise the judicial mind more feelingly than that where parents come before a judge, demanding restoration of their children to them upon writs of *habeas corpus*. It carries with it the force of nature's appeal to the heart, seconded by all the influences which the relation of parent and child so naturally suggests. This is a peculiar case, as will appear from the allegations in the mother's petition, the return made by defendant to the writ, and the evidence in the case. The mother alleges



that her child (which the proof shows was illegitimate) is illegally detained by defendant under a pretended claim that she holds her as a peon or a servant. The first part of defendant's return denies that the child is unlawfully detained, but avers that she voluntarily remains with her, and then she immediately avers that she keeps and detains her by virtue of document A, and the gift by Carpio Bustamento to her, and that such keeping and detention of the said child is with the consent and at the request of the child's father, said Carpio Bustamento. It must be kept in view that the defendant, in no part of her return, denies the allegation in the plaintiff's petition, that she detains the child under a pretended claim of a peon or servant. She does not put in issue the plaintiff's allegation touching the capacity or condition in which she detained the child, whether as a peon or servant, or a free person not subjected to the condition of service. She evades showing the judge, either by any allegation in her return or by proof, in what capacity she held her—whether as a free person, or one bound to do service as a peon or a servant. She bases her right to the detention of the child upon document A and Carpio Bustamento's gift.

The failure on the part of the defendant to respond as to the manner in which she was alleged by plaintiff's sworn petition, to hold her child as a peon, is a circumstance which very likely had much weight in the exercise of the discretion of the judge who tried this case below. It will be found in reviewing the authorities that in cases of this kind the welfare of the children is regarded as well as the right of the parties contesting their claim to their care and custody. There is not the slightest doubt, that when a contest is had concerning the rights of parties to minors, the courts have examined into the fitness of the parties to take charge of them, and in very many cases they have been given to the party who had not the higher legal right. But in all those cases it will be found that there were strong controlling circumstances which overrode the legal right. It is assigned as error in this case that the district judge erred by sustaining a motion to reject testimony offered to

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prove plaintiff's unfitness to take the care and custody of her child. It is not contended by this court that such testimony is not competent in most cases of this kind, but the question to be settled was an error in this particular case. This case stands upon a different footing from those usually met with in the books. The mother in this case seeks to rescue her child from the defendant, who, she alleges, holds her child as a peon or a servant under some pretended claim. Her aim is not alone to gain possession of her child, but also to emancipate it from servitude.

The defendant insists upon her right to detain the child, without saying whether free or bound to do service. It is known that what is commonly called the system of peonage exists in this country. If the sworn allegation of the mother that her child was held and detained from her as a peon or servant by defendant under some pretended claim was true, (and said allegation is not denied by defendant as to the character in which she was held), what had the fitness or unfitness of Juana Analla to take charge of the child to do with the real matter in issue? The real charge is that defendant restrained her child of her liberty as a peon. Defendant responds by alleging that she has a right to detain her by virtue of the judicial decree of Manuel Armijo, justice of the peace, marked A, and the gift of Carpio Bustamento, her father, but does not allege whether she claims her as a peon or not. Document A is in the words and figures following:

"In the county of Bernalillo, on the twenty-sixth of February, 1847, appeared before me, Manuel Armijo, justice of the peace, Don Carpio Bustamento, and his servant, Juana Analla, both resident of said county, and stated that in consideration of their wish to legalize their accounts they would enter into a trial (*jugado*), and I, the present judge, adjusted the account and found that she was owing one-hundred and forty-four dollars at the rate of bits, and by an agreement which they had of a *lésee*. Instigated by the mother of Analla, Carpio Bustamento pardoned her for the amount of forty-four dollars, and from that date she only owes one hundred dollars, and on consideration that from

the earliest infancy of Catalina and George they have been raised in the house of the master, from this date the mother gives them to Bustamento, that he may maintain and educate them as a legitimate father who will be responsible before God and man; and as the mother has summoned him, agitating impertinent demands, from this time forward she is to make no further complaint, nor have any hearing in any future trial. All of which I noted down, and Analla swore to it, and I, the judge, fixed my judicial decree this twenty-sixth February, 1847.

“MANUEL ARMIJO, Alcalde.”

It is under the above document, and the gift of the master of Analla and the putative father of the illegitimate child, that defendant leases her right to detain this child from the servant-mother Analla. From the document it is apparent that in consideration that the master would release his servant of the sum of forty-four dollars, and in consideration that her two children had been raised in his house, the two children having been forgotten by himself, Analla is induced to give these two children to him to be maintained and educated, as their legitimate father, and to stand responsible for them before God and man; and Analla the servant, is further bound never to bring against him any demands. Give this document whatever construction it may bear, it does not give the children to Bustamento as peons or servants. He was to maintain and educate them as their legitimate father. The poor, crushed servant-mother, indebted to the putative father, exhibits her maternal affection to them by requiring that he should come under the obligation to maintain and educate them as their legitimate father. She afterwards finds one of her children, thus delivered up to their putative father, in the possession of a stranger, held under a pretended claim as a peon or servant. Can any one say that the poor mother can not again recover the possession of such child, and relieve it from its servile condition? The defendant nowhere denies that she detains the child as a peon or servant. She introduces no testimony to negative this allegation in the petition of the mother. The object of the writ in this case

was not only to regain possession of the child, but to discharge it out of its alleged condition of servitude.

The judge below had a discretion to exercise in the trial of this cause, in admitting testimony touching the fitness or unfitness of the mother to take care of the child, according to the peculiarities of the case. His first object was to discharge the child out of the servile custody of the defendant, and it did not lie in the mouth of the defendant to introduce testimony against the mother's fitness to be guardian of her own child, until she had shown, either by a denial in her return, or by proof, that she detained the child in the servile condition alleged. This was a contest between the plaintiff and the defendant, as to their legal rights to this child. The plaintiff charges that her child is held by defendant as a peon or servant under some pretended claim. The defendant returns by setting up her claim under document A and gift. That is the issue. It is whether the mother has a right to her child, or the defendant has a right to hold the child as a peon or servant under document A and gift. The testimony which defendant complains that the judge ruled out was as to the fitness of the plaintiff to have the care and custody of the child. Was this any injury to the defendant? Can she be heard to complain of it in this court? Suppose this testimony to have been introduced, would it have changed the decree so far as she is concerned? Would it have strengthened her claim to the child? Would it have given the child to her if found to be true? Not at all. Then, if it follows, that from the evidence in the case the decree as against appellant would have followed that said child should be discharged out of her possession as not entitled to it, what right has she to complain that the court did not go into a collateral issue as to whose custody the child should go into? We hold that, so far as defendant is concerned, this species of testimony is only allowed to aid the judge as chancellor to make a proper disposition of the child. It is also allowed in cases where disputes between the father and mother arise as to the custody of their children, and this kind of testimony is introduced for the benefit of the children, so as to aid the chancellor in making

the best provision for them. If there was any error, it was only error as against the child, and not against appellant.

Another error assigned is, that the judge erred in not allowing the child to answer whether she is willing and anxious to remain with the defendant. From the peculiar nature of the allegation of the mother that her child was held as a servant, and not denied by the defendant, the judge refused to allow such testimony. Such testimony can not be deemed satisfactory when a child is a servant under the control of the mistress or master. The proof shows that Analla was the mother of the child in question, and that she was illegitimate. It is laid down that the mother is the natural guardian of her illegitimate children, and she is bound to maintain them: *Wright v. Wright*, 2 Mass. 109. In this case the principle is established, that the mother of a bastard child is entitled to the custody of it, and should hold as against a putative father, after a marriage and divorce had: *Id.*

The general principle applicable to cases of this kind is laid down by Lord Mansfield, in *Rex v. Delaval and others*, 3 Burr. 1436, that in cases of *habeas corpus* directed to private persons to bring up infants, the court is bound *ex debito justitiæ* to set the infant free from improper restraint. They are not bound to deliver the infant over to any particular person. This must be left to their discretion according to the circumstances that shall appear before them: 8 Johns. 328. It is to the benefit and welfare of the infant to which the attention of the court ought principally to be directed. If, then, the judge below, in the exercise of his discretion as to the welfare and benefit of the child, Catalina, did not deem such testimony as is insisted upon in this case ought to have been heard, necessary or pertinent to the issue before him as to whether the child was rightfully held as a peon by defendant or not, can it be made error here? The decree discharged the child out of the custody of the defendant, and delivered it over to its mother. That the mother had been a woman of immorality is proved by the very fact of her having illegitimate offspring. The illegitimate birth of the very child in controversy was evidence of

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the fact. But she was the mother, and the law gave to her the custody of it. If she is unfit to have its custody, the law provides that the probate courts of this territory can appoint a guardian for the child. The door is open to have full justice done in the premises, and if the district judge did not assume upon himself to appoint a guardian for this child, other than the mother, what right has the defendant to complain unless she believes this testimony, if given, would have given her the child? If there is any error, it is not error against appellant. Let the decree below be affirmed, with costs.

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

JANUARY TERM, 1859.

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ALLEN T. DONALSON *v.* THE COUNTY OF SAN MIGUEL.

COUNTY MAY BE SUED.—A county is a *quasi* corporation, and therefore may sue and be sued, by virtue of the territorial statute, extending the word "person" to bodies "politic and corporate."

PETITION A SUBSTITUTE FOR DECLARATION.—Though a petition has been, by statute, substituted for a common law declaration in this territory, none of the essential averments in such a pleading are thereby dispensed with.

PETITION ON ACCOUNT FOR SERVICES AS JAILER, AVERMENTS IN.—In a petition against a county, on an account for services as jailer, the absence of averments that the plaintiff was acting in that capacity, that there was any promise by the county that a warrant was drawn on the treasury for the amount, or that the county is in any way liable for its payment, renders the petition demurrable.

CLAIMS AGAINST COUNTY BY WHOM ALLOWED.—The judge of probate, and not the judge of the district court, is the proper officer to allow claims against a county in the first instance.

ONE GOOD COUNT IN PETITION, OR DEMURRER TO WHOLE.—In case of a demurrer to the whole of a petition containing several counts, the plaintiff is entitled to judgment if there is a single good count.

APPEAL from the district court for the county of San Miguel. The case appears from the opinion.

*Houghton and Watts*, for the appellant.

*T. D. Wheaton*, for the appellee.

By Court, BENEDICT, C. J.:

The county appeared by counsel in the district court, and filed a general demurrer to the plaintiff's petition. This demurrer the court sustained, and rendered judgment in the defendant's favor, and the defendant then appealed. This judgment is assigned for error. The plaintiff did not apply for leave to amend his cause of action. We are warranted in the belief that the court disposed of the case upon one point alone, made by defendant's counsel, against the petition. This fact, which seems to be well known by those most familiar with the history of the case, seems to explain why the plaintiff omitted to obtain leave to amend his petition. The point which we allude to is contained in the proposition, that a county in this territory is not liable to be sued. The court below holding this position to be correct in law, applied the demurrer to that point solely, and did not think it necessary to scrutinize the petition further, and it is fair to presume, that the plaintiff's counsel had no mistrust that any other legal insufficiency worked in the declaration.

We proceed first to examine the liability of the county to be sued. At common law no county could be sued, yet the American reports are abundant with cases in which counties have been parties, both plaintiffs and defendants. It must be conceded, that upon known legal principles, no county can sue or be sued, unless such proceeding shall be authorized by the legislative authority within the state or territory. Has it been authorized in New Mexico? If not, no suit was sustainable against the county of San Miguel. Our Revised Statutes, on page 188, provide that the word person may be extended to bodies politic and corporate. Is a county such a body, and for the purposes of suing or being sued to be regarded as a person? The political or public organizations denominated counties are peculiar to the English government, and to the states and territories of the union. They have prominent importance where the principles of freedom have decided and distributed the powers of government, and invested the inhabitants of prescribed



districts of country, with certain powers, to be exercised by fixed rules, and through a defined and responsible organization.

The legislature has created counties in New Mexico. San Miguel is one. We must consult authorities emanating where counties and their properties are well known, to aid us in defining their character and liabilities in this territory. All the authorities we have been able to consult define a county as a *quasi* corporation. In 7 Mass. 186 [*Riddle v. Proprietors*, 5 Am. Dec. 35], the court say: "We distinguish between proper aggregate corporations and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are in the books called *quasi* corporations. Of this description are counties and hundreds in England, and counties, towns, etc., in this state." In 6 Cal. 255, the court says: "Counties are *quasi* corporations." Angell and Ames, in their work on corporations, say, page 19: "Both towns and their political divisions, as counties, hundreds, etc., which are established without an express charter of incorporation, are denominated *quasi* corporations." Chief Justice Parker speaks of the like, although "recognized by various statutes and by immemorial usage as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained by suits at law, yet are deficient in many of the powers incident to the general character of corporations, they may be considered as *quasi* corporations, with limited powers co-extensive with duties imposed upon them by statute or usage."

These authorities, without incumbering this opinion with others, we think demonstrate the fact, that counties are corporations, though limited in character, yet having powers sufficient to discharge the duties imposed upon them. Chief Justice Parker speaks of them as persons, even by immemorial usage, as to the objects of their creation, and capable of being parties in suits at law. Applying these aids in the interpretation of the statutes extending the word "person" to bodies politic and corporate, and we can not avoid the conclusion, that a county is fairly included as

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a body politic and corporate, to which the word "person" is extended, and is liable to be a party in suits at law, of suing and being sued.

We are not without positive enactments which sustain this construction. On page 94, Rev. Stat., is a chapter concerning the attorney-general and circuit attorneys. It is there provided, that the circuit attorney shall reside in his circuit, shall commence and prosecute all civil and criminal actions in which the territory, or any county in his circuit, may be concerned, and defend all suits which may be brought against the territory, or any county in his circuit. Here there is a clear and unequivocal recognition by the legislature that a county may both sue and be sued, and an attorney is supplied by law to bring and defend her suits. Page 286, in relation to bonds given by disorderly persons, declares that a lien forfeited, an action may be brought in the name of the county before any court of record.

Again, on the twelfth of February, 1855, Rev. Stat. 310, the legislature enacted: "That all real estate of the territory of New Mexico, and of any county of said territory, is by this act exempt from execution, and, therefore, no court of this territory shall issue execution against said property." Now the reasons why this act was passed are well known in the history of that time. A judgment had been rendered in the district court against the county of Santa Fe in favor of J. S. Watts. Although there was no order for execution made by the court, yet an execution was taken out from the clerk, and was levied upon some property as that of the county. This act was then passed while the writ was in the hands of the sheriff to exempt territorial and county real estate. The act implies a full knowledge on the part of the assembly of the liabilities of counties to suits and judgments, and it never was attempted to remove such liability. It simply withheld executions, and exempted the county's real estate, and left the process still free to compel a county to a settlement of a claim or demand against her by suit, trial, and judgment. So far as the action of the court below was founded upon the opinion of the judge, that a county was not liable to be sued, we think it was clearly erroneous.

The petition contains two counts. Although the assembly has substituted the name of petition for declaration, it has never been held in this court that any of the necessary and essential averments which the wisdom and usage of centuries have sanctioned and required, have been abolished in pleadings in our courts. The statutes require the plaintiff to set forth the facts upon which his suit is founded, in a clear and plain manner.

We shall not go into an analysis of this petition to show the extremely loose manner in which it is in some parts drawn. The pleader below is well versed and skilled in all the essentials as to form or substance which constitute a valid declaration or petition. He commences by describing his complaint "In a plea in assumpsit," and he evidently had in his mind the *indebitatus assumpsit* form of courts in framing the petition. One of the former judges of this bench is reputed to have said, "that no better form of a petition under our statute could be found than the common law form of a declaration in assumpsit." Though it may contain some things that are not indispensable under our system, yet it is eminent for one thing, and that is clearness and plainness, although it has much verbiage in its endeavor to attain these essential qualities. Our statute makes it imperative upon the pleader to set forth his facts in a clear and plain manner. It also provides "that no want of form shall be sufficient cause for abating any matter pleaded, provided the court can see in it sufficient matter upon which to base a decree or judgment." This does not lessen the strictness in pleading, prevailing in common law courts, where the practice of amendments is judiciously and liberally expressed. An almost reckless disregard of the usual forms of pleading is apparent throughout the whole of the petition in this case. The first count relies upon a promise implied in the warrant drawn upon the treasury to supply the place of positive averments, and we will not say that there is not sufficient set forth to entitle the plaintiff to recover, should the proofs not fail. The second count is too loosely drawn to be sustainable. It embodies an account against the county, drawn up in form; but there is

no averment that the plaintiff was acting in the capacity of sheriff or jailer at the time the account accrued, nor that any promise or assumpsit had at any time been made to him by the county, nor that any warrant has ever been drawn upon the treasury, nor that the county had become liable in any way to pay him the amount, or any part of it. The act of the judge of the district court approving and allowing the claim was extrajudicial, and of no binding effect upon the county. The judge of probate is the officer to allow claims against the county, in the first instance, as the statutes state.

The claim in the second count is set forth as distinct from that in the first, and is for the sum of three hundred and fifty-five dollars and fifty cents. We can not refrain from alluding to the fact in the record, that before the demurrer was filed and the cause disposed of, the plaintiff did apply to the court and obtained leave to amend his petition, although he never availed himself to it.

It is our opinion that the demurrer should have been sustained as to the second count, and overruled as to the first. Gould lays down in his treatise on pleadings, p. 172, "that if on demurrer to the whole declaration one of the counts is judged sufficient in law, the plaintiff will be entitled to a judgment on that count, though all the others be defective."

The final judgment in this case in the district court must be reversed, and also, so much of the judgment of the court as sustained the demurrer to the first count. This cause is remanded to the district court, to proceed therein in conformity with this opinion, and to grant the plaintiff leave to amend upon such terms as shall seem proper, the costs of this appeal to be paid by the appellee.

**Reversed and remanded.**

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Opinion of the Court—Benedict, C. J.

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**RAMON ARELLANO v. RAFAEL CHACON.**

**PREFECTS AND ALCALDES SUPERSEDED BY ORGANIC ACT.**—The officers known as prefects and alcaldes under the provisional government, were superseded by the organic act, and by common consent and construction the probate judges and justices of the peace have respectively succeeded to their powers and duties.

**NEW TRIAL OR REHEARING BY PROBATE COURT.**—New trials are peculiar to courts of common law where jury trials prevail and a rehearing belongs to chancery jurisdiction, and as the probate court is not provided with a jury and has no chancery jurisdiction, it can not grant a new trial or rehearing after deciding a contested election for justice of the peace, under the statute.

**NO APPEAL IN SUMMARY PROCEEDINGS.**—Where a court is authorized to proceed in a summary manner to determine a question, one of the consequences is that there can be no appeal unless the statute expressly or by clear implication grants a right of appeal.

**NO APPEAL IN CONTESTED ELECTION FOR JUSTICE.**—No appeal lies from the judgment of the probate court in the case of a contested election for the office of justice of the peace. Overruling *Quintana v. Tompkins*, ante, 20.

**APPEAL** from the district court for the county of Taos. The opinion states the case.

*T. D. Wheaton*, for the appellant.

*Ashurst and Tompkins*, for the appellee.

By Court, BENEDICT, C. J.:

At an election for justice of the peace in the precinct of Chamisal, in the county of Taos, 1855, the parties in this cause were candidates. It seems that Chacon was declared elected, and obtained his certificate. Arellano contested the election in pursuance of the following provision of the statute: "In case any election for sheriff, justice of the peace, or constable, be contested, the party contesting shall give eight days' previous notice to the party opposing, in the same manner as prescribed in the foregoing section, which contest shall be heard and determined in a summary manner, by the probate court. In case any election for other subordinate officers created by law shall be contested, said contest shall be determined in the manner prescribed by the probate judge." Upon notice being given, the parties met before the probate court, as ap-

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pears by the record, and went into trial, and after hearing the case, the court gave judgment in favor of the defendant, Chacon. After this was done, and before the court adjourned "until court in course," Arellano applied for a new trial, and the judge says that "under the proofs produced by him, the court annulled the judgment and granted a new trial, to be had at the next term." This next term came on in January, 1856. Chacon made no appearance, and the court gave judgment in favor of Arellano, and adjudged Chacon to pay the costs. The next day the latter appeared and took an appeal to the district court. At the August term, 1856, the parties appeared in the latter court, and Arellano's counsel moved to dismiss the appeal for various reasons, one of which was, "that no appeal is allowed by law in such cases." The court overruled the motion, and plaintiff excepted. Defendant's counsel then moved to dismiss the suit, and judgment was rendered against the plaintiff for costs; and thereupon he appealed to this court.

The acts of the court, both in overruling the plaintiff's motion and sustaining the defendant's, are assigned for errors. It has been necessary to give so circumstantial a history of this case in order that our opinion may be the better understood. Neither party will derive any benefit from any judgment which we can render, as to the subject-matter of controversy for which the contestant instituted his proceeding. A justice of the peace holds his office for the term of one year. Time and the operation of law have long since put an end to the right which either party may have had to the enjoyment of the office for which both engaged in contest. As for ourselves, we might have so disposed of this case that we would have been relieved from the labor and responsibility of an investigation. We, however, are willing to meet and determine the material points controverted. This seems to be required for the instruction of persons and officers, and for the guidance of courts in all causes of a character similar to this which may hereafter arise.

Before this court this cause has been twice argued, and each time with zeal and ability. It is contended that the

probate court, after having once heard and adjudged the case, put its decision beyond its control; that it possessed no power to annul the judgment, which it had once in due course of trial formally pronounced between the parties, as in this cause; that it could grant no new trial, nor open the case to a rehearing, and that when it gave judgment in the contest, in favor of Chacon, the defendant, it did, so far as it had any power over the matter, determine, confirm, and invest him in the office in controversy, and that it could not, by any proceeding whatever, divest him, subsequent to the judgment made and rendered.

The judicial powers of this territory are clearly vested and carefully distributed by congress, in what is termed the organic act. This act declares that the several courts, both appellate and original, and those of the probate and justices of the peace, should have jurisdiction as limited by law. It then immediately proceeds to prescribe by law, limits to justices of the peace, and confining them beyond the power of the territorial legislature to enlarge, and in the very same sentence vests the supreme and district courts "with chancery as well as common law jurisdiction." So plain and complete an endowment of judicial power in the courts of highest dignity and authority in the territory must be taken as negating the like jurisdiction in the inferior courts, as also excluding the legislature from the authority to clothe them with the jurisdiction so affirmatively reposed in the supreme and district courts. Now, when a constitution or an organic law simply speaks into existence a probate court, every enlightened lawyer at once knows the functions it is designed to perform. These are of a testamentary character, and such others as may be expressly conferred by the legislature, not inconsistent with the other plain distribution of powers. The power and practice of granting new trials grew up in those courts of "common law and chancery jurisdiction," in the midst of that system of jurisprudence that has been so generally adopted in the United States. New trials were introduced to cure the defects, errors, mistakes, and the like, which juries might have committed in their verdicts. They superseded the

ancient proceeding by attaints against juries for wrong verdicts. They originated in these courts, where the trial by jury was an essential and fixed element. They are authorized in the courts of the United States, where causes are tried by juries. The district courts of this territory may try issues of fact by juries, set aside verdicts for established legal causes, and grant new trials. To exert these high powers, the law has expressly conferred the authority. It is a parcel of that common law jurisdiction of which they are made the depositaries by the organic act. When exercising the chancery jurisdiction granted with the common law, the district courts conform to the rules and usages which compose that peculiar system of jurisprudence. In that system a court may grant a rehearing.

The probate court had not chancery jurisdiction. The law had not provided it with a jury, and it had no power to try this cause by a jury. It had the sole, the absolute power, and that, too, in a "summary manner." That was exerted, and fully, and when that was done, the court's power of adjudication in the cause ended. It had performed the duty required by the statute, and could not un-say and make null its solemn judicial act at its will and pleasure. With or without proper and sufficient evidence, wise or foolish as the act may have been, the court, as far as it could, vested in Chacon, and confirmed to him, the office of justice of the peace, and it could not retrace its steps, divest him of his office, and bestow it upon another.

We come now to another point of grave consideration in this cause, and that is the one made in the district court, and insisted upon here, in substance, that no appeal is allowed by law in cases of contested elections before the probate court. The gravity of the examination of this point is augmented by the fact, that the same point precisely was made and determined in this court, in the case of *Quintana v. Tompkins*, ante, 29, at the January term, 1853, and decided in favor of the right to appeal. Although that decision was made by the highest judicial authority within the territory, and pressed by a member of the court of distinguished legal ability, the proposition adjudged against seems still to



be pressed upon the notice and action of the courts, whenever an appeal is taken in the case of a contested election. Such being the case, and however much we may desire to see repose under judicial decisions, we do not feel at liberty to shrink from an examination of the correctness of the grounds upon which the appeal in the case mentioned was sustained.

The sections of the statutory law upon which the court relied as authorizing the appeal are as follows: "Appeals from the judgments of the prefects shall be allowed to the circuit court, in the same manner, and subject to the same restrictions, as in case of appeal from the circuit to the supreme court." "The circuit courts in the several counties shall have appellate jurisdiction from the judgments and orders of the prefects and alcaldes, in all cases not prohibited by law, and shall possess a superintending control over them."

Judicial authorities are here mentioned that are wholly strangers to the organic act, and totally incapable as such of receiving any portion of judicial power. No court nor officer denominated prefect or alcalde can have legal existence under our present organization. Congress has authorized other courts and brought into existence other officers, and the legislature and courts must yield conformity thereto. Here we find prefects and alcaldes perpetuated in the Deavenport revision of the statutes. Yet they were superseded by the organization of the territorial government, and upon the powers and duties of probate courts and justices of the peace being prescribed. The language of the sections above quoted is to be accounted for upon the ground of their having originated and been put in force long before the territorial organization and the passage of any territorial laws in New Mexico. They were promulgated by General Kearny upon his receiving the submission of the inhabitants. By a legislative act of July 14, 1851, the general provisions of the Kearny code, with few exceptions, were continued in force so far as not repugnant to nor inconsistent with the constitution of the United States, the organic act, or any act passed by the assembly then in ses-

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sion. Six days after the passage of this act the election law under which this contest arose was also passed. By common consent and common construction the probate courts and probate judges succeeded to the powers and duties of the prefects and prefects' courts, and justices of the peace to those of *alcaldes*. In the section prescribing the mode by which the election of justices of the peace and other officers may be contested, it should not be overlooked that the contest should be heard and determined in a summary manner by the probate courts. Now the phrases, summary manner, summary proceeding, and summary convictions, when employed in statutes, have a distinct, well-defined technical meaning, and one of the incidents, and consequences of such trial or proceedings is that, unless the legislature grants expressly the power of appeal, none can be allowed or taken. This position is sustained by high authorities and every day's practice, and the sweeping clause that the circuit court shall "have appellate jurisdiction from the judgments and orders of prefects and *alcaldes* in all cases not provided by law," must, in its interpretation, submit to some distinctions and limitations.

Now one very necessary body of summary proceedings and convictions belonging to all courts and justices of the peace in this territory to exercise is that of punishing for contempts, and yet no appeal is allowed from the proceeding and conviction. And why is this? It is because from the known principles of law, of which courts take judicial notice, a policy has arisen which does not permit an appeal, and if the legislative authority at any time extend to change the rule which this policy sustains, it must say so in express terms, and that appeals may be taken from orders and judgments of probate courts and justices of the peace punishing for contempts to be heard *de novo*, as in cases of appeals from other orders and judgments. The proceedings of magistrates, including judges of probate and justices of the peace, in arresting and examining persons charged with crime, with the view of holding to bail or committing for safe keeping, are of a summary nature. Yet no one pretends that the judgment or orders of the justice or probate

judge in the case can be taken to the district court by appeal, and that they are embraced in the sweeping language of the sections above quoted.

The reason is, that the officer acts in exercise of a jurisdiction of a known summary nature, and one in which the principles, practice, and policy of the law absolutely prohibit an appeal, and which prohibition is not required to be declared by express statute. The prefects had power (and so now have the probate courts) to appoint overseers of roads, their clerks, treasurers, etc. Could an appeal be taken to the district court from the orders making such appointments under the general language referred to? Power was given to prefects to levy a tax to defray the expenses of their respective counties. Could the district court have received an appeal to try *de novo* the case of the order of the prefect levying such tax? The probate judge of the county of Doña Ana was required by the legislature to order an election to be held in the Mesilla valley precincts. Could the district court have been the recipient of an appeal from the order which the probate judge made? Power was given to the prefect to arrest and have brought before him any one who should keep a dram shop, etc., without license, and "determine the offense in a summary manner, and assess the punishment" at not over five hundred dollars nor less than fifty. Here it is worthy of remark, that in the same statute, immediately following, is the full and express power of appeal granted from the judgments of the prefects in that particular summary proceeding.

Our legislature has provided by statute that if any person shall have in his possession certain public records, and refuse or neglect to deliver the same to the proper officer, he may be arrested and taken before the district judge and be fined and imprisoned in a "summary manner, as for contempt;" and the fine may be assessed as high as five hundred dollars. Here the assembly provided a summary proceeding, and did not intend any appeal, as none is defined, from the district judge. He is intended to act distinct from the district court.

Mr. Greenleaf, in his treatise on evidence, defines "sum-

mary causes by first defining plenary causes," and says that the latter "are those in which the order and solemnity of the law are strictly observed in the regular contestation of the suit," whilst he then says "that summary proceedings are those in which this order and solemnity are dispensed with." Blackstone describes summary proceedings, "except in the case of contempt," as directed by legislative acts, and to be tried without the intervention of a jury, and by the suffrage of such person only as the statute has appointed judge. It is laid down in 6 Cart. 514, that in such proceedings there is no appeal, unless the power is expressly given by the legislature. Mr. Chitty, in his work on practice, in writing of the various statutes which directed summary proceedings, lays down the proposition in the most emphatic manner, that in such cases, no appeal to a higher tribunal could be had, unless an appeal be expressly or by the terms of the particular act clearly impliedly given.

We now turn to the statute itself, by virtue of which the contest in this case was commenced. The section early embodied in this opinion refers to a "foregoing section." That provides, "in case any election for probate judge is contested, the party contesting shall give eight (8) days previous notice to the opposing party, specifying the grounds of the contest, and if any objections are made to persons having voted, they shall be fully specified. Said contest shall be heard and determined in a summary manner by the circuit (district) court, or by three justices of the peace, selected for the occasion by the contesting and opposing parties." Could the judge of probate sit and try his own case, this section doubtless would never have been enacted. The acting probate judge may sometimes be a party in a contest where he has been a candidate for re-election. Will any lawyer contend that any appeal is provided or can be taken from the decision of three justices of the peace that may be chosen by the parties to determine in a "summary manner?" The probate judge is a judicial officer of no inconsiderable dignity and utility in our system of legal administration. How, then does it come that when we shall select three justices of the peace to make a summary dispo-

sition of his contest as to an office, no appeal to a higher tribunal is allowed if an appeal is provided by law as to all other officers of an inferior grade?

Again, suppose the parties contestant shall select the district court instead of three justices, to determine the contest. The court must simply try the cause upon the evidence, and give its judgment. Can the dissatisfied party appeal to the supreme court? The trial is in a summary manner, without the "order and solemnity of the law being observed," or, in other words, without the observance of the technical rules and forms in practice. From what errors in proceedings can the party appeal? Does the party appeal from the court's judgment upon the evidence? The judge has been constituted the judge in a summary manner, in a case where no jury can intervene. Is there, then, any verdict of a jury or any finding of a court where the parties have dispensed with a jury from which a new trial may be moved for, granted or refused, and error assigned upon the court's judgment? And all know that witnesses can not be introduced into the supreme court.

We have examined this section to show that the law has not provided nor intended any appeal in contests under its direction in cases of probate judges, all of which strengthens our argument upon the proposition that, in those proceedings directed by statute as summary proceedings, no appeal can be allowed or taken to a higher tribunal unless expressly or by clear implication it shall be granted and permitted in the particular act directing the summary proceeding. In such a contested election as the statute directs in this case we do not think that an appeal is given either expressly or by implication. The statute points out who may hear, without the incumbrance of forms, the case between the contestants and their steps. It will not be forgotten that the contest is solely between the parties, and that the public is not in any way a litigant in the controversy. Two persons claim the enjoyment of the office. One is in possession, administering its functions and enjoying its emoluments, and recognized by the laws to have full power and authority, so far as third parties are concerned. The other

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Opinion of the Court—Benedict, C. J.

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seeks to displace the incumbent, and be himself installed and become the recipient of official honors and profits. Let the contests be determined as they may, we are not called upon to point out what remedial process still remains in the hands of public authority to cause the claims of any usurper or intruder into a public office, or any one who has no right to be its incumbent and attempt its duties, to be arraigned, tried, and determined.

In describing the summary manner of proceeding in causes of civil claimants to an office after an election, it seems as if the legislature itself intended to put a speedy and certain end to litigation between parties about a public matter so well calculated to promote and perpetuate discords and feuds in precincts and counties, and destroy confidence in the local magistracy, and diminish their efficiency. From the heat and unscrupulousness too often the attendants upon partisan passions, and from other causes, errors and wrong, doubtless, will too often enter into the decisions of probate courts in election cases, frauds will go uncorrected, and partisan and political favorites have an undue advantage on the trial of contests. If so, the means of remedying the evil is the legislature. Its needed and prompt action, with a more enlightened and lively sense of private, public, and legal justice, would soon remove all just cause of complaint. The remedy by appeal, heretofore allowed and sustained by the courts, proved of small avail, let right and justice have lain where they may. The courts are so established, that the case must be very rare, in which a contest can be instituted and appealed from court to court, and litigated until a final decision from this bench, before the term of office of a justice of the peace will expire by time and operation of law. During the whole term, however fallacious may be the acting incumbent's claim, still, by workings of his appeal, although decided against in all the courts, he continues himself in the enjoyment and emoluments of the office until succeeded by a new election.

In overruling the decision of this court, upon the power of appeal in the case referred to, we are not discouraged in

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**Points decided.**

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our sense of duty by the reflection that heavy and important interests as to property and persons have grown up, under the protection, and by virtue of that decision, which our present rulings would disturb, embarrass, and destroy. No such interests have arisen. If they had, we would long have hesitated touching the question discussed, let our opinions have been as they may. Circumstances may sometimes exist, when a court should pass previous adjudications as a "sealed book" though they may have been erroneously made at the beginning.

From this opinion it follows, that in our judgment the district court erred, both in dismissing the suit and overruling the motion to dismiss the appeal. The motion to dismiss went back to the beginning of the contest, and alleged the notice to have been insufficient, besides other grounds; upon which one the court rested its judgment we are left to conjecture; at all events, it did dismiss absolutely the whole suit, the entire cause itself, and of course all and every proceeding from the first notice down to the moment of its action. The judgment of the court below is reversed, and this cause is remanded to the district court, with directions to dismiss the appeal, and adjudge the costs of the same against the appellant, the costs in this court to be paid by the appellee. This court gives no judgment as to the costs in the probate court.

Reversed.

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**ESTEBAN TENORIO v. THE TERRITORY OF NEW MEXICO.**

**CAPTION OF INDICTMENT.**—Where in the caption of an indictment the time and place where it was found are set forth with certainty to a common intent, and the character of the court designated, and the grand jury appear to have been sworn for the body of the county, it is sufficient.

**IDEM—NAME OF JUDGE NOT NECESSARY IN.**—It is not necessary in the caption of an indictment to mention the name of the judge holding the court.

**INDORSEMENT OF PROSECUTOR'S NAME UNNECESSARY.**—It is not necessary to the validity of an indictment that the name of some person acting as prosecutor should be indorsed on it.

## Opinion of the Court—Boone, J.

**INDICTMENT UNDER PARTICULAR STATUTE**—In an indictment under a particular statute, the words of the act defining the crime must be used, and a material variance will be fatal.

**AYERMENT OF DEADLY WEAPON IN INDICTMENT FOR MURDER**—In an indictment for murder it is not necessary to allege that the weapon used was a "deadly" or "dangerous" weapon, except where the defendant is charged with murder in the fifth degree under that part of the statute in which those words are used in defining the crime, when the words of the statute must be followed.

**CONVICTION OF MURDER IN FIFTH DEGREE UNDER COMMON LAW INDICTMENT**. A defendant may be convicted of murder in the fifth degree under an indictment for murder at common law of the common form.

**APPEAL** from the district court of the first judicial district for Santa Fe county. The case is stated in the opinion.

*Ashurst and Hopkins*, for the appellant.

*R. H. Tompkins*, attorney-general, for the appellee.

By Court, BOONE, J.:

This is an appeal from the decision of the court below upon an indictment against Esteban Tenorio, for murder. There is no question, upon the evidence in the case, but numerous errors have been assigned by the defendant below, now plaintiff in error, as to the legality of the indictment. It will be necessary, therefore, to set out the indictment in full. It is in these words:

TERRITORY OF NEW MEXICO, }  
County of Santa Fe. } ss.

In the district court for the first judicial district for the territory of New Mexico, held for the county of Santa Fe, in said district, of September term, A. D. 1856, the grand jury for said territory of New Mexico, duly impaneled and sworn for the body of the county of Santa Fe aforesaid, upon their oaths do present, that Esteban Tenorio, late of said county of Santa Fe, on the fourteenth day of September, A. D. 1856, in the county of Santa Fe aforesaid, with force and arms, in and upon the body of one Ramon Rodriguez, feloniously, willfully, and of his malice aforethought, did make an assault, and that the said Esteban Tenorio, with a certain knife, of the value of twenty-five cents, which the said Esteban



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Opinion of the Court—Boone, J.

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Tenorio in his right hand then and there had and held, in and upon the left side of the head, near the left temple of the said Ramon Rodriguez, feloniously, willfully, and of his malice aforethought, did strike, thrust, and penetrate, giving to the said Ramon Rodriguez then and there, with the knife aforesaid, in and upon the said left side of the head, near the temple of the said Ramon Rodriguez, one mortal wound of the breadth of three inches, of the width of six inches, and of the depth of three inches, of which said mortal wound the said Ramon Rodriguez, from the said fourteenth day of September, in the year aforesaid, until the eighteenth day of the month of September, in the year aforesaid, did languish and languishing did live; on which eighteenth day of September, in the year aforesaid, the said Ramon Rodriguez, at the county aforesaid, of the said mortal wound did die. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Esteban Tenorio, him, the said Ramon Rodriguez, in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace and dignity of said territory, and against the form of the statute in such cases made and provided.

(Signed)

WHEATON, for the Territory.

Upon this indictment is the following entry: "A true bill, (signed) James J. Webb, foreman of the grand jury." The witnesses' names are also indorsed.

On the twenty-fourth of August, 1857, the case was tried upon the foregoing indictment, in the court-house at Santa Fe, and the jury found the defendant guilty of murder in the fifth degree, and that he should be sentenced to confinement in the territorial prison for one year. In conformity with the finding of the jury, the court below, on the seventeenth of September, 1857, sentenced the prisoner. Bail was entered for an appeal to this court, and the sentence stayed, to wait its decision.

Several errors have been assigned, but it is only deemed necessary to consider the following:

1. The caption of the indictment is not sufficient or legally set forth;

2. No prosecutor was indorsed upon the indictment;

3. The indictment does not aver that the instrument with which the wound was inflicted was a deadly or dangerous weapon.

The caption is admitted as a very material part of the indictment, but to arrest the judgment or to quash an indictment upon this ground the defect must be of a clear and a decisive character: *State v. Hickman*, 3 Halst. 299. We hold that where time and place are set forth with sufficient certainty, the character of the court designated, and the grand jury appear to have been sworn for the body of the county, it is sufficient.

In the caption of this indictment these requirements have been substantially complied with; certainty to a common intent is all that is required. Any legal technicality should be disregarded, especially after a trial upon the merits: *State v. Brisbane*, 2 Bay, 451. It is stated that the grand jury were sworn for the body of the county of Santa Fe, and the record which accompanies this cause, states that at a session of said court, held at the court-house in Santa Fe on the nineteenth of September, 1856, the grand jury appeared, through their foreman, and presented this bill of indictment. The character of the court is properly described as the district court for the territory of New Mexico. This is the title designated in the organic act, and recognized by various acts of the assembly. It is not necessary to mention the name of the judge. Some states may require this, but the court is not aware of any act of our legislature that requires it.

As to the second error, that a prosecutor should have been indorsed upon the indictment, it is alleged that inasmuch as it is declared by the act of assembly, that the person who makes the oath for the arrest of the accused shall be the prosecutor, and as this term is used in various places in the laws of the territory, it follows that the name of the prosecutor must be entered upon the indictment to give it validity. We are not of that opinion. As well might it be required to indorse the name of the committing magistrate, so far as legalizing the indictment is concerned. There is

no law that requires the indorsement of the name of the prosecutor, and it would be extremely injudicious and impolitic to enact such a law. It is true that the legislature has, very unwisely, as we think, made the prosecutor liable in certain courts for the costs, but it has never gone so far as to say that his name shall also be indorsed upon the indictment. The truth is, for all the purposes of public justice, the territory should be and is regarded as the prosecutor, especially in cases of high crimes. The person who makes the first oath for the arrest of the offender may take no further part in the prosecution, and another may be the active party in carrying it on. The latter, therefore, should more properly be considered as the prosecutor. And it may, and often does occur, that an indictment may originate with the grand jury, without any previous oath having been made for the arrest of the accused, and in such case it would be impossible to say who the prosecutor really is, and hence, if the position of the defendant's counsel be correct, the ends of justice might sometimes be defeated.

Again, crimes of great magnitude, seriously affecting the entire community, are sometimes committed where no one person more than another is interested in having the offender brought to justice. Should it, however, be decided that the person who makes the first oath is to be not only regarded as the prosecutor, but that his name as such shall be formally indorsed for all time to come on the back of a criminal indictment, it would only be adding to the many difficulties which already exist in regard to bringing offenders to justice as the law now stands. There are but few men in these days who are sufficiently bold and patriotic as to place themselves in the equivocal and hazardous position of prosecutor for the benefit of any community, which in the end would be more likely to condemn than applaud him. It would, therefore, be wrong to add anything to the weight of anxiety and responsibility which already attaches to the unfortunate individual, who in this territory consents to become a prosecutor in cases of high crimes and misdemeanors. As has already been stated, as the law now stands, the prosecutor, in case of acquittal, is made

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Opinion of the Court—Boone, J.

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liable for costs, and there may be cases where it would probably be proper that the name should be indorsed as such—such, for instance, as in misdemeanors, offenses which do not seriously affect the public interest and where personal or private rights are mainly involved, but where the law, for wise purposes, permits the aggrieved party to prosecute in the name of the territory. In prosecutions of this character, should a motion be made by the defendant during the progress of the trial or at its commencement, that a prosecutor be indorsed on an indictment, and assign good reasons therefor, the court, in their discretion, may order it to be done, not with a view of imparting validity to the indictment, but in order to give the defendant any advantage which might be derived from his being able to show that the prosecution has been instituted in private malice and not to serve the ends of public justice.

The third error assigned is, that the words deadly weapon were not inserted in the indictment. It is undoubtedly the law that an indictment brought under a particular statute must follow the words of the act, and that any material variance would be fatal. This is an indictment for murder in general terms, and the jury, if the evidence had warranted it, could as well have convicted the defendant of murder in the first degree, as in the fifth degree. The offense charged is one at common law, and although the legislature has enacted different grades of murder, it is not required to vary the usual and common form of an indictment, to enable the jury to find the defendant guilty of any one of the minor grades of the offense. Even if the words deadly and dangerous weapon had been used in the specific clause of the act defining what should constitute murder in the fifth degree, it would not have been necessary to insert those words in the indictment. But had the defendant been indicted under that particular clause or part of the act, which changes the common law definition of murder, for murder in the fifth degree, and the words in question being used in the law, it would then have been necessary to follow the words of the statute. Our adjudication must proceed upon the record represented to this court, without reference to

the finding of the jury, and the indictment being in the common form, and no statutory provision existing in this territory, where the words deadly or dangerous weapon are used in simply defining the crime of murder, the indictment is good without those words. On the contrary, their insertion would have vitiated the indictment, for I am unable to discover that they are to be found at all in the particular clause which defines or rather speaks of what shall be murder in the fifth degree. It is right that all the parts which constitute the offense should be clearly set out in order that the defendant be enabled to ascertain fully whether they constitute an indictable offense in order that he may properly defend himself, and to enable him to plead an acquittal or conviction in bar of another prosecution for the same offense. This indictment contains all the necessary requisites.

The case of *The Territory v. Seavilles*, in which the opinion was delivered by this court, has been relied upon by the defendant's counsel. But the decision in that case is predicated upon an entirely different state of facts from those disclosed in this. There the defendant was indicted under the seventh section of the third article concerning crimes and punishments of the Kearny code, which declares "that every person who shall be convicted of shooting or stabbing another on purpose, or of assaulting or beating another with a deadly weapon, with intent to kill, maim, ravish, or rob such person, or to commit any other crime, shall be imprisoned not exceeding seven years and not less than two years."

Here is an indictment, not for murder, but for an attempt to commit certain specified crimes, and was brought under a particular statute which creates and defines the offense, and although the statute contains the words deadly weapon, yet these important words were entirely omitted in the indictment, and the court very properly decided, that inasmuch as the indictment was for a new and distinct offense, under the statute, it should have followed the words of the statute, and not having done so, the objection was fatal.

By reference to the indictment copied in this opinion and

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 Points decided.
 

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the matters there stated, it will be seen that there is no similarity between the two cases.

There was also a question in the case just referred to, in regard to the caption of the indictment. The learned judge says that "the indictment only describes the grand jury as the grand jurors of the territory of New Mexico, inquiring for the county of San Miguel, and did not show that they were chosen, impaneled, and sworn for that county." This defect was regarded as fatal by the court but this objection or defect to the caption does not exist in the case now under consideration. On the contrary, the indictment declares that "the grand jury for the territory of New Mexico, duly impaneled and sworn for the body of the county of Santa Fe," etc. The allegation that they were duly impaneled means legally impaneled for the county of Santa Fe, and is sufficient without stating that they were chosen for that county. The judgment of the court below is thus far affirmed.

Since the rendition of judgment in this case by the court below, the act providing for a territorial prison has been repealed, and by a law of the legislature, the convicts are required to be confined or imprisoned in the counties where the offenses have been committed.

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### JOHN S. WATTS v. THE COUNTY OF SANTA FE.

#### NOTICE OF CHANGE OF REASONS FOR MOTION UNNECESSARY, WHERE—

Where, upon a motion to quash an execution, certain reasons therefor are assigned, and after argument, both parties being present, the court, upon the suggestion of the court, withdraws the reasons assigned and assigns others varying from them in form only, and not in substance, and requiring no change in the arguments or authorities relied upon by the adverse party, the latter is not entitled to new notice before proceeding to further argument, and if he declines to contest the motion further without such notice, the court may nevertheless, decide the motion against him.

APPEAL from the district court of the first judicial district for Santa Fe county. The case appears from the opinions of the judges.

*J. S. Watts, in propria persona, for the appellant.*

*T. D. Wheaton, for the appellee.*

By Court, BOONE, J.:

This is an appeal from the judgment of the court of the first judicial district, on a motion to set aside the levy and sale made under an execution issued upon a judgment in this case, to quash the execution and to stay further proceedings in the same. The first reasons assigned for the motion were as follows: 1. Because the execution under which said sale was made is founded upon a judgment null and void in law; 2. Because the execution under which said sale is effected is null and void; 3. Because the property sold could not legally be levied upon or sold as the property of defendant under any execution.

(Signed)

WHEATON, for Defendant.

During the argument upon this motion the defendant's counsel, on a suggestion from the court, withdrew the reasons assigned above and substituted the following, to wit: 1. Because no execution can issue legally against the defendant on a judgment of this court. 2. Because the execution under which said levy was made is issued on a judgment null and void in law. 3. Because the said execution is illegal and void. 4. Because the property levied upon can not legally be levied upon or sold under any execution. 5. For various other good and sufficient reasons.

It appears by the bill of exceptions tendered by the plaintiff and signed by the judge below, that the plaintiff declined to enter an appearance or to make any argument on the second reasons filed, due notice not having been given to him. Whereupon the court ordered, that the said sale be set aside, the execution quashed, and that all further executions in the case be stayed. The execution referred to was issued on the twenty-fifth of December, 1854, under which a levy had been made on real estate belonging to the county of Santa Fe; and the same sold by the sheriff. It is charged by the plaintiff, as has been stated, that he declined to enter any appearance to the subsequent reasons

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Opinion of Benedict, C. J.

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filed by the defendant's counsel, or to enter upon any argument upon the same, because due notice had not been given him, and that nevertheless the court proceeded to make the order. This is the error assigned, and is the only question before this court.

When matter is introduced during the progress of the cause presenting entirely new and distinct points, which would necessarily require of the opposite party other proof and different arguments to meet, and it appearing plainly to the court that he is taken by surprise, he should be permitted to have sufficient time to prepare for the purpose of meeting with proof and arguments the new issues or arguments presented. Whilst the rights of parties require this, it is not the policy of the law that applications of this character, and when it is apparent to the court that the objection is purely technical, and that no harm or injustice can possibly result from the want of further time, should be allowed. In this case the notice itself was not changed, and in the subsequent reasons assigned for the motion the words used are very nearly similar to those contained in the reasons withdrawn, and certainly the subject-matter or spirit is the same, although somewhat varied in the manner of setting it out. No new points are presented requiring a different form of reasoning, other authorities or proof, and we are unable to perceive from all this how the least possible injury could have been done to the cause of the plaintiff by insisting upon the disposal of the case without further notice. By affirming the proceedings of the court below, the rights of the plaintiff, as to the binding effect of the judgment against the county, are not infringed upon. This judgment against the county of Santa Fe remains in full force, and can not be impeached by this proceeding.

Judgment affirmed with costs.

Separate opinion by BENEDICT, C. J.:

This case has been submitted without argument and without assignments of errors. The attention of the court by the appellant has been called to one part of the record, and I am willing to announce my opinion upon the points



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Opinion of Benedict, C. J.

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presented. A motion was made by the county through her attorney to set aside a sale of property made by the sheriff, under an execution, etc. The bill of exceptions shows that the appellant was present and argued the motion. As there is nothing in the record showing that notice had been given to him, the presumption is that he appeared voluntarily and came within the jurisdiction of the court. After the motion was heard, it was withdrawn upon suggestion of the court, and another filed, varying but little from the first. When this was made, Watts declined to enter an appearance or argument unless due notice was given him. The court, however, proceeded and adjudged the motion in favor of the county, and Watts excepted.

The appellant wishes this court to say whether the court below was right in deciding the second motion without due notice to him. I think he had notice; a summons in the forming of a proceeding in an original writ to bring a party before the court was not necessary. Watts was there and took active part upon the first motion. The exceptions clearly imply that he was present when the modified motion was made. The bill says, in substance, it was so done, and Watts then declined to enter any appearance or argument unless due notice was given. The court, it seems, thought that his having appeared in the first, and being present when the second was made, and declining to attend further to his interest in the case, was sufficient notice, and I think so too. The court had something to do in determining what was due notice in the case, and I see no oppression or indecent haste in its action. Watts sought to obtain a mere technical advantage by assuming that he had no notice, though it evidently was given by making the motion in his presence and hearing, and by also assuming that he was not there in law, though he was there in person.

It is not the first time that parties and counsel have entered into cases and flitted out again, and then re-entered, perhaps with a view to trying the nerves of the court, and by rapidity of motion embarrassing its action. A court that knows its duties and powers will not find in such erratic practice any serious impediment in the way of exercise

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Opinion of Benedict, C. J.

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ing properly its judicial functions. Watts asked for no time to prepare. The court only went on in the same cause in which Judge Watts, and Wheaton, attorney-general, had been so long and so ably in argument. I can not consent to reverse this cause upon the ground that Judge Watts was not notified of the proceeding. .

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.  
JULY TERM, 1859.

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FRANCISCO LEONARDO *v.* TERRITORY OF NEW  
MEXICO.

**FOREMAN'S NAME NOT INDORSED ON INDICTMENT, OBJECTION WAIVED, WHEN.**—Where a defendant in a criminal case goes to trial in the court below without objecting to the want of an indorsement of the foreman's name on the indictment, he is precluded from making that objection in the appellate court, and it will be presumed that the indictment was properly indorsed.

**INDORSEMENT OF FOREMAN'S NAME INDISPENSABLE.**—The indorsement of the foreman's name on an indictment is an indispensable act. *Per Benedict, C. J.*

**CAPTION OF INDICTMENTS, SUFFICIENCY OF.**—Where the caption of an indictment states that the grand jury "were impaneled, sworn, and charged to inquire within and for the the body of" a particular county, it is sufficient to show that they were legally selected from that county, without a distinct averment of that fact.

**RECEIVING STOLEN GOODS—PREVIOUS CONVICTION OF THIEF UNNECESSARY.**—A receiver of stolen goods may be tried and convicted without a previous arrest, trial, and conviction of the thief.

**IMMATERIAL OR TECHNICAL EXCEPTIONS.**—After a trial on the merits, the judgment in a criminal case will not be reversed on immaterial or technical exceptions.

**RECEIVING STOLEN GOODS, WHAT CONSTITUTES.**—One who, knowing or having good reason to believe that goods are stolen, retains them for a single moment, or permits their concealment in his house, either for the purpose of appropriating them to his own use or for the purpose of obtaining the reward, may be convicted of receiving stolen goods.

## Opinion of the Court—Boone, J.

**VERBAL INSTRUCTIONS TO JURY.**—Under the act of the legislature of January, 1853, the judge's instructions, in criminal as well as civil actions, should be in writing, but where verbal instructions were given in a criminal case, the judgment will not be reversed on that ground, unless the instructions are excepted to at the time and embodied in the bill of exceptions, and are substantially erroneous and prejudicial to the defendant.

**"SUIT," MEANING OF, IN ACT OF 1853.**—The word "suit" in the act of January, 1853, requiring instructions to be in writing, applies only to civil causes. *Per* Boone, J., dissenting. Benedict, C. J., and the other judges, *contra*.

**INSTRUCTIONS GIVEN WITHOUT REQUEST.**—It is the right of the judge presiding at a criminal trial to instruct the jury without being requested to do so by the parties. *Per* Benedict, C. J.

**APPEAL** from the district court for Bernalillo county. The case is stated in the opinion of Boone, J.

*Baird and Hopkins*, for the appellant.

*H. N. Smith*, attorney-general, for the appellee. 1. The statute requiring written instructions in all "suits" applies only to civil causes: Toml. L. Dict. 535. 2. The caption of the indictment is sufficient: Whart Prec. of Indictments 14 and 20; *Tenorio v. Territory*, *ante*, 279.

By Court, BOONE, J.:

The defendant, Francisco Leonardo, was committed at the last term of the April court for Bernalillo county, upon an indictment for receiving stolen goods, the property, goods, and chattels of one Louis Zeckendorfer. The jury assessed a fine of one dollar, upon which judgment was entered by the court below in the usual form. Upon the record herein as presented, it appears that the clerk below has omitted to certify the judgment rendered; but, by the argument of the attorney-general and the counsel for the defendant, the court is permitted to regard the judgment as entered below in the usual form.

Several exceptions were taken in the court below, and errors assigned in this court, which are in substance as follows, to wit: That the indictment is defective; that the caption does not state that the jury were taken from the proper county, and that it is not shown that the person who is alleged to have stolen the money was first arrested, tried, and convicted; that the court erred in refusing a new

trial, and that the court erred in charging the jury verbally, without being requested to do so. The indictment in this case is in the usual form, as laid down in the books of approved precedents; it is full and explicit as to the offense charged, and every material allegation is substantially set forth. It was stated in the argument, but nowhere appears in the exceptions of errors filed, that the name of the foreman was not indorsed upon the indictment, as to the finding by the grand jury. The defendant should have taken notice of this in the court below. He did not do so, but chose to go to trial, and he is now precluded from obtaining any advantage of this defect, if any in fact existed; and it is fair to presume that all was regular in the court below; that the name of the foreman is regularly indorsed upon the indictment; but that it is a clerical error of the clerk in omitting to copy it in the record. Of this I have no doubt whatever. The caption of the indictment is defective, it is alleged, because it does not state in express terms that the grand jury were taken from the county of Bernalillo. Upon this point the court has no doubt. The caption states that "the grand jury for the territory of New Mexico were impaneled, sworn, and charged to inquire within and for the body of the county of Bernalillo;" and it is an extremely forced presumption, to suppose that a grand jury thus designated were taken from a neighboring county, instead of the county where the trial took place and in which the offense was committed. It is therefore sufficiently apparent that they were properly and legally selected.

As to the exception, that the person stealing the money should have first been arrested, tried, and convicted, it is only necessary to say that the act of assembly in express terms, has declared this to be unnecessary, and such, I believe, is not the law in any state in the union. After a trial upon the merits, this court will not reverse upon immaterial or technical exceptions. This, I believe, has been the ruling of every appellate court in England as well as in this country for the last three hundred years, and yet courts are still urged to pass upon exceptions of that character, and this although it must be apparent that they are certain

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Opinion of the Court—Boone, J.

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to share the same fate of the thousand and one similar cases already decided upon.

To seriously regard trivial and unestablished exceptions to indictments and proceedings in criminal cases, would, in a majority of cases, entirely defeat the ends of justice, make trial by jury a mockery, and courts of justice a curse instead of a benefit to the country. There are well-settled and substantial objections that may exist and be alleged against an indictment which no trial by a jury, however fair, can cure. In cases of this character it is the duty of the court to arrest the judgment. For it is the right of every defendant arraigned upon a criminal indictment to demand that the matters charged against him should be set forth in such a manner as to afford him protection, as a bar to any subsequent prosecution for the same offense, and unless our courts disregard every or all established principles of law and common sense, no other exceptions should be entertained.

The motion for a new trial was overruled by the court below, and this court is unanimously of the opinion, from the facts exhibited upon the record, that the ruling was correct. All the money, amounting to two thousand five hundred dollars, was found concealed in the house of the defendant. with the exception of some fifty dollars paid to him by the person who stole it, in the purchase of a horse and some provisions; and when the fact of the larceny was mentioned to him on the morning after the occurrence, he admitted that he knew where the money was, and stated that he would disclose the fact to the owner, for the sake of the reward of two hundred dollars which was offered for its recovery. This was sufficient to satisfy the jury that he knew where the money was, and the fact of his having received a portion of it from the thief, in the purchase of a horse and provisions, was calculated to leave no doubt upon their minds of his knowledge as to who the thief was. And if the defendant, for a single moment, retained this money, or any portion of it, or permitted it to be concealed in his house, either for the purpose of appropriating the same to his own use, or for the purpose of obtaining the reward, he is guilty of the charge. The smallness of the fine imposed, or assessed, by

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the jury, was no doubt the result of a conviction on their part that howsoever he might be guilty in the eye of the law, yet having shown a disposition to return the money, which was done to the entire amount, a mere nominal punishment was all that was required, and whether the jury erred in this view of the case or not, it is certainly no good ground for the defendant to take exceptions to. He at least should not complain of this.

There is another exception taken in this case to the action of the court below, which I will now proceed to notice. It is that the court erred in giving verbal instructions to the jury. A majority of the court are of the opinion that the act of assembly upon this subject extended to criminal prosecutions as well as civil cases. My opinion is unchanged upon this point, and I am constrained to differ with the majority of the court. There was no fault found with the court below, by the counsel for the defendant, with anything that was said to the jury by the court, and the remarks made to them were very few. No exception was made as to an instruction either upon the law or the facts in the case, and no request made to the court to reduce the instructions given to writing. But the objection rests upon the naked fact of an act of assembly, which, it is contended, prohibits the judge in all cases from delivering a verbal charge to the jury. There are, I am aware, in many states of this union, statutes which require the judge in all cases, when requested by counsel, to furnish a copy of his charge to the jury. This is probably right and proper, and although some of the judges look upon it as a privilege liable to be abused by counsel, in sometimes requiring written opinions when really no possible objections in any way can be made to the charge; yet such is the high character and courteous deportment of a vast majority of the members of the bar in the United States, in their bearing towards the court, that it seldom occurs that a judge is asked to commit his charge to writing, unless the counsel is sincere in the belief that he has erred in his view of the law, or has misstated the facts in the case; any other course would be regarded as captious. The judge is presumed, at least, to occupy an impartial position on the bench, and he should be actuated

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solely by a desire to see that the law should prevail, and the ends of justice be attained, and if to effect these results, he should be of opinion that the jury required instructions or an elucidation of the evidence, it is his duty to give it to them. The act of assembly in question is in these words: "That in any suit in the district court, the judges shall give their instructions to the jury in writing only, and such instructions thus given shall be filed with the papers in the case."

I shall not undertake here to enter upon the question, as to how far it is in the power of a territorial legislature to regulate the action of United States judges, as to the manner and mode of administering justice in the trial of causes, or whether it has the power to say that every word uttered by a judge to a jury, in all civil suits and criminal prosecutions shall be in writing. Would it not, by a parity of reasoning, have the power to say the judges should not give any instructions whatever? However this may be, I feel it to be a matter of duty and self-respect, not to give a latitudinous construction to an act of the legislature, calculated, in my opinion, to impose unnecessary burdens upon the bench.

In endeavoring to ascertain what is the true Anglo-Saxon meaning which the legislature attached to the word suit. I do not deem it necessary to refer to Blackstone, Coke, or the Year Book, or to the old Latin lexicographers, or to the early writers upon civil law, for I very much question whether these books were read or studied by the legislature that passed the law, with any view of finding out the true meaning and definition of the word suit. It is plain and obvious that this word, in common parlance, means the mode and manner adopted by law to redress civil injuries; in other words, that it means civil action. That this is the common and universal acceptance of the meaning of the word suit, can not be denied. The words criminal suit sound awkwardly, at least to the professional ear, and are seldom or never used. Had it been the intention of the legislature, or the gentlemen who framed the law, to include trials for crimes and misdemeanors, the words "and criminal prosecutions" would unquestionably have been added.



The universal rule for construing statutes is to presume that the legislature attached the usual and customary meaning to the words employed in connection with the subject-matter under consideration. And this is certainly the only fair and honest mode of arriving at their intention. A departure from this common-sense rule must invariably lead the inquirer into a thousand devious paths. It is certainly the only safe rule for a judge to pursue, and should never be deviated from. No other construction, therefore, can, in my opinion, be fairly put upon the act in question, than that the legislature intended to impose the duty on the judge, of writing out his opinion in civil cases only.

For myself, I care nothing about the matter, and shall, of course, in the trial of civil suits and criminal prosecutions conform to the views of the majority of the court; my only objection is to the principle involved.

The court are unanimous, however, that the judgment of the court below can not be reversed upon this ground, for it does not appear that there was any misstatement of law or fact to the jury.

The judgment, therefore, of the court below is affirmed with costs.

**Separate opinion of BENEDICT, C. J.:**

Although I concur in the judgment which the court renders in this case. I am not content to let it rest without putting upon record my opinion as to one or two points which have been presented. The transcript shows that the defendant moved in arrest of judgment, assigning as one ground, that the court charged "and directed the jury, as to the law and fact, without being requested or desired to do so; and that said charge and direction was given verbally, without requirement, against the provisions of the statute, thereby illegally influencing the jury." Defendant excepted to the court's overruling the motion. As to the exception that the court charged and directed the jury without being requested or desired, I can hardly think that the distinguished counsel for the defense could have been very serious in the insertion of that portion in the motion or bill. The power and right of a judge to give a charge to the trial jury

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after hearing the evidence, when he shall think proper and shall believe that right and justice in the case demand such act to be done by him, does not depend upon the wishes or will of the parties or their counsel; it is among the functions and duties of the judge. He is not required to be passive and silent, until moved to the exercise of this important function by the counsel, nor can he be resisted in its performance, although the matter, the principle, and law of the charge may be excepted to and preserved for revision in the appellate court. He should scrupulously avoid encroaching upon the rights of the jury, whether in civil or criminal causes, but within his sphere of duty and authority. He should see in trials before him that crimes do not go unpunished, and that the innocent do not fall under conviction; that justice be not thwarted or trampled under foot; that passions and prejudices do not usurp the office of calm minds and impartial judgment; and that sophistries and ignorance do not dominate over reason, logic, and the laws.

In instructing the jury below without being required, the judge but exerted his right to do so, and all exceptions as to the kind of chair he occupied, or where his hat was hung, or where he boarded and lodged, would have possessed equal legal merit and effect. Not so with the other portion of the exceptions mentioned in the case; this was the instructing verbally. In January, 1853 (see Revised Statutes), the legislature enacted, as appears in the English translation, as follows: "That in any suit in the district court the judge shall give his instructions to the jury in writing only, and such instructions so given shall be filed with the papers in the case."

I am not aware that any judge in this territory has ever held that this provision was binding upon him in the trial of causes arising under the laws of the United States. In such cases our courts look for their rules of proceeding and practice to a source superior in authority to our general assembly. In cases arising, however, out of the legislative acts of this territory, and in trials in that branch of jurisdiction, the courts have conformed in their rules of procedure to those prescribed by the legislature where the subject was one of rightful legislation in its hands.

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In the act cited, the word suit being employed in the English publication, the court below seems to have held, and the judge of that court holds still, that civil suits only are included, and criminal causes are excluded. Now to a rightful interpretation of the act, it must be taken into consideration that the translation is from the original in Spanish. It is so marked in the statutes. It was introduced, passed, and approved by the governor in Spanish; then, if there is any discrepancy between the plain and unquestioned meaning of the terms used in the Spanish original and the terms used to express the same meaning in the English translation, the original must prevail. In the interpretation of the law the Mexican people are not to lose the benefit of their laws enacted in their own tongue, because the translation has done injustice, or because those who occupy judicial seats may not be versed in the Spanish idiom. Now, the word used in the original act in Spanish and which is translated suit, is *causas*; this is plural of the noun *causa*. The *causa*, according to high Spanish authorities in lexicography, when used in relation to judicial proceedings, means lawsuits, trials, criminal causes or information: See Velazquez' Dictionary.

By reference to the Spanish and Mexican law-writers, we find that the word *causas* is used to embrace all causes, as well criminal as civil. The terms suit and lawsuit, we find, when translated into Spanish, to be, in connection with judicial matters, *pleito*, and this word is defined litigation judicial contest, lawsuit. Cause in English includes those civil and criminal, so the word *causas* in Spanish expresses civil and criminal causes.

From this exposition, there can be no doubt that the act, as written, passed, and approved in the Spanish original, and as it now stands upon the statute books, does require the judges to give their instructions to juries in all cases, civil and criminal, in writing. New Mexico is not strange and alone in this kind of legislation. Many states have enactments on the same subject, and not infrequently more stringent in limiting their judges' action in the mode of instructing juries. Our act only requires the instructions, be they what they may, to be written, and to be preserved with

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the files of the cause. The judge may instruct to whatever extent he may believe the case demands, but he must write what he says. In the motive that induced the law in question, I can see no good reason that it should be limited to civil causes only. It was intended to temper the influence of the judges with the juries. Perhaps the law-makers were under the impression, justly obtained, or from misrepresentation or caprice, that some of the judges had misused or abused the power of instructing, by making the "last speech" to the jury. Perhaps some judge, from a warm zeal to promote justice and prevent wrong, had contracted a habit of endeavoring to enforce, by his delivery and manner, his views, opinions, and feelings upon juries to such an extent as to produce discontent among parties in court. It may have been, too, that ambitious and talented counsel, in all the warmth of advocacy for their clients, had felt chafed and chagrined in meeting instructions pointed and amplified in direct hostility to the counsel's great object and hope—success. Let the complaint have been what it may, any motive apparent existed as strong with reference to criminal causes as civil causes. Lawyers, from their education and practice, would incline to look for the stronger motive growing out of criminal causes. If the judge abuses his functions, and from his influence with juries, becomes dangerous to the rights of parties on trial, can it be supposed that the legislature would only check and temper his action in cases involving dollars and property only, and leave him loose to act out his will, ample and swift, in cases which involve the liberty and life of the party upon trial? Such a discrimination, I presume, is unknown upon the statute books throughout the union, and I certainly shall not impute to our assembly the discredit of having adopted it, until the rules of legal construction shall impose upon me the obligation to determine that such adoption has been made.

To be prepared to instruct at all times in writing, and not to err as to the law or the examination of facts, is a severe task upon intellect and knowledge. To escape error and never mistake the law can hardly be expected of the ablest and wisest. No judge should, however, so dispose of the

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rights of men from the bench as to shrink from furnishing for review the clearest evidence of his acts or their legal grounds. The additional labor in concentrating the powers of the mind and condensing principles into writing has some compensation in the avoidance of disputes and misrecollections at the bar as to what has really been instructed when exceptions are taken. In this the dignity of the bench is less annoyed and exact certainty attained. The higher the position and more enlarged the service imposed upon a man in a free government, the more intense is the mental labor to equal the duties and requirements of the office. The judges of the higher courts hold in their hands the administration of the laws to their fellow-beings. On these depend the happiness and security, even the very existence, of society. Labor and anxiety, with an oppressive feeling of responsibility, are unavoidable to an enlightened and conscientious judge. The office is not created for the gratification of his pleasures, vanity, or pride. He is in a high trust position, for and in behalf of the government, the public, and individuals. This ease and quiet must constitute no part of the rule of his conduct, nor must he shrink from any burden or labor as hard and unbearable, when required by the legislative powers, with an intentional want to arrive at greater directness, exactness, and justice and right in guarding and enforcing the natural and legal rights of men. The continuance in an office and receiving its honors and emoluments should all be received as evidence of a willingness on the part of the incumbent to discharge all the duties, bear all the burdens, and perform all the labor pertaining to the office.

As to the instructing verbally in this case, I am clearly of opinion that it was improper on the part of the court and in direct violation of the statute. Yet that complaint can avail the convicted defendant nothing. In the hearing he has obtained in this court, he should have embodied the charge itself and been able to have submitted it to the inspection of this court. This court will not reverse any cause for alleged irregularities in the manner of charging the jury, unless the charge itself shall be preserved and the

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record shall show that it was excepted to when delivered. This court must be able to see that the instructions were such as might lead to influence unfavorably the party complaining. Nothing will be regarded as instructions required to be written except those given upon the law and evidence touching the merits of the case and the issues submitted to the jury. Trivial exceptions upon immaterial matters will work no relief to the objector, and especially when the whole record shall show that upon full trial substantial justice has been done between the parties. The indorsement of the name of the foreman of the grand jury upon the indictment is an indispensable act. I would not for a moment be understood as tolerating the idea that the court could arraign the accused and compel him to plead to and go to trial upon an indictment without such indorsement. No notice was taken of such omission in this case below. Surely no counsel, in the fulfillment of his professional duties, would submit his client to all the expenses, perils, and mortifications of a trial for felony, knowing such a fatal deficiency to exist in the form of proceedings, and in giving faith and authority to the public charge of crime. It certainly can not be supposed that the omission could have escaped the counsel's examination.

All reasonable presumptions in this court are now in favor of the proceedings having been regular, and the conviction rightfully had in the court below. Particularly is this the case when the charge does not involve life or a total destruction or forfeiture of the liberty of the accused. In this case it is fair to presume that the indorsement existed in the court below, and that clerical laches have failed to send the fact with the transcript. The clerk does certify that the "indictment" was found by the grand jury. A glance at the transcript will at once evince the irregular and inexperienced manner in which it is prepared. The defendant brought this case for review. It was upon him to have a perfect record before us. The party presumes too much upon the want of caution and firmness of this tribunal, so far as its history has yet been unrolled, when he brings his case here, and with a mutilated record, caused

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Points decided.

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by evident clerical errors, hopes to escape upon an untenable technical objection the just denunciations of the law which have overtaken him in the district court.

The attorney-general for the territory might well have gone to a hearing upon the transcript, with an intelligent foresight that though the defendant had filed an evidently diminished record, the court would properly regard and enforce the legal presumptions inherent in the cause.

BLACKWOOD, J., concurred with his honor the chief justice.

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**JOHN C. MOORE v. WILLIAM J. DAVEY, RICHARD OWENS, AND GEORGE H. ESTES.**

**SPANISH AND MEXICAN LAW OF REGISTRATION OF MORTGAGES.**—By the Spanish and Mexican law prevailing in this territory at date of the treaty of Guadalupe Hidalgo, and still in force except so far as repealed by statute, a mortgage was inoperative upon the property unless recorded in the mortgage office of the judicial district in which the property was situated, and the mortgage was required to be presented to the register for inscription within six days, if executed in the town where it was to be registered, and within one month if executed elsewhere, and to be registered in twenty-four hours after such presentation.

**MORTGAGE TO BE REGISTERED, WHERE.**—Under the act of January 12, 1852, a mortgage is not valid except between the parties interested, or as to those having actual notice of it, until it shall be deposited for registration with the clerk of the county where it was executed.

**LOAN—EFFECT OF NON-REGISTRATION.**—A mortgage executed in one county, of land lying in another, and never deposited with the clerk of the former county for registration, but recorded in the latter in eleven days after execution, must be postponed to a judgment recovered in the former county two days after the mortgage was made, execution upon which was immediately issued and levied upon the land, the judgment creditor having no notice of the mortgage, where the levy is kept alive and the land sold thereunder to the judgment creditor; and the latter's title can not be affected by a subsequent foreclosure.

**APPEAL** from the district court for Rio Arriba county. The opinion states the case.

*M. Ashurst*, for the appellant.

*Smith and Tompkins*, for the appellee.

By Court, BENEDICT, C. J.:

In the district court, Moore filed his bill to foreclose a mortgage against Davey. In the course of the proceedings, Davey filed his plea, setting forth that Richard Owens and George H. Estes had obtained a judgment against him in the district court for a large amount of money, prior to the execution of the mortgage, and that by virtue of execution in pursuance thereof, they had become the purchasers of the identical lands mentioned in the mortgage; that being interested in the premises, they had not been made parties defendant in the bill. The plaintiff demurred, but his demurrer was overruled by the court. Afterwards Owens and Estes were admitted as defendants, and filed voluntarily their answer to the bill.

It appears that the mortgage was executed on the twenty-third day of June, 1853, in the county of Santa Fe, and recorded in the county of Rio Arriba, where the land lay, the second of July following. Two judgments are set forth in the complaint—one rendered in the district court of Santa Fe county on the twenty-third of June, 1853, for one thousand seven hundred and seventy dollars, and the other on the twenty-fifth of the same month, in the same county, for seven hundred and sixty-one dollars and twenty-four cents. The answers set forth, in substance, that executions were immediately issued in proper form, and levied, and the levy kept alive until the lands were sold and purchased by Owens and Estes. At the April term of the district court, 1857, a decree was rendered against Davey for the amount due upon the mortgage, and if the decree should not be paid within sixty days, the lands included in the mortgage against which a decree of foreclosure was made, should be sold; and that Owens and Estes should deliver possession of the premises to the purchaser within sixty days after the sale. From the decree they appealed. It is insisted in this court that the appellants, by their judgments, executions, and levy, acquired a lien upon the lands prior to the mortgage; that they never lost it; that they were rightfully in possession of the premises under their judgment, lien, levy, and purchase, and that therefore the court erred in disregarding



their rights in the decree of foreclosure, and also in its decree that they should deliver up the possession of the lands to the purchaser under the decree.

From the silence of our statutes at the time the mortgage in question was made, as to its qualities and the legal consequences which followed its execution, we are to turn for information and authority to the Spanish and Mexican law, as it stood at the time of the treaty of Guadalupe Hidalgo. In view of that law (still in force where not repealed or modified), this was a conventional mortgage, or one executed by the mutual agreement of the parties, and in writing, and in which the property mortgaged, the terms and conditions were duly set forth. Such "mortgage, in order to have effect, must be registered in the mortgage office. If this be not done, the mortgage is inoperative." Schmidt, *Civil Law of Spain and Mexico*, 8. The mortgage "attaches to the mortgaged property, and follows it until released, in whatever hands it may fall." *Id.* "The person in whose favor the mortgage is given has the right to seize the property for the satisfaction of his debt or claim, in whatever hands said property may be found." For "this purpose he may resort to executory proceedings," etc.: *Id.* 183. "Every contract creating a mortgage must be registered in the mortgage office of the judicial district where the mortgaged property is situated." If such registration "is not made, the property is not considered mortgaged, and the contract is only personal."

These extracts show the benefits as getting security in the property, which results to the mortgagee by the mortgage, but to have "effect it must be registered, otherwise it is inoperative." "The property is not considered mortgaged." The contract is only personal. The registration had to be, too, at the place pointed out. Also the mortgage had to be presented to the register for inscription within six days after the execution of the contract, if made in the same town where the registry was to be made, and within one month if made elsewhere; and it had to be registered within twenty-four hours from the time of presentation.

We will now examine some of the provisions of the terri-

torial statutes entitled "Conveyances." The Revised Code, page 194, section 14, defines where conveyances shall be registered, since that act went into effect. In this respect it changed the rule before quoted. "All writings conveying real estate, or by which real estate may be affected in law or equity, which shall be signed, acknowledged, and certified in the manner herein prescribed, shall be registered in the office of the archives of the county wherein said conveyance is made.

"All persons making said instruments of conveyance after they shall be signed, certified, and registered, in the manner above described, shall give notice of the time of its being registered in the office of the register, to all persons mentioned in said conveyance, and all purchasers and mortgagors shall be considered in law and equity to have purchased under said notice."

"None of said writings shall be valid except to the parties interested and those who have actual notice of the same, until it shall be deposited in the office of the clerk to be registered."

The Spanish rules quoted, and the statutory provisions, will aid us in the determination of this case. Although he had his mortgage, still he did not obtain its execution until the next day after the first judgment in favor of Owens and Estes, and did not have it recorded (and there is no proof that it was ever recorded) until ten days subsequent to the said judgment, and not until the seventh day after the judgment of the twenty-fifth of June. Again, the registration was not made, and so far as this court knows, never has been, up to this date, made at the office, and within the county specified by law. The mortgage was made in the county of Santa Fe, and the act of twelfth of January, 1852, provided it should be registered in the office of the archives of the county where made. It was recorded in the county of Rio Arriba. The office of the clerk in the county of Santa Fe was the place where it should have been deposited, and the act is plain and explicit that it should not be valid except to the parties interested, and those who had actual notice of the mortgage.

until it should be deposited with the proper clerk. The principle or rule contained in these sections as to the consequences of non-registration is but a re-enactment of the Spanish law upon the same subject.

The answer of Owens and Estes avers the immediate issue of execution upon the judgment, and before they had any actual notice of the execution of the mortgage, and that upon the same day or day following after the issue of the writs, they were levied upon the premises in question. Though these executions, or a part of them that followed the judgment, are offered as exhibits in the answer, they do not appear in the record, nor any proof explanatory of their absence or descriptive of their contents.

The answer was replied to, and such evidence of a documentary character as appears in the transcript is not so clear and satisfactory on some points as the defendants ought to be able to produce. We think, however, that enough appears in the record to establish Owens and Estes' lien in the premises in preference to the mortgage, and that the decree of foreclosure in disregard of their rights, and of expulsion from possession, was erroneous. They seem diligently to have pursued their remedy, and therefore, so far as their diligence has gained them legal advantages in good faith, they stand favored in court. "The law favors the diligent," is a maxim well known to every lawyer. If the complainant has lost his hold upon the property, so far as these defendants are concerned, he will take warning from it and guard with more legal vigilance his interests in the future.

It is the unanimous opinion of the court that the decree of the district court be, and hereby is, reversed, and that the cause be remanded to the district court to be proceeded in, in conformity with the general views of this opinion, and that upon additional proofs upon a rehearing, the court will protect in its decree such equities as the case shall disclose as accruing to any of the parties upon the record. And it being made known to the court here that Richard Owens is now deceased, the district court will admit his administrator a party representative in the suit.

Reversed and remanded.

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Opinion of the Court—Benedict, C. J.

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**LEVI SPIEGELBERG v. JOHN H. MINK.**

**AFFAIRS WHERE JURY DISPENSED WITH.**—Where a cause is by consent tried by the judge, without the intervention of a jury, the losing party, to entitle himself to a revision of the facts by the supreme court, should move for a new trial, and if refused, should embody the evidence in a bill of exceptions.

**PAROL EVIDENCE AS TO COMPENSATION OF APPRAISER OF ESTATE.**—Parol evidence is admissible to show that an appraiser of a decedent's estate agreed to serve without compensation, and also that he performed no service.

**APPRAISER'S RIGHT TO COMPENSATION.**—Where an administrator has joined with a duly appointed appraiser in listing and valuing the property of the estate, and has accepted and acted upon the appraisement without objection, expressing himself as satisfied with it, he can not resist payment of the appraiser's legal fees on the ground that no services were performed.

**GRATUITOUS SERVICES.**—Where one performs services for another with the intention of not demanding compensation, and is so understood by the other party, he can not afterwards maintain an action for compensation.

**APPRAISER'S WAIVER OF COMPENSATION.**—Clear and satisfactory proof will be required to defeat the claim of an appraiser of a decedent's estate to the fees allowed by law, on the ground that he consented to serve gratuitously.

**JURISDICTION OF PROBATE COURT AS TO ALLOWING CLAIMS.**—The allowance of claims against a decedent's estate is so peculiarly within the province of a probate court, that another court will not be disposed to disturb its action if the proceedings appear to have been fair and regular.

**APPEAL** from the district court for Santa Fe county. The facts appear from the opinion.

*R. H. Tompkins*, for the appellant.

*M. Ashurst*, for the appellee.

By Court, **BENEDICT, C. J.:**

Mink presented, in the probate court for the county of Santa Fe, a claim against Levi Spiegelberg, as administrator of Elias Spiegelberg, deceased, for the sum of one hundred and twenty dollars, for service as an appraiser of decedent's estate. The probate approved of sixty-three dollars and forty cents of the claim, and rejected the balance. The administrator then appealed to the district court, and, on trial, judgment was rendered against the appellant for the same amount adjudged against him in the probate, and

thereupon he appealed to this court. The points made in the cause are few. We deem it proper to notice one matter of practice which the record brings to view. In the district court neither party required a jury. The judge was substituted in the place of the jury, heard the testimony, and found the judgment, or rather the verdict, upon the facts submitted. Spiegelberg excepted to the decision of the court, and tendered his bill of exceptions.

Now, had the cause been tried by a jury, the party, to be placed in a condition to have entitled him to a revision of the facts in this court, should have moved the court below for a new trial, and, upon being overruled, embodied the evidence in a bill of exceptions. No exceptions could have been supported against the judgment of the court, upon the verdict of the jury, until its attention should have especially and formally been called to a re-examination of the correctness of the verdict. So, too, where the judge is substituted for the jury, the party aggrieved should move for a new trial, and the judge be thus required to revise his finding upon the facts in the case. If the motion is carried, the party will then be entitled to his bill of exceptions on the evidence. This will be found to be the usual rule of practice where the courts are permitted to put the judge, by the consent of the parties, in the place of the jury, in trying the facts in a civil action. In this case, such course was not pursued; the appellant only excepted to the judgment of the court. Upon this practice no point has been made before us in this court, and we shall give the parties the full benefit of a revision of their testimony, the same as if it had been brought here in the most regular and commanding mode. The chief arguments have been made in review of the evidence, and our judgment by both parties is expected to be rendered upon such merits as this evidence discloses.

Mink's claim was founded upon alleged services as one of the appraisers of the estate of the deceased Spiegelberg. It was not questioned that he was duly appointed and sworn. The statute provides that "appraisers shall receive at the rate of fifty cents for every hundred dollars until the termination of the appraisement on property left

by will as well as property left by intestates." Rev. Codes, 490.

It appears that Spiegelberg, administrator, made an inventory of the deceased's estate, and the same was filed in probate, amounting to the sum of twenty-four thousand one hundred dollars and fifty-two cents. Five days from the date of said inventory, Mink, with C. P. Clever, sworn appraisers, certify that they had appraised the property specified in the inventory at the same sum of twenty-four thousand one hundred dollars and fifty-two cents. This appraisement appears to have been filed with the probate as the true valuation of the estate, and its correctness was never opposed by the administrator. The latter opposed the justness of Mink's demand upon the grounds, to wit:

1. He never performed the services as appraiser to entitle him to compensation.
2. That he agreed to perform those services without compensation.

The only oral witness was Mr. Clever, the joint appraiser. Some objection was made by counsel for Mink, to the competency of this witness, upon the ground that the appraiser's action being reduced to writing, Mr. Clever could not give verbal testimony as to anything said or done by Mink touching the premises. We think that the court properly admitted the witness to testify and upon grounds so obvious as not to require further remark in this opinion. Clever's testimony unfolds a state of affairs which calls for our marked condemnation from this place. We are unable to say that any fraud was actually practiced upon those interested in the estate; but the mode of procedure, if permitted to go unrebuked, and should it be repeated, might lead to frauds upon estates, heirs, and creditors, of the most aggravated character. A large portion of the estate consisted of merchandise. Clever testifies that he, the witness, appraised the goods in company with the administrator; that Mink did not invoice the said goods, nor did he render any service in the invoicing; that Mink was probably in the store two or three times during the appraisement. Clever states the reason for this strange conduct to have been, that

the witness and his partner had purchased the goods of the administrator at a certain percentage on the original cost, and as they were going to put said goods on the market, they did not desire said Mink to know the prices of said goods.

The way the goods were appraised was by putting a percentage on the original cost. As to the other items in the account, witness did not appraise them, nor does he know whether the plaintiff appraised them or not. The list of the other items was made out by the administrator and Mink, and the administrator brought the certificate of appraisal to the witness and told him it was all right, and he signed the certificate. Now, it is evident that if Mink was not present and aiding in the invoicing, it was because by design and consent between the joint appraiser and the administrator he was excluded. Whether Mink knew that he was thus combined against, and became willingly passive in his exclusion from his active and sworn duties, the witness does not say. The witness was unwilling to trust the private interest he had in the subject-matters to be invoiced to the information of Mink for fear he might impart his knowledge to the damage of the new partnership in trade then formed.

To all this the administrator became a willing party. What other motive he may have had, aside from the interests of the purchasers of those goods in usurping the duties of Mink, and excluding a sworn agent of the law and the estate from the discharge of his functions, is not brought to view in the testimony. If Mink was unworthy of the trust with which he was clothed, and such was known to the administrator, he should have resisted his appraisal or applied for his removal. From all that appears in this case, it is difficult to resist the conclusion that Mink was appointed, at least with the acquiescence of the administrator, with the hope, if not the positive understanding, that he should passively and willingly minister to the convenience of the parties most immediately interested in the goods to be appraised. We do not see that he was at all unfaithful to their views and wishes. After the goods were

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disposed of, it seems that Mr. Clever became passive as to the other items of the estate, though exceeding thirteen thousand dollars in valuation. Mink could not give any knowledge of these items, the imparting of which would injure the private interest of others, and so Mr. Clever retired from further labor, and the administrator joined himself with Mink, in whom both he and Clever seem at this point to have found confidence. The administrator made out the list, and with Mink, brought the certificate to Clever, and told him it was all right, and he signed it. The administrator was well satisfied with Mink's labors; assured Clever that all was right; filed the appraisement with the probate as the true, genuine, and lawfully made appraisement of the estate he was charged to guard, administer, and distribute, and never once thought of applying to the probate to set aside the valuation, as one made by himself, with one of the appraisers only.

After all this, after Mink had been so complying, and his labor had been so satisfactory to the administrator, we are asked to turn Mink from this tribunal as one having no just claim to pay for services in the capacity to which he was appointed. We can not consent to such an act of wrong and injustice. It is not for Spiegelberg, after having used Mink as he desired; after having found him quiet and unobtrusive, in the midst of the usurpations and irregularities practiced in the mode of appraisement; after having been so well satisfied with Mink, that "all was right;" after having treated the appraisement as truly, properly, and strictly made, and filed the same with the probate, without any attack upon its legal genuineness; after appropriating to himself all these services of Mink, and still claiming all the advantages resulting from them, without once pretending that the estate, or any one interested in the same, had been wronged or defrauded by any commission or any act of bad faith on the part of Mink as appraiser; after all this, we say, it is not for Spiegelberg, in a suit of this nature, to repudiate the fair demand of the appraiser.

As to the ground that Mink agreed to perform the services without compensation; we take this proposition to be



correct, that when one person performs some service to another without intending to charge pay while performing the same, and is so understood by the recipient of the services when done, the person so performing has no legal claim maintainable in a court of justice. Clever proves that he charged nothing for his services as appraiser, nor did he intend to charge anything, because his impression was that the appraisers were not to charge anything. Clever knew that he made such an agreement, and thinks Mink made the same; thinks he heard Mink, after the commencement, say he did not intend to charge anything, and would not have done so had the administrator treated him well, but that he now would charge all the law would give him.

Mink was an agent appointed by law to perform certain duties. His compensation was fixed by law and put beyond the control of the administrator. To establish that Mink renounced to the latter his lawful claim to pay, the evidence must be of the clearest, most direct, and certain character. He was the agent of the law, and not the employee of Spiegelberg, and not dependent upon his will for his pay. Clever says he made no charge, and thinks Mink was to have made none. His impressions are not sufficient to defeat another in his clear and just legal rights. Clever was interested in the concealment of the prices of the goods, as he states, and therefore might well have agreed to charge no pay, if that could assist him in procuring the appointment.

Mink had no such interest. The estate was abundant and rich in property, and the administrator was under no necessity, no obligation to procure the services of such as would labor for nothing. We think the testimony insufficient to maintain that Mink renounced his claim to pay. As to the amount of the judgment below, it seems the same as that approved and allowed by the probate. The action of the latter may have had some influence upon the mind of the district court. Both the probate and the district courts probably took an equitable view of Mink's actual labor. Be that as it may, Spiegelberg has no cause to complain.

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Points decided.

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Had the judgment been for a larger amount, we would not disturb it. The allowance of payments, and the approval of claims, to the legal and judiciary agents of a decedent's estate, are so especially within the province of the probate, that another court will not be disposed to disturb its action when the proceedings have been fairly and regularly done, and it has had a full knowledge of all the facts legitimately connected with the subject-matter.

While the district and this court have their supervisory powers, they will duly respect the acts of the probate in those matters intended by our laws to be so thoroughly submitted within its province. We, however, admonish that court of the necessity of great vigilance, that its confidence may not be too lavishly bestowed on persons full of zeal to acquire the control of wealthy estates whose heirs are not infrequently in Europe. In the wise care of no one is the heir's interest, as such, so reposed as in our probate courts. All legal agents appointed in pursuance of law, to duties, trusts, or powers touching such interests, should be as far removed as possible from selfish and corrupting motives.

It is the unanimous opinion of this court that the judgment of the district court be affirmed, with costs.

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MARIA ENCARNACION ROMERO v. LUGARDA  
MUÑOS.

**BILL TO PROTECT POSSESSION RECOVERED IN EJECTMENT.**—Where, after the plaintiff has recovered in ejectment and been put in possession, the defendant re-enters upon the premises, expels the plaintiff, and destroys his crop, etc., a bill will lie to restore the plaintiff to possession and to enjoin the defendant from further molesting or disturbing him therein, there being no adequate legal remedy.

**INJUNCTION AGAINST TRESPASS.**—An injunction will lie to restrain trespasses for which there is no adequate remedy at law.

APPEAL from the district court for Rio Arriba county.  
The opinion states the case.

*J. S. Watts*, for the appellant.

*M. Ashurst*, for the appellee.

**By Court, BENEDICT, C. J.:**

In the district court the defendant demurred to the complainant's bill in chancery, which was sustained by the court, and judgment rendered in favor of defendant for costs, and thereupon complainant appealed. The demurrer averred that the bill did not contain equity. The bill shows that at the September term, 1854, of the district court for Rio Arriba, the complainant prosecuted a suit in ejectment against this defendant, succeeded upon the trial, obtained execution in due time, and was duly put, by the sheriff, in possession of the lands and premises in question. In March, 1855, the defendant, as the bill says, "unlawfully and in contempt and disregard of said judgment and recovery, entered upon and took possession of said lands (the same recovered in the ejectment suit), pulled up and destroyed the crop of the complainant, planted and growing on said land, to her damage in the sum of sixty dollars." She further states that she was unlawfully deprived of the possession of the lands which she had rightfully obtained in her suit against Munos, and also deprived of the benefit of the same; also that defendant was trespassing upon the lands of the complainant, and outside of those described. Other matters are stated, but, for the purposes of this opinion, enough are recited. An injunction was prayed for, to enjoin defendant from molesting, disturbing, harassing, or driving away complainant from the possession of her land. She also prayed to be restored to the possession, and to be secured from the disturbance of Munos, etc. She charges, likewise, that defendant had carried the crops, etc., away.

But few points are presented for consideration in this case. We think the court erred in sustaining the demurrer. Equity obtains jurisdiction where the remedy at law is not plain, adequate, and complete. It is not enough to exclude its jurisdiction that there is a remedy at law. The remedy should be equal to give complete redress. If it fails in some essential quality, the equity may be invoked. In this case the plaintiff had pursued her remedy by ejectment. All that that action would do for her had been done; complete

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execution had been had; that cause was ended. Still in utter contempt of the force of the law sanctions in favor of the plaintiff, defendant again, by some means, re-enters the lands, and deprives the plaintiff of the enjoyment of her lawful possession. Will equity say that the plaintiff has no other remedy than to repeat her ejectment case? And how many times must she be remitted to the deprivation of the possession and the same lawsuit, with all the harassments and expenses incident thereto, before she can find equitable relief by injunction?

When such a persistent disregard of legal rights as is set forth in this case, with such a virtual disobedience of the mandates of the courts, are perpetrated, it is time that the courts interfere to prohibit their repetition in future. It may be said that resort may have been made to the action of forcible entry and detainer within the jurisdiction of a justice of the peace. What hope could the plaintiff have, when the action of the district court had been set at naught, that any redress could be effected through the justice's court? Again, to give the justice jurisdiction, the entry or detention must have been in certain modes, and, from the bill, it is by no means certain that the entry in this case was made in either of those modes. The justice can not take jurisdiction where the titles or boundaries of the lands should come in question, and from the bill it is quite probable that the latter would arise upon the trial. So, both in the prosecution of trespass, and to arrest the committing of threatened trespass, equity frequently interferes. The injured party is not compelled to lie still and submit to trespasses until his wrongs or his ruin shall become complete, and then seek his redress through the vexatious and costly and sometimes doubtful process of law. He may seek a relief from equity adequate to save him from the trespasses and their consequences in time.

How the proof may disclose the facts on the hearing of this complaint we of course know not. We are now passing upon the case as it stands upon the record, and we think that the defendant should have been required to answer. Upon hearing the case after the parties shall make

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Points decided.

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their issue and produce their proof, or in whatever mode the cause shall stand before the court for hearing, it will be able to render such decree as equity and justice shall require. We think the face of the bill presents ample grounds for an injunction. It is the unanimous opinion of this court, that the judgment of the district court be reversed, and that this cause be remanded to said court for further hearing; that the demurrer be overruled, and the defendant be required to answer the bill, and that the appellee, Mufios, pay the costs of this appeal, and that the clerk in certifying this case to the court below, certify also a copy of this opinion.

Reversed and remanded.

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### GEORGE CARTER v. TERRITORY OF NEW MEXICO.

**JUDICIAL NOTICE OF HISTORICAL FACTS.**—Judicial notice will be taken of public and notorious facts in the history of New Mexico.

**RETENTION OF MEXICAN CITIZENSHIP UNDER TREATY.**—The declaration of intention to retain the character of Mexican citizens provided for by the treaty of Guadalupe Hidalgo, with respect to Mexican residents of this territory, must be presumed to have been designed to be made according to the laws of naturalization of Mexico, rather than those of the United States.

**PUBLIC DECLARATION NECESSARY.**—Such declaration of intention could not be made privately, but was necessary to be made before some court, officer, tribunal, or public authority, who should preserve the evidence of it.

**GOVERNOR WASHINGTON'S PROCLAMATION ON THIS SUBJECT UNNECESSARY.**—The proclamation issued by acting Governor Washington, in April, 1848, was not necessary to enable Mexican residents of the territory to elect to remain Mexican citizens; but in the absence of any such proclamation, a formal declaration of an intention to retain such citizenship made before a court having a record and a clerk to keep the same, would have been sufficient.

**SUCH PROCLAMATION AUTHORIZED.**—Acting Governor Washington had competent authority, as the representative of the president, and the executive head of the *de facto* government then existing in this territory, to issue such proclamation.

**DECLARATION UNDER SUCH PROCLAMATION VALID.**—A declaration of an intention to retain Mexican citizenship made and subscribed freely, knowingly, and without fraud or deception, before a probate court, in accordance with Governor Washington's proclamation, was a valid and binding

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exercise of the right of election reserved to Mexican residents of the territory, by the eighth article of the treaty of Guadalupe Hidalgo.

**PROOF OF DECLARATION INSUFFICIENT, WHEN.**—The appearance of the name of a party, proved to be in his own handwriting, subscribed, with others, to a declaration of an intention to retain the character of a Mexican citizen, contained in a book produced from the office of the secretary of the territory, but not shown or certified to have been the record of the probate court of any county, and there being nothing to prove that such list was opened or kept in pursuance of the proclamation, or that any of the persons whose names are included therein ever appeared before any court or officer, and subscribed such declaration, or as to when or where the names were subscribed, is wholly insufficient evidence of an exercise of the right to elect to remain a Mexican citizen under said treaty.

**CERTIFICATE BY DEPUTY CLERK INSUFFICIENT, WHEN.**—A certificate signed by one as "deputy" in the name of his principal as clerk of a court is not a sufficient authentication of an official document, it seems, where there is no law authorizing the appointment of a deputy.

**CERTIFICATE MUST STATE FACTS.**—A clerk's certificate to a list of names, appended to a declaration of intention to remain Mexican citizens, that "it is a correct list of all who have elected" in a particular county "to retain the character of Mexican citizens," is insufficient, because it states merely the judgment of the officer and not the facts as to the persons so named having appeared before such officer and subscribed such declaration, etc.

**PROOF OF EXECUTIVE PROCLAMATION INSUFFICIENT, WHEN.**—The mere production of a copy of an executive proclamation, not certified by any person without any proof that it was ever published, is insufficient proof of the issuance of such proclamation.

**FILING DECLARATION OF NATURALIZATION DOES NOT PROVE ALIENAGE.**—The filing of a declaration of intention to become a citizen of the United States by a Mexican who resided in this territory at the date of the treaty of Guadalupe Hidalgo, is not evidence that such Mexican had previously elected to retain his Mexican citizenship under that treaty, where such evidence is offered under a plea in abatement to an indictment found by a grand jury of which such Mexican was foreman.

APPEAL from the district court for Santa Fe county. The opinion states the case.

*M. Ashurst*, for the appellant.

*B. H. Tompkins, attorney-general*, for the appellee.

By Court, BENEDICT, C. J.:

George Carter, at the March term, at Santa Fe, of the first judicial district court, 1858, was indicted for an assault with intent to kill and murder Juan Duro. Upon being ar-

raigned, he pleaded specially "that the territory of New Mexico ought not further to prosecute the said indictment against him, because he saith that Anastacio Sandoval, one of the grand jurors who found the said indictment, was not at the time of finding said indictment a citizen of the United States, but was at the time of finding said indictment, a citizen of the republic of Mexico, etc. He prayed 'judgment' that he be discharged and dismissed from the premises in said indictment specified."

To this the attorney-general replied generally, and tendered an issue to be tried by a jury, which was joined by the defendant.

This was then tried by a jury, who found the following verdict: "We, the jury, find the issue for the territory in this, that Anastacio Sandoval is a citizen of the United States."

The case was then continued until the next term. When the term came, Carter was duly arraigned, and pleaded not guilty to the indictment. Upon trial, the jury found a verdict of guilty, and fixed his punishment to be the payment of a fine of sixty dollars. Carter's counsel then moved for a new trial, assigning two grounds: 1. "That the jury found against the law and the evidence in the trial of the issue upon the plea in abatement, and also upon the final issue of not guilty." This motion the court overruled, and rendered judgment upon the verdict of the jury against the accused. The counsel then moved in arrest of judgment, because "the jury found against the law and the evidence on the trial of the plea in abatement." This, too, the court overruled, and the defendant excepted, and the court allowed an appeal, and granted him a stay of execution of the sentence.

No testimony appears embodied in the bill of exceptions, other than that given upon the trial of the plea in abatement, and no errors are alleged to have been committed in the district court in this cause, except the overruling of the motion for a new trial and arrest of judgment. Whatever objections might properly be found to exist as to the form of the plea in abatement in attempting to reach the object

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for which it was pleaded, they have all been waived by being replied to and issue joined thereon. It was intended to open the case to the introduction of evidence to prove that Anastacio Sandoval, one of the grand jurors, had retained the character of a Mexican citizen, in pursuance of the eighth article of the treaty of Guadalupe Hidalgo, and thereby established his Mexican citizenship and disqualification to serve as a juror.

The opinion of the court is invoked as to the sufficiency of the evidence to prove these facts on the plea in abatement. Were we disposed to shrink from the heavy responsibilities unavoidably to be assumed in the discussion and decision of this cause, upon the testimony, there are points of practice and technical merits upon which the court might repose, and avoid the examination and adjudication intended to be presented in this appeal. Such shrinking, however, would be unworthy of the independence and dignity of an intelligent tribunal of justice. We may take judicial notice of the public and notorious acts which constituted a portion of the history of New Mexico during the past thirteen years, and in the midst of these the question of the retention of the character of Mexican citizenship has been exciting and disturbing. It is so now, and this fact imposes, in the investigation of this question on its legal merits, the greater labor and care.

The eighth article of the treaty of Guadalupe Hidalgo provides that, "those Mexicans who shall prefer to remain in the said territory (including New Mexico) may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of ratification of this treaty, and those who shall remain in the said territory after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States."

It is insisted that Anastacio Sandoval did declare his intention within the one year to retain his Mexican character as to the rights and title of citizenship. To demonstrate



the weight the testimony in this case gives to the maintenance of this proposition, it is proper to state the most material parts relied upon to show that Sandoval's declaration was legally, personally, and knowingly made; that he did the act in the manner and form allowed by the treaty, and that the proof offered possessed all the essential elements to require the jury so to find, instead of finding as they did.

It was proven by Mr. Jackson, the present secretary of the territory, that at the time he took possession of the books and papers belonging to the office, he found a book, which he produced in court, and which was permitted to be offered to the jury without any objection from the territory, among the archives of the office. The book shown contained the caption in the following words: "We elect to retain the character of Mexican citizens." Below this caption, among other names, was found the name of Anastacio Sandoval. At the conclusion of the signatures in said book was found a certificate in the words and figures following:

"Territory of New Mexico, County of Santa Fe.

"I, James M. Giddings, clerk of the probate court, do hereby certify, that the foregoing is a true list of all who have elected in said county to retain the character of Mexican citizens. Given under my hand and seal, this first day of June, 1849. (Signed) JAMES M. GIDDINGS, Clerk,

[SEAL.]

"By F. B. Giddings, D. C."

A proclamation was also found in said book, pasted on the lid, containing the words and figures following. This proclamation recited exactly the provisions of the treaty before copied herein, and then continued, but in the Spanish language, and correctly translated as follows:

"Whereas, I, John M. Washington, governor of the territory of New Mexico, do hereby ordain, that the clerks of the probate courts in the different counties of this territory shall immediately open, at the prefectures, records, which shall be handed as follows: 'We elect to retain the character of Mexican citizens;' in which those of each county who shall so elect may personally record their

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names, and those who do not appear and sign said declaration, on or before the thirtieth day of May next, will be, in conformity with the treaty, considered citizens of the United States. Within six days after the thirtieth of May, the record shall be sent, with the certificates of the clerks of the prefectures of the several counties, to the secretary of the territory, that they may be published and distributed to the different tribunals of justice in the territory. Given under my hand and seal, at Santa Fe, the twenty-first day of April, 1848.

(Signed)

“J. M. WASHINGTON.”

Jesus Sena y Baca testified that he was acquainted with the handwriting and signature of Anastacio Sandoval, and that said signature of Anastacio Sandoval shown him in said book was genuine.

It was also proven, that Anastacio Sandoval, at some previous term of the district court, had, with many others, declared his intention to become a citizen of the United States. It was admitted upon the trial, that Sandoval was foreman of the grand jury that found the indictment against Carter. It is argued that the proclamation of Washington was made without authority of law, and no acts done in pursuance of its directions could affect the rights and titles of any one as to his citizenship; that no one, by complying with its provisions, could secure the retention of the character of Mexican citizen, solemnly guaranteed to every Mexican in New Mexico by a treaty between the nations having full power over the subject-matter. Now that part of the treaty cited was one of the provisions and covenants made in favor of Mexico and her citizens. A war had been waged between the two republics, disastrous at all points to Mexico, until the success and power of the United States seemed threatening the very existence of Mexico as a nation. It was then the treaty was concluded. This dismembered the Mexican republic, and one portion cut off from the nation was New Mexico, which had been conquered by the troops of the United States in 1846.

In this region there was a large number of native-born Mexican citizens. In the cession made, few, perhaps, are

aware how deeply the Mexican government felt in insisting upon a treaty stipulation that should secure to those citizens, beyond cavil or dispute, the right to retain their Mexican citizenship, should they prefer to do so, in preference to becoming citizens of the United States. The movements of a portion of these people in what is known as the Taos "insurrection" against the United States authority and government seems to have drawn towards these inhabitants strong professions of sympathy from the Mexican government. During the discussion between the commissioners, on the part of the two nations, as to the provisions the treaty should contain, a liberal council was held by the Mexican government, which resulted in giving to the Mexican commissioners a new body of instructions, which were imparted in form by Secretary Pacheco, in a communication at Mexico, September 5, 1857: See executive documents, No. 52, thirtieth congress, first session.

These instructions express the extreme unwillingness to cede this territory by Mexico. They say that even should congress approve, the government would not consent to cede New Mexico, whose inhabitants (we quote the exact language) "have manifested their will, to make a part of the Mexican family with more enthusiasm than any other part of the republic. Those well-deserving Mexicans were abandoned to their fate, very frequently without protection, not even shielded from the incursions of the savages; yet, notwithstanding all this, they have been the truest Mexicans, and most faithful patriots. Forgetting their private grievances, they at this time remember only that they are and wish to belong to the Mexican family, exposing themselves to be sacrificed to the vengeance of their invaders, against whom they have risen. When their plans were discovered, their conspiracies frustrated, they have not ceased to conspire. Could the government go to sell Mexicans like these as they would a herd of sheep? No! Before the nationality of the rest of the republic shall be lost to them we will perish together.

"In New Mexico, and the few leagues that divide the right bank of the Nueces from the left bank of the Bravo,

is contained either peace or war. If the commissioner of the United States leaves nothing else to the government of Mexico, than to choose between this cession and death, in vain was he sent by his government."

The American commissioner writing to our own government, under date of September 4, 1847, from Yacubayo, says upon this same subject of ceding New Mexico: "Both honor and interest, they say, forbid them to surrender it. They could not without ignoring 'sell' a portion of the population of the country, who have given such striking proofs of fidelity to the republic, and of their determination to retain the character of Mexican citizens. On the other hand, interest required them to hold on to that part of the republic, as one of its main dependencies for meat to feed its inhabitants. Upon the grounds set forth in considerable detail rested the special objection to parting with New Mexico."

In the effort between the two countries to establish peace, the Mexican government offered a project which included territory claimed by them as before then belonging to Mexico. In this they insisted that, "if the persons here treated of think proper to remain in the territories they now inhabit, they may preserve the titles and rights of Mexican citizens, or at once acquire the titles and rights of citizens of the United States if they wish."

The stipulation finally adopted was such as the eighth article contains. The right to preserve the Mexican character was guaranteed, but the obligation to make the election was limited to one year. We now see with what tenacity the Mexican government insisted upon, and finally obtained, the agreements in favor of Mexicans in the ceded territory, embraced in the article before cited.

It has not remained for this court to urge the sanctity and inviolability to treaties. Every increased spread of light in the world of civilization has given renewed vigor and sanction to all lawful agreements between man and man and nation and nation. Good faith in these regards is among the highest distinguishing traits that make and fix the moral character, rank, and honor of individuals in commu-

nities. To no nation is strict observance of covenants and agreements of so high importance as to the United States, whose very existence depends upon the mental and moral consent and the deliberate formal agreements of the parties interested in the formation and continuance of the system which made them a nation among the powers of the earth. It is not for a government whose exalted tone and sense of constitutional justice has restrained each and all of the states of the great union from ever passing any law that shall impair the obligation of a contract, and has made her treaties a part of the supreme law of the land, to disregard her solemn promises and engagements, though made to the weak, ill-governed, and distracted nation of Mexico.

But it is urged with much zeal, and apparent conviction of the soundness of the view, that although the treaty did secure to the Mexican citizens of the ceded territories the unqualified right to retain their Mexican rights and titles within one year, still the treaty failed to prescribe the form and manner by the observance of which such citizens could avail themselves of the stipulations in their favor, and as congress passed no act in aid of such persons, and defined no special form by means of which they could declare their intentions, they remained wholly without remedy, and the portion of the eighth article in their favor became without effect, a dead letter among the supreme laws of the land, and void as to any power to retain rights under its provisions.

Now, all the Mexicans contemplated had to make their election to either retain the character of Mexicans or acquire that of citizens of the United States. The former had to perform a positive act to make their election, while the latter might make their election by remaining passive and doing no positive act touching such election during one year, and this passiveness was declared to be evidence that they had chosen to be citizens of the United States. When such non-action was to be proof of the solemn act of changing allegiance and citizenship on the one part, was the other party left without remedy or compelled to seek it through some modified declaration under oath analogous to that provided in our naturalization laws? I think not.

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True that the treaty uses the phrase "declared their intention." From this it has been sought to maintain that this language, if intended to refer to any form of election, must be construed to adopt the manner of declaration of intention of citizenship prescribed for aliens by our laws. Those who advanced this opinion seem to lose sight of the fact that two independent nations were forming that treaty, and that both adopted the language referred to. It is no more to be held that the stipulating parties intended to mean the adoption of our legal signification of a declaration of intention of citizenship, and our oath upon that subject, than that to the exclusion of our laws, and statutory and legal terms; the parties intended what the laws of Mexico meant by the like phraseology in her naturalization laws. Although the contracting powers stood equal, yet as the stipulation was to inure in favor of Mexico and her citizens, the presumption is much stronger that her statutory meaning was to prevail, than that ours should become the only rule.

A reference to the Mexican rules for giving letters of naturalization, as contained in the appendix to Schmidt's Civil Law of Spain and Mexico, will throw more light upon the sense in which declaration of intention was understood in Mexico when used in connection with citizenship. Article 2 directs the mode the applicant must proceed to obtain letters of naturalization. Article 3 then declares that whoever "wishes to be naturalized must also present one year beforehand a petition in writing to the *ayuntamiento* of the place where he resides, explaining his intention of establishing himself in the country. Proof of such declaration must accompany the documents spoken of in the following article."

There is clearly expressed what was a declaration of intention of establishing one's self in Mexican country, and this was a preparatory step in the course of acquiring Mexican citizenship. It could be done simply in writing before the *ayuntamiento* or incorporated authorities of the village, town, or city where the applicant resided, and one year before he could apply for his letters. It is a fair presumption that the election given to Mexicans was to be made in the terri-

tories ceded by the treaty. It was by their continuance upon the soil that, passively, one party was to choose allegiance; the other, by a positive act, was to choose to remain in allegiance to the Mexican republic. The impracticability of going beyond the territories to seek the authorities of either power before whom the declaration could be made was at once apparent. Now, each power must be presumed to have formed the treaty in full view and recognition of the fixed and universal laws of nations. They knew that the governments found to exist *de facto* within the ceded countries at the ratification of the treaty must continue to exist *de jure* until changed by the legislative power of the United States. The government of the United States observed and enforced the mentioned rule throughout the countries that cession had confirmed to it, from the moment the treaty went into effect down to the establishment of governments by congress' final enactments. This court has repeatedly announced and enforced the same doctrine, and the supreme court of the United States has, in many instances, given the highest sanction known to our judicial system, to the law that all civilized and enlightened nations observe.

Mexico, then, knew that public authorities, magistrates, and courts were established and in full exercise of their powers and duties, throughout those territories, and that they must continue. Mexico bound the United States to respect inviolably the property of every kind belonging to Mexicans established in those countries. The United States, also, became bound as to those Mexicans who should not preserve the character of citizens of the Mexican republic, that they should be "maintained and protected in the enjoyment of their liberty, their property, and the civil rights then vested in them, according to the Mexican laws." To fulfill these obligations, courts, magistrates, etc., were absolutely indispensable, and must exist.

Having now, we think, sufficiently shown that public authorities, before whom the declaration might be made, were anticipated by the parties to the treaty, we pause to inquire what act would have amounted to the declaration in-

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tended. This matter is not without previous adjudication in this court. At the January-term, 1853, this very question was presented and determined in the case of *Quintana v. Tompkins*. The court used this language in their opinion: "As no mode had been prescribed, and no particular species of evidence required, it was an act that might have been performed in any sufficient manner and form, like any other disputed fact, by the best evidence of which the nature of the case admitted."

This was undoubtedly correct. It was an act that might have been performed in any sufficient manner. Such might be said with equal justice of all lawful acts susceptible of being performed under our laws. No one will question that where such acts are sufficiently performed they are done; nor is the proposition to be controverted, that the act alluded to, when done, might be proven by the "best evidence of which the nature of the case admitted." The rule here asserted is one of the universal rules of evidence, and we know of nothing in the treaty which has changed its practical force. From the language quoted, we get no tangible, definite idea as to what constituted a sufficient manner. The court failed to give any clear definition of what it would have considered such manner, though it held in the same opinion that "various modes of making the election might have been adopted." In that case, it was proven that Quintana was seen to sign his name "in the book," and that afterwards in conversations he stated that he was a Mexican citizen. The court held that the declaration was sufficiently proven, and that Quintana was a Mexican citizen.

Here, then, is a decision of this court, formerly made, that the election under the treaty could be and was made in this territory, and up to this time that decision has never been overruled by this bench. It, then, stands as the law upon that subject to all other tribunals in the territory, and must so stand until this court shall otherwise adjudge.

It is said in argument, that the declaration might have been bindingly made in whatever mode the person himself might select, provided it manifested the intention within



the mind of the party to retain the Mexican character. To this proposition we can not yield assent. Those who would avail themselves of the privilege granted were expected generally to remain within the territory. Their selection would deprive them of none of the most precious political rights and privileges within the land of their birth and homes. In the contests incident to a free government, to which the Mexicans were going to be introduced by the treaty, some mode, certain and permanent in proof, and beyond any mere oral testimony, surely must have been intended to be observed in the act of retention. It must have been done in such modes that the frailty of the testimony could not momentarily imperil the rights of citizenship. In our government, and also in the Mexican, as has been shown, no declaration concerning citizenship could be made without the aid and presence of some public authority. Varied as were the forms in both governments, there was one element ever present and universal, and without which no such declaration in any form was known to our laws. This was some court, magistrate, or council, that should receive the declaration, and preserve the imperishable evidence of the act. Neither government ever trusted to memory the preservation of so solemn an act as that of the assumption of allegiance; an unchanging, an undying record was ever required.

The Romans were not the only people that have lived, whose sons, by the simple utterance that they were "Roman citizens," averted danger and commanded protection in whatsoever country they might wander, from interest or pleasure. Modern powers follow their citizens or subjects whithersoever they may lawfully go, and an injury to them by any foreign government is an injury to the government where the allegiance is rendered. It was the principle involved in this practice, that but recently equipped the formidable naval expedition that frowned upon the waters of La Plata, until redress was perfected for the wrongs done to the citizens of our republic. The power of Great Britain sends her battle ships wheresoever the keel can part the waves, and threatens with her cannon whatever people

or government wantonly outrages him who bears with him the attributes and tests of being a British subject.

The inhabitants of this territory, in numbers, with heavy merchant trains, yearly enter and traverse the Mexican states, making large purchases at the fair at San Juan, at the capital at Durango, and in Guadalajara. They seldom make their trips without moving amidst revolution upon revolution, raised and effected by the various factions that spread distraction, insecurity, and ruin throughout the land. What safety have these traders aside from their character as citizens of the United States? Should they be known as persons from this country, who had retained the character of Mexicans, and owing allegiance to that government of their birth and election, what would save them from all the outrages, afflictions, and losses which the Mexican authorities of the hour might resolve to practice? Let the extent, be what it might, how could the victim appeal to our government to redress them? Could the idea ever for a moment be tolerated, that the trader might be followed by his ruthless, deadly enemy, who, upon declaring that he has heard the merchant say in a private conversation at a hotel, upon the corner of a street, in a crowd, or while journeying upon the highway, in the workshop, or field, or elsewhere, that he intended to retain his Mexican character, and such should be received in Mexico as proof of such retention, and subject the pursued and persecuted to all the horrors the Mexican authorities might inflict? Can it be supposed that proof of such an act, even though the witness be wholly unblackened with perjury, would be sufficient to establish the declaration mentioned in the treaty, and fulfill the intents of the contracting powers? Are the rights of one who changed his allegiance to the United States to be so easily periled, should he be found, with his interests with him, within the limits of the Mexican states?

We come now to the proclamation found upon the lid of the book, and which in argument is conceded to be a true copy of the one issued by Colonel Washington, at the same time exercising the powers of civil governor in New Mexico by virtue of his being the then military commandant of the

United States in this region. To the objections so persistently urged that he had no authority to make such proclamation, we answer that no such act was needed or required to enable the Mexicans to make their election within the year. Their right was already full and perfect, and their means ample and complete. They had only to appear before some court then existing within the district or counties, and having a record with a clerk bound by law to keep the same, and to truly record all of the proceedings of such court, or before the clerk in his official capacity, with his record, and in writing make the formal declaration. The right to do this could not be given by the acting governor, nor could he take it away. It existed independent of him, and this he doubtless well knew. Indeed, he had no purpose of speaking into life a new right, but to aid the inhabitants in the proper enjoyment of what was already in their hands.

It is incumbent at this point, in order to a full understanding of this whole question, to inquire what position Colonel Washington then occupied towards the government of New Mexico and the execution of her laws. When war existed between Mexico and the United States, the president, as commander-in-chief, sent General Kearny, with a military command, to make conquest of this country. In the instructions given he was told: "Should you conquer and take possession of New Mexico, and Upper California, or considerable places in either, you will establish temporary civil governments therein." We need not say that the conquest was made and the temporary civil governments established.

On the eleventh of January, 1847, Mr. Marcy, secretary of war, writes to General Kearny, approving of the civil government and laws "established for the government of the territory of New Mexico," except such portions as proposed "to confer upon the people political rights, under the constitution of the United States." These the president disapproved, and directed they should not be carried into effect. It is added: "Under the laws of nations, the power conquering a territory or country has the right to establish a civil government within the same, as a measure of securing the conquest, and with a view of protecting the

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persons and property of the people, and it is not intended to limit you in the full exercise of this authority."

Under the same date, the president, through the secretary of the navy, wrote Commodore Stockton, who had been invested "with the direction of the operations on land, and with the administrative functions of government over the people and territory occupied by us, in California," "that the course of our government in regard to California, or other portions of the territory of Mexico now or hereafter to be in our possession by conquest, depends on those on whom the constitution imposes the duty of making and carrying treaties into effect. Pending the war, our possessions give us only such rights as the laws of nations recognize, and the government is military, performing such civil duties as are necessary to the full enjoyment of the advantages resulting from the conquest, and to the due protection of the rights of persons, and of property of the inhabitants."

Also, under the same date, the secretary wrote to Colonel Price, the officer commanding the United States forces at Santa Fe, New Mexico: "The temporary civil government in New Mexico results from the conquest of the country. It derives its existence directly from the laws of congress or the constitution of the United States, and the president can not, in any other character than that of commander-in-chief, exercise any control over it. It was first established in New Mexico by the officer at the head of the military force sent to conquer that country under general instructions contained in the communication from this department of the third of June, 1846. Beyond such general instructions the president has declined to interfere with the management of the civil affairs in this territory. The powers and authority possessed by General Kearny when in New Mexico were devolved on you as the senior military officer on his departure from that country. They are ample in relation to all matters presented to the consideration of the president in the communication of the acting governor, Vigil, dated the twenty-third of March last, and to you, as the senior military officer, he will leave such matters, without positive or special directions.

"It appears from the letter of the acting governor of New Mexico, of the sixteenth of February, that he wishes to withdraw from the duties of that post, and only holds it until the president shall appoint a successor. On this subject, I am directed to say, that the filling of this office appertains to the senior military officer, to whom the temporary civil officer is subordinate. Should the present incumbent wish to retire from that office, you or the senior military officer in New Mexico, if convenient or necessary to delegate the power, will select such person as you or he may deem best qualified to exercise the functions of that situation, and duly invest him with them."

At the like date the president directed General Kearny, in California, that upon his return the functions of civil government would devolve upon the officer of the army next in rank to himself, or on such officer of the army as may be highest in rank for the time being. "It is not intended by what is said before, in regard to the functions of the temporary civil government being in the officer of the army highest in rank, to deny or question his right to invest any other person with the powers and duties of temporary civil governor, should such officer find it inexpedient or inconvenient to exercise these powers and perform these duties in person; but in case of such delegation of the functions of temporary civil government, the person exercising them must be subordinate to the commander of the land forces, and removable at his will. The responsibility as to the military and civil officers rests with the officer in chief command of the military force."

It is settled throughout all branches of our government, that the president, as commander-in-chief during the war, had full power and authority to organize and set up the forms and rules of government, which, in pursuance of his orders and will, were ordained in New Mexico and California. That form was "military," and the functions of civil governor were reposed in the military commander for the time being. He was empowered to delegate his functions to another person, should he find it convenient or expedient to do so, as was done to Governors Bent and Vigil in this

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territory. Such was the form of government found here at the ratification of the treaty. Under date of December 10, 1848, the president, through the secretary of war, Mr. Marcy, writes to Major-General Worth: "The situation of the people of New Mexico is similar to that of the people of California. The views of the government, as presented in the letter of the secretary of state, you will regard as applicable to the inhabitants of New Mexico, and take the proper measures to make them known in that territory."

That letter was written by Mr. Buchanan, now president of the United States, and says: "By the conclusion of the treaty of peace, the military government which was established over them under the laws of war, as recognized by the practice of all civilized nations, has ceased to derive its authority from this source of power; but is there, for this reason, no government in California? Are life, liberty, and property under the protection of no authorities? Fortunately, they are not reduced to this sad condition. The termination of the war left an existing government, or government *de facto*, in full operation, and this will continue with the presumed consent of the people, until congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly enforced, from the fact that no civilized people could possibly desire to abrogate an existing government, when the alternative presented would be to place them in a state of anarchy beyond the protection of all law, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." October 12, 1848, the secretary of war says to the officer commanding the forces at Santa Fe: "Whatever civil government is found to exist is to be regarded as a government *de facto*, and also to be respected. Until a territorial government shall be provided by congress, things must remain as they are. It will be the duty of the military authority there to defend the territory from invasions, to repress and repel Indian incursions, and preserve internal tranquillity. The important duty of the military force will be to protect the inhabitants of the territory of New Mexico, in the full enjoyment of life, liberty,

and property. The views of the executive, in relation to the civil authority, and the collection of revenue, you will understand from a copy of a letter from the state department, written with particular reference to the people of California."

We will now show what sanction the supreme court of the United States has given to the various orders and instructions. In the case of *Cross et al. v. Harrison*, 16 How. 164, the court quote largely from the letter of Mr. Buchanan, and affirm the principles announced. They refer to the orders of the president, made through the secretaries, and say: "None can doubt that those orders of the president, and the action of our army and navy commanders in California, in conformity with them, was according to the law of arms, and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. It will certainly not be denied that those instructions were binding upon those who administered the civil government in California."

Again: "The government of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent over a conquered territory. It had been instituted during the war by the command of the president of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The president might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The inference from the inaction of both, is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made."

We have made these large extracts from so many of the highest authorities in order to demonstrate the more clearly the nature of the executive in this territory from the time of the conquest by arms up to the ratification of the treaty, and from that period down to the institution of a territorial government by the act of September 9, 1850. The gov-

ernments founded at the treaty continued *de facto*, and the executive functions of civil affairs remained in the hands of the senior officer in military command. He was, so to speak, *ex officio* civil governor, and authorized to perform all the necessary acts belonging to the executive power within the territory.

We will now be able to show such authoritative relation as Colonel Washington had in making a proclamation to the Mexicans in New Mexico, in regard to their retaining the character of Mexicans. A proclamation is defined by the English law writers to be "a notice publicly given of anything whereby the king thinks fit to advertise his subjects:" 3 Tomlin's Law Dict. 236. To give it a definition corresponding to our political system, it is a notice publicly given of anything whereof the executive thinks fit to inform and notify the people; it is a publication by authority; an official notice given to the public.

We will now inquire if such a state of things existed in this territory, that such a proclamation was needed to emanate from the executive, to preserve the public peace and tranquillity, and our public honor and good faith in the fulfillment of our duties under the treaty. We find the highest evidence of what the president expected of the officers in command, in his letter of instructions dated April 3, 1849, to General Smith, commanding the Pacific division. He says: "The defense of the territory against foreign invasion, and the preservation of internal tranquillity, from civil commotion, will be objects of your care, and may require the exercise of your authority. The duty of regarding the obligations of the treaty lately concluded with the republic of Mexico, is now superadded; especially those provisions which relate to the time when the resident Mexicans are required to make their election of citizenship, and others who may choose to remove with their property beyond the limits of the United States into Mexico."

We scarcely need say that the same duty as specified in these instructions, in its fullest force, was upon the officer commanding in New Mexico on the nineteenth of August, 1848. The Mexican congress, by a decree, authorized the



appointment of a commission to proceed to New Mexico and aid such Mexicans as should not prefer to acquire the character of citizens of the United States, to emigrate to the Mexican republic. On the sixth of September following, the president of Mexico appointed and commissioned Ramon Ortiz, a priest, to execute the instructions of the decree. In due time he arrived in this territory. What followed is a part of the public history of New Mexico. Of this the court may take notice. It may refer to the safest sources of information to know the events of that period. So far as a knowledge of these is essential to the consideration of the matters under consideration, none can be more reliable than the written relation of the honorable Joab Houghton, who, from the conquest of the country down to the induction of the territorial government, occupied the position of chief justice of the supreme court and circuit judge, and must have had full knowledge of all the movements resulting from the entrance of Ortiz among the Mexicans, and his promises to and deportment with them. The records of the executive proceedings of that time will also assist in the inquiry we are now making. After reaching Santa Fe, the commissioner journeyed through some of the counties, and to use the language contained in the narrative of Judge Houghton, produced a great excitement among the people, inducing a large portion of the inhabitants of those counties not only to declare themselves as retaining the character of Mexican citizens and their readiness at once to emigrate, but excited them to acts of disturbance and disregard of the then existing authorities. In fact, as it then appeared to both civil and military authorities, an open rebellion was threatened in consequence of the course taken by the commissioner: See executive records sustaining the truth of Houghton's statement.

So great was the commotion, that Governor Washington became alarmed for the public tranquillity, and ordered the commissioner to return to Santa Fe, and no longer communicate with the people personally, but put at his disposal the press of the city by which he could issue his notices of proclamations. That course for a time allayed

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the excitement. The administration, however, of the territorial government found itself greatly embarrassed. It found in some of the counties the officials, such as the prefects, alcaldes, sheriffs, etc., insisting that they had declared to the commissioner their intention to retain the character of Mexican citizens. Many influential Mexicans were seeking some public mode of declaring their intentions. Under such condition of affairs, Washington, the commanding officer, published his proclamation.

In direct view of such a state of facts, well authenticated, and the obligations under which Colonel Washington held his command, and his powers as governor, to take care and preserve the internal tranquillity of the territory from civil commotion, and his superadded duty to regard the obligations of the treaty, especially those provisions which related to the time when the resident Mexicans were required to make their election of citizenship; who, in view of all this, will still assert that the proclamation was published without authority, and was without any meritorious effect upon the matter to which it related? It was now after the peace confirming the conquest, in the midst of all the hatred and bitterness against Americans and the United States, which the conquest and its consequences had engendered among a people foreign in language, laws, customs, and religion, with the pride of kindred and race peculiar to all Spanish races, in the midst of those who had lately, as the Mexican cabinet council said, "risen against the government and the American name and blood in the country," and when risen, whose steps and deeds were marked with murder, robbery, and fiendish atrocity in the village of Taos, and who, as the counsel assert, though "their plans were discovered and disconcerted, their conspiracies frustrated, did not cease to conspire." A popular, powerful, and well-known priest, clothed with a commission from the Mexican government, though dismembered and humiliated, was exciting the prejudices of the people, already hostile to the new government, offering bounties to those who would reject allegiance, and payment of expenses to them upon their emigration.

A failure upon the part of congress to establish a territorial government had kept the doors closed against the ambitious struggles for distinction, preferment, and power, of the most intellectual, instructed, and talented. Their hopes that they would be relieved from the military rule and government had been disappointed. They were in much despair as to the future. They were seeking to know the most proper means of cutting themselves fairly loose from all allegiance to the United States, to abide the fortunes of their ill-fated mother republic.

Now, under the treaty they might make sure a right they and Mexico so much valued. It is rare in the United States that an executive finds himself surrounded by more exciting and critical circumstances than those presented to Colonel Washington. It was absolutely necessary to obtain some certain legal tests that would designate those persons of Mexican allegiance. It was the imperious duty of Washington to allay the increasing excitement and tranquilize the inhabitants. It was incumbent on him more than upon any one else, to inform the ignorance of the population of the easy and lawful mode by which they could declare their intentions, and retain their Mexican citizenship. He was the power to call the excited Mexicans to pause, to consult more calmly and wisely their true interest, and let reason and judgment assume the control of passions and prejudices in the selection to be made between Mexico and the United States.

He was equal to his duty and the occasion. By withdrawing the priest from among the inhabitants and issuing his proclamation, he attained, as far as the time would permit, the desired results. The people were informed that they were only to personally appear at the different prefecturas, or prefect's offices, in the counties, and in proper form record their names to retain their Mexican citizenship under the treaty. The disturbed state of the public mind calmed itself. A second thought convinced many of the impolicy of casting their own and their children's fortunes with Mexico. The commissioner was shorn of his power to deceive his Mexican friends, and do evil to the United States. Those who desired availed themselves of

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the modes the proclamation had declared to retain their Mexican character. We have arrived at the point to announce unhesitatingly, with a clear conviction, that those who did make their election in the manner and form pointed out in the proclamation, with a knowledge of their act, and without being the victims of fraud or violence, did preserve to themselves the right guaranteed in the eighth article of the treaty, and to the fullest extent the character of Mexican citizens; that they did voluntarily reject and refuse the citizenship of the United States, and retain that of Mexico.

In examining the questions connected with the proclamation, we do so as they were presented to the jury for their finding on the trial of the plea as the evidence stood, but as the facts have been conceded to exist in the arguments before this court, the force of the testimony that went to the jury we will examine before this opinion closes. We think it not foreign to the inquiries we have made, to see what sanction or ratification the government of the United States implied or expressly gave to the act of Colonel Washington, and the rights which Mexican citizens perfected in the mode by him directed. At no time do we find that the president or congress disapproved the proclamation. From the moment that the proof appeared that a Mexican had elected to retain his Mexican character in due form in the prefecture, he was excluded from all places and share in the administration of the laws of the territory. He was turned from a seat as juror, and deprived of his functions as a local or county officer, and this exclusion remained, up to the establishment of a territorial government.

By searching, we can find no other test applied than having made the declaration in the place and manner required or pointed out in the proclamation. Congress, in giving an organic act to New Mexico, expressly said, "that the right of suffrage, and of holding office, shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the republic of Mexico, concluded February 2, 1848." In this congress clearly intended to draw a distinction as to the ineligibility to office and voting

of those who had preserved the Mexican character. It is implied in the provision that congress knew that a class of men were here who were not recognized as citizens by the treaty. It must be presumed to have known the elements about which and for which it was legislating, and adopted the language to show the intents of the section alluded to. Throughout the whole territory a body of men were recognized for nearly two years and a half before the organic act, by themselves, the official authorities, and the entire mass of inhabitants, as not being citizens of the United States, because they had recorded their names in the records of the prefect as retaining the rights and titles of Mexican citizens. If congress did not mean those men in the provisions quoted, and thereby give full sanction and effect to the means by which they had reserved their character, and to the proclamation of Governor Washington, who, then, were meant by that language; or could it have been idly written in the statute giving a government?

Out of the treaty arose a difficulty or misunderstanding as to the true boundary between the two republics. This is familiarly known among us in New Mexico as the "Mesilla question." It portended for a time another war between the nations. A new treaty, however, settled the strife. This treaty endeavored to adjust all the preceding difficulties between the powers. It is not to be supposed that Mexico did not know in what manner the United States had fulfilled her stipulations upon Mexicans in New Mexico. Her commissioner, Ortiz, had fully reported to his government the result of his mission. Among the various grounds of complaint between the negotiators, none was offered by Mexico that the United States had enacted no law, no means by which the Mexicans could evidence their intentions of the character of Mexicans. What is known as the "Gadsden purchase," with her people, were to be ceded to our government. It does not seem to have occurred to either party that the new treaty should and ought to specify the mode in detail by which the Mexicans of that purchase might retain the character of Mexican citizens. This treaty was concluded on the thirtieth day of December, 1853.

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It is worthy of observance, that in this was adopted and ratified the identical article 8, contained in the treaty of Guadalupe Hidalgo. It is done in article 5 in these words: "All the provisions of the eighth, ninth, sixteenth, and seventeenth articles of the treaty of Guadalupe Hidalgo shall apply to the territory ceded by the Mexican republic, in the first article of the present treaty, and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and effectually as if the said articles were herein again recited and set forth."

With the thorough knowledge both powers must have had, it is fair to presume that they were well satisfied with the interpretation which had been given to the eighth article in New Mexico, and the manner of electing allegiance; and that further stipulation was required to secure Mexican rights. If this be correct, then we have the solemn sanction which a treaty, a portion of the supreme law of the land, impliedly imparts to the action of Governor Washington, and the mode in which Mexican citizenship was retained.

We deem it proper here to notice what has been some of the legislation of New Mexico as to the right of voting and holding office. The first session of the general assembly, under the organic act, was held in July, 1851. This is often referred to as being distinguished for the ability and high standing of its members in the territory. In enacting an election law, they enacted that "no person prevented by the organic law of the territory should be entitled to vote or hold public office." And further: "If any Mexican citizen prevented from voting by any of the provisions of this act, shall vote at any election hereafter held in the territory, on being convicted, he shall be sentenced to a fine of not exceeding five hundred dollars, or to be imprisoned for a term not exceeding one year." See Rev. Code.

Those provisions have never been repealed. They remain this day in force. From "Mexican citizens" only being included, it is evident that the legislature had in view those who had retained that character; and intended to rigidly restrain them from the enjoyment of a privilege belonging only to citizens of the United States. Having

occupied so much space in the investigation of the matters which have arisen in this case, before entering upon the last point to be considered, we will indulge the remark, that few questions of more personal importance to many, and general importance to all, can arise in New Mexico, than that we have been discussing, and about which we have announced conclusions. To be a subject under a despotism is to be naked of political rights. To be a citizen of the United States in New Mexico, elevates the man to being virtually his own legislator. This is a position not to be lightly esteemed. This great right should not be trifled with by those who enjoy it. Those who knowingly and willfully pushed it aside or trampled it under their feet, after the treaty offered it to their hands, must place to their own charge their great loss. They should have estimated more justly the strength, progress, and justice of the government inviting their allegiance. It is but truth and justice to say that many of those reputed to have made their election adverse to the United States, are among the men of the highest standing, for intelligence, worth, and patriotism, in the territory.

As deeply as we may regret this citizen condition, still it is one of their own seeking, and from which they have a mode of extrication. The pathway of the bench is where the law and duty leads them. They are not to suffer their ears to be corrupted by the whispers that there are those who have personal political interests involved in this question. The breath of the demagogue, whose odor is always filthy to the upright, just, and strong spirit, is inconceivably so, when attempted to be suffused towards the tribunal of justice. It is no part of the duty of these tribunals to ravish men into the rights of citizenship of the United States, who, in an evil hour, mocked at the privileges offered, and are as yet refusing to avail themselves of our naturalization laws. If outside of them relief is to be found, other branches of the government must give it, and not the judicial, however gladly an individual judge might interpret an act lessening the disabilities under which the elected Mexican citizen labors.

We come now to the sufficiency of the testimony, as it appears upon the record, to maintain the plea in abatement, and establish Sandoval's "Mexican character" in conformity with the principles laid down. No parol evidence seems to have been introduced to explain how the book originated, how and by whom it was kept, or where, when, or before whom the signatures were recorded. If the book had been one of the records kept in the prefect's court or pertained to his official duties, and kept by the clerk, there is no certificate showing that the persons whose names are found in the list following the caption, had been before him or the prefect's court had recorded their names. If the book is the one kept and opened in pursuance of the proclamation of Washington, in the office of the prefect of Santa Fe, no witness proved the fact, and no certificate of the clerk shows it. No law existed authorizing the prefect's clerk to appoint a deputy who, in the name of the principal, could authenticate books, papers, or documents, or give faith or validity to a certificate; and even should it be admitted that such appointment could be made without legislative authority, the certificate does not show that Giddings, the principal, was clerk of the prefect's court "for the county of Santa Fe," but only that he was "clerk of the prefect's court." Also it states that the foregoing is a correct list "of all who have elected in said county (Santa Fe) to retain the character of Mexican citizens." In this, the clerk's pretended deputy certifies his judgment instead of showing the acts done and the facts in conformity with the proclamation. He fails to inform us whether the persons named in the list recorded their own names, or whether it was a list of persons merely that in the county had retained a certain character. True, Sandoval's signature was proven, but there was no proof when, or where, or under what circumstances he wrote it, or that he did it in the presence of any court, magistrate, or other official authority having the attributes to receive and authenticate the declaration when made.

As to the proclamation found upon the book, the jury have no proof before them that it had ever been published



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Opinion of the Court—Benedict, C. J.

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by Governor Washington—neither how, when, nor where. The attorney-general, though he seems with a liberal spirit not to have objected that the defendant should have the benefit of the book and what it contained before the jury for what it was worth, it does not appear that he made any admissions to supply the utter weakness and insufficiency of the evidence to prove the issue for the defense. It was proven that at some previous term of the court, Sandoval had declared his intention to renounce Mexico and become a citizen of the United States. It must be borne in mind that the whole effort of the defense was to prove that Sandoval's Mexican citizenship resulted from his having elected to retain it under the treaty. If he was a resident of this territory, as was apparent at the time of the ratification of the treaty, and has so remained, and did not elect in favor of Mexico, then, with this explanation, neither one nor a hundred declarations of intention in the district court would prove him a Mexican citizen, in fact and law. With such residence, the presumptions would be in favor of his citizenship to the United States, nor should he lose it or be deprived of it without the clearest proof. He may not have known his rights, or mistaken them, and had a fancy to make them doubly secure. The date at which he did that act, as it seems jointly with fifteen others, does not appear, but it is shown by the record that it was some time during the judicial administration of Chief Justice Deavenport. Sandoval was not defending his own rights of citizenship on the trial, and it is but a reasonable inference that he had perfected his naturalization, even if such in law be needed. A plea in abatement should not only be well pleaded, but well proved also. The evidence was wholly insufficient to authorize the jury to find in the defendant's favor. They found rightly for the territory.

We shall not discuss the effect of the defendant's not moving for a new trial upon that finding until after he pleaded the general issue of not guilty, went to trial and was convicted. Exceptions appear to the action of the court on that trial. No other conclusion, then, can here be drawn, than that the trial was correctly had, and the defendant

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Points decided.

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fairly and justly convicted. The court properly overruled the motion made in his favor after the trial.

We take pleasure in acknowledging the legal ability with which this cause was argued by counsel on both sides. As to the weight of the testimony, the arguments were exhaustive.

It is the unanimous opinion of this court that the judgment of the district court be affirmed.

Affirmed with costs.

Separate opinion by BLACKWOOD, J.:

While concurring in the affirmation of judgment in the above-entitled cause, upon the finding of the jury in the court below, and the plea in abatement that Sandoval was a citizen, yet as regards the question of Mexican citizenship introductorily considered in the elaboration of the opinion of the court, I desire hereby to reserve any differences of opinion from views therein expressed, and doctrines advanced, that future reflection may suggest to my mind. A comparatively slight opportunity having been afforded me in the progress of this cause to examine a subject confessedly of so great importance, and therefore, any investigation of its merits not having been as thorough as I could wish, I deem this reservation proper and necessary in the premises.

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LEWIS W. GECK v. OLIVER L. SHEPHERD.

**REPEAL OF STATUTES BY IMPLICATION.**—A statute may be repealed without being referred to by a subsequent statute on the same subject, which is wholly irreconcilable with it, and both can not stand together.

**SUITS, WHEN TO BE COMMENCED.**—The act of January 12, 1853, providing where suits shall be commenced, repeals, by implication, section 24 of the act of July 12, 1851, and all suits must be commenced in the county where the defendant resides, or in the county where the plaintiff resides and the defendant is found, unless the defendant is a non-resident, when the suit may be brought in any county.

**PLEA IN ABATEMENT WHERE SUIT BROUGHT IN WRONG COUNTY.**—Where a suit is brought against a resident of the territory in a county in which he does not reside, and he is served in another county, this fact may be pleaded in abatement, or the writ may be quashed on motion.

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Opinion of the Court—Boone, J.

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**ATTORNEY MAY VERIFY PLEA IN ABATEMENT.**—The attorney of a defendant may swear to a plea in abatement which requires to be sworn to.

**MOTION TO QUASH WRIT NEED NOT BE VERIFIED.**—A motion to quash the writ commencing a suit need not be upon oath.

APPEAL from the district court of Socorro county. The facts appear from the opinion.

*Smith and Wheaton*, for the appellant.

*Baird and Watts*, for the appellee.

By Court, BOONE, J.:

This is an action of trespass and false imprisonment brought by Lewis W. Geck, the plaintiff below and defendant in error, against Oliver L. Shepherd, the defendant below and plaintiff in error. The defendant, Oliver L. Shepherd, is and was at the time of the institution of this suit, an officer of the United States, stationed at Fort Defiance, in the county of Bernalillo. The action is for personal injuries and destruction of personal property belonging to the plaintiff, Lewis W. Geck, a resident of the county of Doña Ana. The injuries are alleged to have taken place in the county of Doña Ana, and on the nineteenth of April, 1854. On the third of November, 1857, the case was finally submitted to a jury, who found a verdict for the plaintiff of ten thousand dollars against the defendant. A remittance was subsequently entered of seven thousand five hundred dollars, and a judgment entered for two thousand five hundred dollars.

This trial was had in the county of Socorro, to which place the venue had been changed. At an early stage of the proceedings a motion was made by defendant's counsel to quash the writ or summons, which was overruled, and on the same day defendant's counsel filed a plea in abatement. To this plea a demurrer was entered. Demurrer was sustained by the court, and the defendant required to plead. It is our purpose to confine ourselves to the error assigned in sustaining this demurrer, for if the court below erred in this, the judgment below must be reversed. It is alleged in the petition of plaintiff that he is a resident of the

county of Doña Ana; that the injury complained of occurred in that county, and that the defendant is a resident of the county of Bernalillo. Although but one writ or summons is actually set out on the record, yet from the pleadings, there seem to have been others issued, and service made upon the defendant in the county of Bernalillo. From the copy of the writ furnished, it appears that it was directed to the Sheriff of Doña Ana county, commanding him to summon the defendant to be and appear before the judge of the district court, to be holden at the court-house in the town of Las Cruces, in the county of Doña Ana, etc.

This writ is dated the twenty-second day of February, 1855.

The sheriff was not authorized or warranted by law to go beyond the limits of this county in the execution of this writ, and on the twelfth of March following, the sheriff returns that the defendant, Oliver L. Shepherd, was not to be found in his county. Whether the defendant was served with another writ differently worded, and directed to the sheriff of Bernalillo county, nowhere appears. It is apparent, however, from the pleadings, that he was served with some writ in the county of Bernalillo. This appears from the motion to squash the writ, the plea in abatement, and the demurrer thereto.

One of the grounds alleged in the motion to quash the writ was, that the defendant could not be served in a different county from the one in which he resided, or in which he was to be found. The plea in abatement is in the following words: "And now comes the defendant, by Hugh N. Smith, and defends, etc., and says that the said plaintiff ought not to further have and maintain his aforesaid action in the said county of Doña Ana, because he says that the defendant, from the time of the commencement of the suit, and from thence hitherto has been, and still is, a resident of the county of Bernalillo, in the said territory of New Mexico, and was not then, and has not been a resident of the county of Doña Ana, nor has he been found in that county, so that process of this court could be served upon him, and this the said defendant is ready to verify. Wherefore he prays

judgment of said action, and that the same may be dismissed and abate."

This plea is sworn to by Hugh N. Smith, attorney, on the eleventh day of June, 1856. In order to determine the question now under consideration, it is necessary to cite the different acts of the territorial legislature, as to where suits can be brought and where process can be served upon the defendant. The first act in relation to the matter is found in the Kearny code, pamp. 82, and in the Revised Code, p. 170. It is an act regulating practice in civil cases, and was passed on the twenty-second of September, 1846. The first section declares that "all actions brought in the circuit court shall be commenced by petition, which shall contain a plain statement of the names of the parties, the cause of action, and the relief sought." The second section speaks of the filing of the petition and issuing of the citation to the opposite party. The third section directs, that the citation, when issued, shall be indorsed upon or annexed to the petition, etc. The fourth section is in these words: "Suits instituted by citation, shall be brought in the county in which the defendant resides, or in which the plaintiff resides and the defendant may be found. In cases where the defendant is [not] a resident of this territory, such suit may be commenced in any county."

These laws are printed in Spanish as well as in English, one leaf occupied with Spanish and the other with English. In the English, which we have cited, the word "not" in the last line but one, is omitted, evidently by mistake, for it is found in the Spanish, in the same section. The omission would render the sentence unmeaning, and therefore we have added the word in the section referred to.

On the twelfth of July, 1851, another act was passed regulating the practice in civil cases: Rev. Code, 174. The twenty-fourth section of this act is as follows: "Every person shall be sued in the county in which he lives, except in the following cases, that is to say:

"1. A married woman when liable to be sued shall be sued in the county in which her husband resides.

"2. When a defendant has inherited an estate, concern-

ing which any one may wish to institute a suit, he shall be sued in the county in which the estate is situated.

"3. When a defendant has contracted to perform an obligation in a particular county, he shall be sued in the county in which he has engaged to perform the contract.

"4. When the defendant has committed some crime for which a civil action for damages may be maintained, in such case he may be sued in the county in which the crime was committed or wherever he may be found.

"5. In case the defendant may be a transient person, he may be sued in whatever county he may be found.

"6. When a suit is brought for the recovery of movable property, it shall be brought in whatever county the property may be found.

"7. In cases against guardians, curators, executors, and administrators, the parties may be sued in the county in which any such persons were appointed to any of said trusts, in the county in which the property in controversy may be found, or in the county in which the defendant may live; it being optional with the plaintiff.

"8. In cases of delinquencies or frauds by public officers, they may be sued in the county in which the fraud or delinquency occurred, or in which the defendant may be found.

"9. When lands are the objects of the suit, it should be brought in the county in which the lands are situated.

"10. When two or more persons are liable to be made defendants in the same suit, if it be in the nature of a transitory action, the suit may be brought in the county in which either of the proposed defendants may reside."

On the twelfth of January, 1853, Rev. Code, 104, the following act was passed: It is an act proposing to regulate suits on joint or several contracts, how suits are to be brought against corporations, and the last section speaks as to where suits are to be brought generally. This section is in the following words: "All suits instituted in any of the courts of this territory, shall be brought in the county in which the defendant resides, or in the county in which the plaintiff resides, and the defendant may be found, and in

case the defendant is not a resident of the territory, such suit may be brought in any county."

It will be observed that this last section is almost a literal copy of the act of twenty-second September, 1846, already cited. Instead of the word suit, the word citation is made use of, but by a reference to the previous section it will be perceived that the word citation as there used means the same thing as suit.

It has been strongly contended for on the part of the counsel for the plaintiff, that the act of 1853 does not repeal the twenty-fourth section of the act of 1851, and that the injury charged to have been committed by the defendant, brings him within one of the exceptions contained in that section which declares that when the defendant has committed some crime, for which a civil suit for damages may be maintained, he may be sued in the county in which the crime was committed, or wherever he may be found. Taking it for granted that the charge is of that character, then if the law be as it is contended for by plaintiff's counsel, the suit was properly brought in Doña Ana county, and defendant properly served with process in Bernalillo county, and the demurrer to the plea in abatement was rightfully sustained. If, on the contrary, the twenty-fourth section of the act of 1851 was repealed and abrogated by the act of 1853, as is contended for by the counsel for the defendant, then the demurrer should have been overruled and the suit abated. After some reflection a majority of the court can come to no other conclusion than that it was manifestly the intention of the legislature in passing the act of 1853, to repeal the twenty-fourth section of the act of 1851. We can not perceive what other object the legislature could have had in view in passing that act. If the act of 1851 was a total repeal of the act of 1846, and such seems to have been the intention of the legislature, then the same course of reasoning must bring us to the conclusion that it was intended by the passage of the act of 1853, to repeal the act of 1851, or the twenty-fourth section thereof; because it is evident from the wording of the act of 1851, and the act of 1853, that it was manifestly intended by the leg-

islature upon both occasions, to regulate the whole subject to which the two acts relate, and that they were not intended as modifications of previous statutes. The section of the act of 1853, is full, distinct, and clear upon the subject as to where suits may be brought; the entire question is fully met, and it is in direct and positive conflict with the act of 1851.

The repeal of a previous act of the legislature by a subsequent one may be done either in express terms or by implication, and where the subsequent act contains provisions contrary to and irreconcilable with the former, the previous act must give way to the latter: 1 Harvey, 10, 2 Bibb, 964; W. C. C. R. 691.

The fact that the legislature in passing the act of 1853 did not refer to either of the previous acts upon the subject does not embrace the question in the view that the court has taken of it. That body may or may not refer to the previous law, and indicate in express terms the reason for the change; but they are not required to do so, and when, as we have said, a clear and distinct section is enacted, evidently embracing the entire subject, and which is full, explicit, and complete upon the question involved, it repeals all former acts inconsistent therewith, and it is to be construed as if it were the only act upon the subject. The last act must have effect according to its terms and obvious intent, and as both acts of 1851 and 1853 can not have full operation according to their terms and intent, the first, and not the last, must yield. The terms and meaning of the two acts are not *pari materia*, but distinct and wholly at variance. By the act of 1851, it is declared that every person shall be sued in the county in which he lives, except in some ten certain cases enumerated, but in some of those exceptions it is permitted of the plaintiff to institute suit in the county in which he resides, even although the defendant may be found in that county; but the suit must be brought in the county in which the defendant actually lives; and we will admit that if the act of 1853 had merely changed the act of 1851, in this particular, and authorized the plaintiff to institute his suit in the county in which he lives or where the



defendant may be found, there might be some grounds for saying that both acts could stand.

The act of 1853 declares that suit shall be brought by the plaintiff in the county in which he lives, or that defendant may be found. But it also says further, and declares emphatically, "that all suits instituted in any of the courts of this territory shall be brought in the county in which the defendant resides;" and it is a little remarkable, too, that this clause is the first in the section, and would seem to be the principal matter considered by the legislature in passing the law, and was evidently intended to repeal the exceptions contained in the act of 1851, which were, doubtless, regarded as oppressive, and, in fact, in many instances, must have been attended with great hardship. A person residing in Doña Ana county might have sued another living in the extreme upper district, if a train or other personal property, about which there may have been a dispute, should happen to be passing at any time through that county; and so if a married woman, who may be living at one end of the territory, and her husband at the other, and yet she might have been sued in the county in which her husband lived; and so of the other exceptions, all of which are of doubtful expediency, and the legislature, after an experience of two years of those exceptions, repealed them by the passage of the act of 1853. If it were not the intention of the law-makers to repeal those exceptions, why was the first clause of the section inserted, which expressly declares, that all suits shall be brought in the county where the defendant resides or may be found? There must have been some object or intention in introducing and passing the section containing this important clause, and we are of opinion that it was manifestly done with the view of repealing the exceptions. If it has not this effect, the words are utterly nugatory and without object, and a perfect dead letter upon the statute book, and, unless we wish to stultify the legislature, we can not come to any such conclusion.

But it is objected too, that this is a plea in abatement to the jurisdiction of the court, and it was not competent for the attorney of the defendant to make the oath required to

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Opinion of the Court—Boone, J.

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the plea, but that it must be made by the defendant *in propria persona*. It is laid down in Chitty's Pleadings, vol. 1, chapter on pleas in abatement, that the oath may be made either by defendant or a third person. And there is no reason why this should not be so. But there is an act of assembly of this territory regulating this subject: Rev. Code, page 178. It is there declared, that all pleas in abatement, except pleas to the jurisdiction as to the subject-matter, shall be under oath. This, it is true, may be regarded as a plea to the local jurisdiction, and not as to the subject-matter, and may require to be sworn to. But the act does not say that the oath shall be made alone by the party, and as all acts of this kind should be construed liberally, it follows that the oath may be made by a third person. But there is also a motion to squash the writ in this cause, in which the entire subject under consideration, in regard to where suits shall be brought and where defendant may be served with process, was involved, and a motion of this kind is not required to be under oath.

It is the opinion of a majority of this court, that the judgment of the court below be reversed, with costs.

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

JANUARY TERM, 1862.

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ANTONIO MATIAS ORTIZ *v.* JESUS MARIA BACA  
Y SALAZAR.

**PRESCRIPTION ORDINARY AND EXTRAORDINARY UNDER SPANISH LAW.**—Prescription under the Spanish civil law is of two kinds, ordinary and extraordinary; the former, which extends only to ten years, applies only where property was acquired in good faith and by a just title, and does not run upon a contract with an insane person or minor; the latter extends to thirty years, requires neither good faith nor just title, and includes contracts between minors and those bearing the relation of tutors to them.

**EXTRAORDINARY PRESCRIPTION BETWEEN MINOR AND TUTOR.**—To a suit upon a document executed in New Mexico in 1833 by the mother and step-father of an infant three years of age, acknowledging the receipt of money belonging to such infant and coming into their hands as his tutors, and promising to pay it over without interest on his coming of age, only the extraordinary prescription of thirty years, under the Spanish law then prevailing, can be pleaded, and such period begins to run only after the infant has attained the age of twenty-five.

**INFANT ENTITLED TO INTEREST IN SUCH CASE.**—In a suit against the tutor to recover money so received, the former infant is entitled to legal interest thereon from the time of attaining his majority.

**APPEAL** from the district court of Santa Fe county. The case appears from the opinion.

*M. Ashurst*, for the appellant.

*T. D. Whenton*, for the appellee.

By Court, BENEDICT, C. J.:

On the fifth day of August, 1856, Baca y Salazar filed his petition in the clerk's office of the district court, for the district and county of Santa Fe. The cause was tried by a jury, at the March term, 1858, and appealed by Ortiz to this court. The suit was founded on a document in Spanish made in 1823. This was filed with the petition and made part thereof. It appears that when the instrument was made, the plaintiff in this suit was of very tender years, being then only about three years of age. His mother, Rosa Salazar, had been a widow, but had intermarried with the defendant, and she and the defendant had become the tutors, under the Spanish law, of the infant child. The instrument was made by the mother, Rosa, and Ortiz. They acknowledged that the minor, Jesus Maria, was entitled to an inheritance in the sum of three hundred and seven dollars and fifty cents, which had been in the hands of Don Juan Esteban Pino, and by them received of him in the capacity of tutors for the minor. They admitted that the sum of money belonged to the minor and might be used by him. They, however, stated that they had agreed between themselves and Don Juan Esteban, that the said sum should remain in the hands of the said Rosa and Antonio Matias, without any interest in the capacity of tutors, until the said Jesus Maria should be in a condition to receive it. The petition avers that the time when he became in a condition to receive it was when he arrived at the full age of twenty-one years, which occurred upon the first day of May, 1841.

The document then contains the strongest pledges, promises, and agreements to pay to the said Jesus Maria the said sum when he should be in the condition to receive it, binding their persons and property in the solemn and formal manner peculiar to the making of instruments in those days. They bound themselves to keep the said sum entire and without diminution. The document was made and authenticated in the presence of an alcalde, and the acting secretary of the then corporation of Santa Fe.

In the district court the defendant pleaded four pleas, among which was that of limitation or prescription to the action, that it did not come within ten years next preceding the commencement of the suit. To this plea the plaintiff demurred, and the court sustained the demurrer. A trial was afterwards had by a jury, and a verdict was found for the sum of three hundred and seven dollars and fifty cents, the sum specified in the instrument. Motions for new trial, and in arrest of judgment were made, which were overruled by the court, and judgment rendered upon the verdict. The defendant did not, in a bill of exceptions, bring all the evidence into this court, but the instrument is here in the original, and also copied as a part of the record. The error assigned, to which the examination of the court is called, is the judgment sustaining the demurrer to the plea of prescription to the action. The merits of the defense set up in this plea must now be considered. This involves an examination of the civil laws in force in New Mexico at the time the money in question was received by the trustees. It is proper to remark here, that Rosa Salazar was deceased when this suit was instituted.

By the civil and Spanish law, "he who prescribes an action does not acquire any right over another, nor on the property of another; he only liberates himself from an obligation due to some other person. In order to be entitled to prescribe, three essential elements must exist. Two of these are good faith and just title."

There are ordinary prescriptions and extraordinary prescriptions. Where the elements referred to combine, a defendant may avail himself in his behalf in an action against him for the recovery of money, by ordinary prescription, after ten years from the time the right of action begins to run. To prescribe by "ordinary prescription, it is necessary that the contract by which the property was acquired be a valid contract. Hence, a thing acquired by purchase, donation, or any other contract made with an insane person, can not be acquired by prescription, nor property obtained from a minor, or in any other mode which

the law holds invalid; but even in such cases the prescription of thirty years applies."

The extraordinary prescription extends to thirty years and includes minors bearing the relation that did the plaintiff to his tutors. It begins to run, in such cases, when the minor arrives at twenty-five years of age. "The extraordinary prescription requires neither title nor good faith."

It is the duty of tutors to "collect sums due to the minor, requiring the debtors to pay when they ought, because if the tutors neglect to do so, they become themselves responsible. They are also bound to invest the funds of the minor where they may draw interest, or to employ them in some other manner by which they are made productive."

For the correctness of these positions reference is here made to *Escrache*, *Las Partidas*, *Las Pandectas*, *Justinian*, *Febrero*, *Schmidt's Civil Law of Spain and Mexico*, and to the *Nuevo Recopilacion*, by *White*. These show that the defendant was not entitled to the defense he interposed, and that the demurrer was justly sustained. Did not these authorities show so conclusively that the defendant would not be in a position for which he could plead prescription against the plaintiff until the "extraordinary" period of thirty years should run in his favor, still, there is one element disclosed in this cause which would operate to the exclusion of his plea, and this is a want of good faith. A good title he had to the possession of the money when he acquired it, yet he knew it was not his. He knew it belonged to the plaintiff, and that he was bound to administer it for him, and account to him for it, when he should pass his minority. He stood in a fiduciary capacity. The money was a trust in his hands. The moment the plaintiff passed his minority it was the duty of the defendant to account and pay over to him the money with lawful accumulations. This good faith demanded. This he failed to do, and the payment to this day has been withheld in bad faith, and the defendant had no just right to come into court and oppose his own bad faith as a defense against the righteous claim of the plaintiff.

This case presents one particular feature not calculated

to woo to itself favor in an enlightened court of justice. When a tutor, under the law, to a child about three years old, the defendant sat coolly down and received the child's money, and procured, as he thought, an arrangement by which he could use it about twenty years as his own, without any liability to increase it for the minor, by investment or paying interest for the use. Every informed lawyer knows that the minor was not bound by the agreement, and that the defendant was liable to him for principal and interest from the time the money was received.

One other consideration remains. The plaintiff is clearly entitled to interest in this action from the time in 1841 at which it is alleged he came of age. This interest the jury omitted to include in their verdict. It is evident that they found the sum specified in the document, and upon its face as testimony.

The statute provides that the supreme court, in appeals or writs of error, shall examine the record and the facts therein contained alone, shall award a new trial, reverse or affirm the judgment of the district courts, or give such other judgment as to them seem agreeable to law.

From this it seems clear there can be no difficulty in pronouncing in this court the judgment the plaintiff merits. Taking the instrument and the judgment below as a basis, what the plaintiff is entitled to in this action is easily ascertained by computation. To send the case back would work delay and costs. This court, therefore, being able to do substantial justice, we think it should be at once determined.

The judgment of the court below must be affirmed, with an additional sum for interest on the plaintiff's claim set out in his petition, from the first day of May, 1841, at the rate of six per cent. per annum, amounting to three hundred and seventy-two dollars, which sum added to the judgment in the record, makes the sum of six hundred and seventy-nine dollars and fifty-six cents.

Judgment for the appellee for that sum and costs. The appellant having died since this appeal was taken, and his executors having entered their appearance in this court as his legal representatives, judgment must be against them, and the securities upon the appeal bond.

## TERRITORY OF NEW MEXICO v. WILLIAM BRANFORD.

**ACTION AGAINST DEFAULTING SHERIFF, WHAT NOT A DEFENSE TO.**—It is no defense to an action brought by the attorney-general in the name of the territory against a sheriff to recover moneys received by him from his county belonging to the territorial treasury, but not paid over, to show that the letter of instructions from the territorial auditor to the attorney-general for the bringing of the suit did not specify the amount of the indebtedness, etc., as required by the act of 1853, concerning defalcations of officers, that act being merely directory and compliance with it not being a condition precedent to the bringing of the suit.

**APPEAL** from the district court for Mora county. The opinion states the case.

*R. H. Tompkins*, attorney-general, for the appellant.

*M. Ashurst*, for the appellee.

By Court, KNAPP, J.:

This was an action commenced by the territory of New Mexico against William Branford, the sheriff of Mora county, to recover the amount he had received from his county belonging to the territorial treasury, and which he had neglected to turn over. The declaration in this case is in the common counts, with *ad damnum* two hundred dollars, and filed by the attorney-general before the commencement of the suit.

On the first day of the term of the district court to which the writ was returnable, an order was made, upon the oral motion of the defendant, that the attorney-general file his letter of instructions in this cause. This order having been excepted to, the attorney-general filed a letter, dated at the auditor's office, March 2, 1861, and addressed to him, as follows:

"I have the honor to inform you that since the county of Mora was created, by an act of the legislature of New Mexico, I have never received any returns from the clerk of the probate, neither has any sheriff appeared at my office to settle his account according to law, for funds collected in behalf of the said territory in said county of Mora. You



are hereby authorized to bring suit against the officers of said county for neglect of duty."

This letter was signed by the auditor, and sworn to before the chief justice of this court.

It is contended by the defendant that this action could only be brought under the act of 1853, "concerning defalcation of officers:" Rev. Code, 390; and that a strict compliance with its provisions is required as a condition precedent to the commencement of the suit. The act provides:

1. "When any collector, or any other officer of this territory, who is required by law to settle his accounts with the auditor of this territory, and fails so to do, within twenty days after the time fixed by law, the auditor is required to transmit to the district attorney of the district in which the defaulter resides, or if there be no such district attorney, then to the attorney-general of the territory, a sworn statement of the indebtedness of the defaulter as appears by the books and records of his office.

2. "If the auditor can not ascertain the exact indebtedness of the defaulter, he must state the same in his affidavit.

3. "It is hereby made the duty of the attorney-general and of the district attorneys to immediately institute suit in the district court against such defaulters by petition, and when the amount of indebtedness is unknown, the same may be left blank; and,

4. "The officer sued shall on or before the second day of the return hence of the summons, file his answer to the petition, under oath."

From the view we have taken in this case, it becomes immaterial for us to inquire into the sufficiency of the letter of instructions to the attorney-general from the auditor. It seems to have been sufficient for that officer to commence this suit. We are of the opinion that this act is merely directory to the auditor and attorney-general in the discharge of their respective duties, and the question whether its provisions have been complied with or not, can not be put in issue in a trial to recover money in the hands of a

## Points decided.

defaulting officer. It can be no defense to one officer who has a public duty to perform, that another officer of the government has not performed his duty strictly in relation to the same matter. Had the defendant pleaded the non-performance of duty by the auditor, it would have been the duty of the district court to have sustained a demurrer to such plea, on the ground that it would raise an immaterial issue.

By the act of 1847, Rev. Code 462, sec. 9, it was made the duty of the auditor "to cause suits to be brought against all collectors, clerks, or other persons, who have failed to collect, or who have failed or neglected to pay into the territorial treasury any public moneys."

This act neither prescribes any mode of proceeding nor what attorney the auditor shall employ. Certainly the attorney-general, the salaried attorney, is a very proper person to employ for that purpose; and being employed, we know of no rule of practice by which this defendant, any more than the defendant in any other suit, could inquire how the plaintiff had employed or directed his attorney to commence the action. We are of the opinion that the district court erred in dismissing the cause, and the case must be remanded, with instructions to overrule the motion to dismiss the cause, with costs, and for further proceedings according to law.

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### JOSE MIGUEL MUÑIS v. PABLO DE HERRERA ET AL.

**SPECIFIC PERFORMANCE OF CONTRACT, JUSTICE CAN NOT ENFORCE.**—A justice of the peace has no jurisdiction to enforce specific performance of a contract to build a house upon a certain tract of land, by an alternative judgment requiring the defendant to build the house or to pay a certain sum.

**ALTERNATIVE JUDGMENT.**—An execution to enforce such an alternative judgment of a justice is void on its face.

**EXECUTION NOT SIGNED BY JUSTICE.**—An execution from a justice's court not signed by the justice, but by the sheriff to whom it is directed is void on its face.

**LEVY UNDER VOID EXECUTION, REMEDY FOR.**—An execution void on its face is no protection to an officer making a levy on chattels thereunder, and he is liable therefor in replevin, trespass, or trover.

## Opinion of the Court—Knapp, J.

**DEED—BILL IN EQUITY WILL NOT LIE FOR.**—The legal remedy for such wrongful levy being complete and adequate, a bill in equity will not lie to compel a restoration of the property and an account of the damages.

**JURISDICTION TO PREVENT TRESPASS.**—A court of equity has no jurisdiction to interfere to prevent a trespass which is not irreparable by reason of the character of the property, and the injury, or the responsibility of the party, and for which there is an adequate remedy at law.

**POSSESSION OF CHATTEL NOT INTERFERED WITH IN EQUITY, WHEN.**—A court of equity will not interfere to take personal property from one party and give it to another before a hearing upon the bill.

**APPEAL** from the district court of Santa Fe county. The facts appear from the opinion.

*Ashurst, Watts and Jackson*, for the appellant.

*T. D. Wheaton*, for appellee.

By Court, KNAPP, J.:

Jose Miguel Mufis filed his bill in chancery against Pablo de Herrera, Juan Gallegos, and Francisco Martinez y Belarde, in which it is averred that he had made a contract with Herrera and his wife, Maria Concepcion Romero, for the purchase of a tract of land in Rio Arriba county, and for which he was to pay twenty-eight dollars, and also build a house at a particular place on the land of Herrera. The contract was made with the wife, who owned the land and signed the agreement with the complainant. He had paid the twenty-eight dollars, but had not built the house, because a controversy had arisen concerning the location, but he was ready to build it at the spot he had agreed upon, but not where they required, and so he had refused to build it at all.

Herrera had commenced a suit before Juan Gallegos, a justice of the peace of Rio Arriba county, upon the contract which was tried by a jury, and verdict was rendered, as averred in the bill, in favor of Mufis, upon which judgment had been rendered for costs. Herrera had taken no appeal from the judgment, but he and the justice had corruptly and infamously combined together to practice a grave fraud and outrage upon him and his rights; and the justice had issued an execution purporting to be based upon a judgment

against him, and placed the same in the hands of Francisco Martinez y Belarde, the sheriff of the county, who had levied the same upon a horse belonging to Mufis, worth one hundred and fifty dollars.

The execution, of which a copy is given, shows that the judgment was that Mufis should build the house according to his contract, or that he should pay ninety dollars to Herrera, and commanded the sheriff to compel him to build the house, or, in default thereof, that he be made to pay the sum of ninety dollars, by a levy upon his goods, etc. This execution is not signed or issued by the justice of the peace, but it is signed by the sheriff. The bill then denied the existence of any judgment whatever, and avers that the whole thing had been gotten up to defraud Mufis of his property. It also prayed for an injunction restraining the parties from selling the horse; that it be returned to Mufis possession, upon his giving a bond for its forthcoming as the court should direct; that "an account be taken and stated as between the said Herrera and Gallegos, upon the one part, and the plaintiff upon the other, of the damages inflicted," and that he have a decree for the amount so found.

These are all the facts stated in the bill which it is necessary to notice. The defendants filed a general demurrer to the bill, which was overruled by the district court. Afterwards all the defendants filed answers, denying the fraud charged, and Herrera filed a cross-bill, demanding damages for the non-construction of the house. To this cross-bill there was a general demurrer interposed, which was sustained. The cause was then set down and heard upon the bill and answers, without replications, and the court found the judgment void, and made the injunction perpetual. From that decree this appeal was taken.

The first question this court is called upon to decide is, did the district court decide correctly in overruling the demurrer of the defendants to the bill of complainant? The bill avers that the execution was void, and being void it had been levied upon the plaintiff's horse, and the sheriff was threatening to sell the same. The copy given with the bill shows several fatal defects upon the face of the execution.

The judgment set forth in it shows that it was founded upon a contract to build a house, or to enforce a specific agreement concerning real estate, a matter over which the justice had no jurisdiction. The judgment is in the alternative, to build the house or to pay ninety dollars, which would require further judicial action. The command to the sheriff was in the same alternative form. Authorities need not be cited to show, that the lord chancellor of England could not, with all his power of sequestration of goods and imprisonment of the delinquent, enforce such a decree if rendered by himself, and promulgated from the woolsack. The execution was not signed by the justice of the peace, or any officer authorized to issue such a writ, but by the sheriff who had it in his hands to be executed. The rule is well settled that a writ void upon its face will not protect an officer who undertakes to execute the same, and he will render himself liable to an action of trespass if, in executing such void writ, any damages are sustained: *Savacool v. Boughton*, 5 Wend. 170 [S. C., 21 Am. Dec. 181]; *Mills v. Martin*, 19 Johns. 9, and the cases referred to in them, and the note to the latter case.

The bill in this case shows clearly that the plaintiff might have recovered the possession of his horse by an action of replevin, or its value in an action of trover or trespass *de bonis asportatis*, together with all damages he might have sustained for its caption and detention. His remedy was, therefore, even more full and complete in an action at law than in a court of chancery. The rule would seem to be too well settled to need a citation of authorities to establish it, that courts of chancery never interfere to prevent a trespass, where there is a full and complete remedy at common law; yet we will refer to the following: *Eden on Injunctions*; *Mitford Pleadings*; *Story Eq. Jur.*, secs. 33-39; *Lube's Equity*, 6, n. 1; *Earl Bathurst v. Burden*, 2 Bro. C. C. 65; *Wiswall v. Hall*, 3 Paige, 313; *Rees v. Parish*, 1 McCord Ch. 59; *Bussy v. McKie*, 2 Id. 26 [S. C., 16 Am. Dec. 628]; *Bell v. Beeman*, 3 Mur. 273 [S. C., 9 Am. Dec. 604]; *Tollison v. West*, Harp. Eq. 93; *Samson v. Hunt*, 1 Boot, 207; *Staniford v. Dewit*, Id. 317; *Beardsly v.*

## Opinion of the Court—Knapp, J.

*Curtice*, Id. 499; *Fitch v. Broomfield*, Id. 467; *Strong v. McDonald*, Id. 364; *Bird v. Holabard*, 2 Id. 35; *Pilkin v. Pilkin*, 7 Conn. 315 [S. C., 18 Am. Dec. 111]; *Bailey v. Strong*, 8 Id. 278; *Beach v. Norton*, 9 Id. 182; *Davis v. Hall*, 4 Mon. 28; *Ferguson v. Bullock*, 1 A. K. Marsh. 71; *Waggoner's Trustees v. McKinney*, Id. 480; *Burns' Heirs v. Rowland*, 2 Id. 232; *Cummins v. Boyle*, 1 J. J. Marsh. 480; *Keas' Rep. v. McMillan*, 2 Id. 12; *Watts v. Hunn*, 4 Litt. 267; *Williams v. Patterson*, 2 Overt. 229; *Standifer v. McWhorter*, 1 Stew. 532; *Andrews v. Solomon*, 1 Pet. C. C. 356; *Coe v. Turner*, 5 Conn. 86; *Hardwick v. Forbes*, 1 Bibb, 212; *United States v. Myers et al.*, 2 Brockenbrough, 516.

So, too, courts of equity do not interfere to prevent a trespass, unless it be averred and made apparent that the injury threatened to be committed will be irreparable, as the destruction of real estate, or an heirloom, whose value consists in its identity alone, or that the trespasser is irresponsible and unable to answer in damages in an action at law. Nothing of that kind is alleged in this bill, but, on the contrary, it might be safely inferred from the bill, that any one of the defendants was abundantly able to pay for a horse of the value of one hundred and fifty dollars.

The prayer of the bill is also obnoxious to a fatal objection. It asks a court of chancery to usurp the prerogatives and jurisdiction of the courts of common law, to direct and command the sheriff, one of the defendants, "to restore the said horse to the possession" of the plaintiff, he "entering into bond for the forthcoming of said horse to abide the result of this cause." Courts of equity sometimes require parties in possession of property in dispute to give bonds that they will not commit waste or destroy the property; and at other times receivers are appointed to take charge of and manage the property in dispute during the pendency of the suit; but they do not interfere to take personal property from one party and give it to the other before a hearing upon the bill. The writ of replevin was invented to accomplish that object, and it is issued only by a court of common law jurisdiction. The bill also prayed an account be taken and stated of the damages inflicted.

Passing over the inartistic manner of pleading in the bill, in asking as if the parties were partners in trade in the horse, and seeking a dissolution and settlement of the partnership affairs, it is plain that the remedy for a trespass committed is far more adequate and perfect at common law, where the jury could give as well exemplary as actual damages for the injury inflicted, than it could possibly be in a hearing before the chancellor, who has no such power. Courts of chancery, as well as those of common law, have sufficient business which legitimately belongs to each of them, without interfering with or usurping the jurisdiction of each other. Nor will the interest of the public be at all promoted by any other blending of the practice of the two courts.

We are of opinion the district court erred in overruling the demurrer to the bill, and for that error the decree must be reversed, and the cause remanded to the district court for further proceedings, in accordance with this opinion.





REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.  
JANUARY TERM, 1866.

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**JAMES THOMAS v. DAVID W. McCORMICK.**

**LOST NOTE, AVERMENTS IN ACTION ON.**—A petition in an action on a lost or destroyed note, distinctly averring the fact of its loss or destruction, without showing the manner of it or the diligence used to find the note, is sufficient, these latter facts being merely matters of evidence.

**REFUSAL OF CONTINUANCE DISCRETIONARY, AND NOT ERROR, WHEN.**—The refusal of a continuance asked for, on the ground of absent testimony, rests in the sound discretion of the court, and unless there is a clear and palpable abuse of that discretion, an appellate court will not reverse the judgment because of such refusal.

**AFFIDAVITS FOR CONTINUANCE CLOSELY EXAMINED.**—It is the duty of the court to examine well into the consistencies and inconsistencies of affidavits for a continuance, and to refuse the application if it appears to have been made merely for delay.

**INSUFFICIENCY OF AFFIDAVIT FOR CONTINUANCE.**—An affidavit for a continuance because of the absence of material witnesses, which does not show that they have been summoned or explain the failure to summon them, where the witnesses reside within eight miles of the court, and which states that the party is informed that one of the witnesses is sick, but does not show the nature or severity of his sickness, or that he is unable to attend court, is insufficient, particularly where it is inconsistent with an affidavit filed as ground for a previous continuance.

**EVIDENCE OF LOSS OF NOTE AND SEARCH THEREFOR.**—In an action on a lost note, the testimony of witnesses, showing that the note was filed with the clerk in a previous action commenced thereon, and that upon making diligent search afterwards in the clerk's office, the note and other papers could not be found, is sufficient proof of the loss.

**APPEAL** from the district court for Mora county. The case is stated in the opinion.

*T. D. Wheaton*, for the appellant.

*Ashurst and Tompkins*, for the appellee.

By Court, BENEDICT, C. J.:

This was a petition in the form of an action of *assumpsit* upon a note lost or destroyed, with a common count for goods, wares, and merchandise. The appellee filed a demurrer to the petition, which was overruled by the court. He then filed a special plea to the first count, which was demurred to by appellee, and his demurrer was sustained, with leave to appellant to amend. The latter then amended his special plea, and filed the general issue, and the appellee joined issue upon the pleas. These proceedings were had at the September term, 1863.

When issue was joined the appellant applied for a continuance founded upon an affidavit, setting forth the absence of two material witnesses whose attendance he had diligently attempted to procure, without success. The court granted the continuance. At the April term, 1864, the appellant again applied for a continuance upon another affidavit, upon the ground of the absence and materiality of two other witnesses, different from those mentioned at the preceding term.

This application was refused by the court. The parties then, by agreement, dispensed with a jury, and submitted the case to the court for trial, and after hearing the testimony the court found a verdict for the appellee, and rendered judgment. The appellant then moved through the formalities of a new trial and arrest of judgment, both of which were overruled, and then he appealed to this court. The appellant assigns for error, the overruling of the demurrer to the declaration; the refusing a continuance, and the giving judgment for the plaintiff, and not for the defendant.

The objection made to the petition is, that it did not sufficiently aver the mode and manner of the loss or destruction of the note sued upon, and the search which had been made to find it. The loss or destruction of the note is dis-

tinctly and positively averred, and this was sufficient. The manner and fact of the loss or destruction, and the diligence of the search to find it, were matters of proof, all of which would be given and contested by counter evidence under the averment of the declaration. We see no error in overruling the demurrer.

The appellant in his special plea averred that he and the appellee had been partners in trade, and that upon the settlement of their affairs at the conclusion of their partnership, he gave to the appellee the note in question for six hundred dollars, a balance which the latter claimed to be due him. That the appellee had kept the books and accounts of the concern falsely and fraudulently, and by false and fraudulent representations had procured the appellant to give the note sued upon, when in truth and fact he did not owe the appellee any sum of money whatever, and that therefore the note was given without consideration. At the September term, 1863, the appellant, in his affidavit for a continuance, swore to the absence of one E. Juan Doris, of the county of San Miguel, and Manuela Espinosa, of the county of Mora, by whom he expected to prove false entries in the books of the partnership, made by appellee, and that he knew of no other witnesses by whom he could prove the same facts he wished to prove by them.

At the April term, 1864, to obtain a further continuance, the appellant made another affidavit setting forth the absence of Lawrence M. Peterson and Jesus Maria Ribera, who, he alleged, were material witnesses in his behalf, and by whom he expected to prove that at the settlement of the partnership the appellee was largely indebted to the appellant, and not the appellant indebted to the appellee, and also by Peterson that the note was obtained by the representations of the appellee that the entries in the books of the partnership were correct.

The affidavit also stated that the appellant knew of no other witnesses by whom he could prove the same facts, and that he had them in attendance at the previous September term.

The granting or refusing of continuances is matter left to

the sound discretion of the court. The granting it can not be maintained as error. We will not say that there may not be such a violent and wanton refusal of a continuance by a court as to authorize an appellate court to review and arrest the action of the district court. It must, however, be a clear and palpable abuse of the discretion reposed by law in the court. In this case the appellant obtained one continuance upon his own affidavit. He claimed Doris was a material witness, residing beyond the limits of Mora county. At the next term he made another affidavit, and his counsel moved for another continuance. In this no mention was made of the witnesses whose testimony was so material at the previous term. Two other persons had become material, and he says they were both summoned and present at the term preceding. He states that he expects to prove by both of said witnesses that at the time of the settlement of the copartnership the appellee was largely indebted to him, instead of his being indebted to the appellee. If this be true, then these witnesses could prove for him a complete defense against the note sued upon.

The suggestion will shape itself into the inquiry, did he not know at the previous term the testimony those witnesses would give? He says he had them summoned and they were in attendance. This would indicate he knew the importance of what they would testify. If not, why procure their presence at court? Yet, in his first affidavit, he swears he knew of no other witnesses except Doris and Espinosa, by whom he could prove the facts of his defense. In the last affidavit he states that he knew of no other witnesses except Peterson and Ribera by whom he could prove his defense set up in his special plea. Furthermore, he stated he had caused subpoenas from the clerk's office to be issued and placed in the hands of the sheriff in due time before the session. Yet it does not appear that either Peterson or Ribera were summoned, though the former lived within three miles and the latter eight miles of the court-house, and any day during the term the continuance was applied for, the former might have been summoned within less than one hour, and the latter in less than two hours. True, the

affidavit says he was informed after the commencement of the court that Ribera was sick, but he forbears any explanation of the nature and extent of the sickness, nor does he state that he himself believes his witness unable to attend court by reason of any serious malady. The application to continue was presented on the second day of the term.

We now look at this whole case as it stands in the record. Many efforts have been made by defendants, in courts, to delay causes by continuances from time to time; but it is seldom that a clearer and more naked case is presented than this we are now considering, where the sole object of the continuance sought was delay and the postponement of the plaintiff below in the prosecution for the attainment of his just rights. The appellant denied that such was his motive, and some urge that his denial must be taken as conclusive by the court. The subject-matter of affidavits for continuances is submitted to a court for its inspection and dissection. It is the duty of the court to be on the alert, that its understanding may not be deceived, imposed upon, or misled to the promotion of frauds and chicaneries and the prevention or delay of justice. The affidavits are prepared by the litigants' counsel, and it is easy for them to deceive affiants as to the import of what is written for them to swear to. If a counsel should be unscrupulous, and lost himself to a just sense of honor and truth, such as his profession should cultivate and does demand, he may assure his client that much he swears to is mere matter of form, which must be complied with to conform to the rules of the court.

In this way very honest yet illiterate men may have their confidence abused by one in whose knowledge and position they may confide. These are considerations to induce a court to examine well the consistencies and inconsistencies of repeated affidavits for continuances. The judge must be dull, indeed, of understanding, or reckless of his duties in the administration of the laws and justice, who does not guard against the base practices, tricks, and frauds which are sometimes interposed for the sole purpose of thwarting the ends of justice by defeating or delaying what

is right, honest, and lawful. When such interpositions are presented, the judge should have the sagacity and discernment to discover them, and turn them from the accomplishment of their nefarious designs.

In this case, the court, in granting the first continuance, was indulgent to the defendant below. The diligence manifested by him was of a slight character. In the second instance it was almost wholly deficient. He says he caused subpoenas to issue, which were never served, although the witnesses were within eight miles of the court-house, and it is known to one of the members of this court that the defendant below lived within two miles of said house. The first affidavit set forth two witnesses, by whom the defendant said he expected to prove a part of his special plea, and no others were known by whom the like could be proved. The second wholly ignores the two first named, and finds two others by whom defendant expected to prove his entire defense, and, important as they were, they had not been summoned. From all these facts and circumstances the conviction will force itself upon the mind, that the defendant or his counsel was relying upon defending against the plaintiff as long as possible by means of affidavits. There is a time in all causes when the court should see closed the affidavit defense. If not, the fairest claim, vested in a man of the highest integrity, may be postponed or finally defeated by dint of continued affidavits, and the more unscrupulous the defendant or his counsel may be, the more flagrant may be the wrongs inflicted. It is the opinion of this court, that the court below exercised its discretion soundly and wisely in refusing the continuance.

The appellant's counsel contends that the court below erred in giving judgment for the appellee. This refers to the testimony given upon the trial. B. H. Tompkins testified (and he was attorney for the appellee) that he filed in the clerk's office of the Mora district court, with John Shock, the then clerk, a declaration with a note, the latter executed by the appellant to the appellee, for the sum of six hundred dollars, dated on the twenty-seventh day of April, 1861, payable twelve months after date, with interest at the

rate of twelve per cent.; that the papers were filed in July, 1862; that he had seen the defendant write, and was acquainted with his handwriting, and believed the note to have been written and signed by Thomas; that it was all in the same handwriting; that he has never seen the note since he filed it; that he had applied to Mr. Shock, and to Mr. Guttman, a subsequent clerk, and to Mr. Ellison, the present clerk, but could not get any information of the note from any of them; that in company with Mr. Ellison he searched the clerk's office, but could not find it. Mr. Ellison testified, that in September, 1863, along with Mr. Tompkins, he searched the records and clerk's office of the Mora district court for the papers in all the cases that appeared upon the docket for the Mora court, but could find neither the note nor the declaration. He also had made every other inquiry and effort to obtain information in relation to the papers of the Mora court that he thought likely to be available, but could get none, nor had he been able, up to the time of the trial of the cause, to ascertain where the papers were, or if they were in existence.

Upon this testimony, the court, without the intervention of a jury, found for the plaintiff below, the amount of the note and the interest, and rendered judgment against the defendant. It may here be stated, that the county of Mora formerly was included in the second judicial district, which had its judge and clerk; that in the winter of 1863, the legislature merged the whole of the said district within the first district, and Mr. Ellison, as the clerk of the latter, succeeded to, and became the lawful custodian of all the records, books, and papers which pertained to the second district which had become a part of the first. The plaintiff below had instituted his suit against the defendant before the second district had ceased to exist, but the papers in the case, with the note, never came to the hands of Mr. Ellison, nor to his knowledge. The plaintiff filed a new declaration, averring the loss or destruction of the note.

It is insisted that the proof of loss and search was not sufficient to authorize the rendition of the judgment for the plaintiff. The contents of the note, and the loss, the hand-

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Points decided.

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writing of the defendant and his signature, were clearly proven by Tompkins. The search was abundant. Tompkins applied to the previous clerks, but derived from them no information of the note. With Mr. Ellison, the clerk's office and the papers seem to have been diligently searched.

Mr. Ellison had become by law the custodian of all the former papers of the second district. It was the duty of the preceding clerk to deliver to him all the records, books, and papers which were in the office of the second district. It is to be presumed such was done. Litigants then had to inquire of Mr. Ellison for the records and the papers pertaining to their causes. The search made by him seems to have been a thorough search. The inquiries and efforts made by him to obtain a knowledge of the existence of the papers were fruitless. We do not think the plaintiff was required to produce Shock and Guttman in court to testify. They had no knowledge as to what became of the note. We think the court was fully authorized to find as it did upon the trial and to pronounce the judgment. This court affirms the judgment of the district court, and assesses the interest which has since accrued, and also six per cent. damages, against the appellee. The judgment now rendered shall draw interest at the rate of twelve per cent., that being the rate agreed upon in the note between the parties.

**Affirmed.**

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**AARON L. CRENSHAW, JAMES PORTER, JAMES L. BARRON, AND JOSE D. SENA, SHERIFF OF THE COUNTY OF SANTA FE, v. SIMON DELGADO, ADMINISTRATOR OF THE ESTATE OF OLIVER P. HOVEY, DECEASED.**

**JUDGMENT AS A LIEN, NO STATUTE RELATING TO.**—The statutes of New Mexico are silent as to the effect of a judgment as a lien, and as to the manner of distributing the assets of insolvent estates among the creditors, and the courts are compelled to resort to the civil laws of Spain and Mexico for a rule to guide them in determining the priorities among creditors in such cases.

**JUDGMENT CREDITOR OF DECEASED INSOLVENT.**—A creditor who has recovered judgment against his debtor in his life-time, but has not sued out execution, upon reviving such judgment by *scire facies* against



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Opinion of the Court—Benedict, C. J.

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the administrators of the debtor after his death, has no priority over other creditors where the estate is insolvent, and is entitled only to payment *pro rata* with other creditors having no legal preference.

**INJUNCTION LIES TO RESTRAIN EXECUTION IN SUCH CASE.**—Such creditor may be enjoined from enforcing his judgment beyond the *pro rata* share to which he may be entitled.

**APPEAL** from the district court for Santa Fe county. The case appears from the opinion.

*Charles P. Clever*, for the appellants.

*R. H. Tompkins*, for the appellee.

By Court, **BENEDIOT, C. J.:**

This was a bill in chancery for an injunction. It appears that Crenshaw, Porter, and Barron, in August, 1861, and in the life-time of Hovey, recovered in the district court a judgment against him for the sum of one thousand four hundred and one dollars and fifty cents, but that no execution to enforce its collection issued up to the time of Hovey's death in August, 1862. At the August term, 1864, by proceeding of *scire facias* they obtained a judgment of revival against Simon Delgado and John Gwyn, Jr., administrators of Hovey's estate, with an order for execution against them as such, in the due course of administration, to be levied of the goods, and chattels, and effects of the deceased Hovey in their hands to be administered. The bill shows the execution issued and was placed in the hands of sheriff Sena to execute, with instructions to levy the same to the exclusion of other creditors of the said estate, and that the sheriff was threatening to levy upon the goods and chattels of the deceased in the hands of the administrators in order to make the money due upon the said judgment.

It further showed that Hovey's estate was largely insolvent, and could not pay more than some thirty or forty cents upon the dollar, of the indebtedness to creditors. An injunction was prayed to restrain Crenshaw, Porter, and Barron, and the sheriff from levying the execution in pursuance of the instructions of the three first named, and the threats of the sheriff. In the district court the appellants

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Opinion of the Court—Benedict, C. J.

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filed a demurrer to the bill, which was overruled by the court, and they refusing to answer or proceed further in defense, the court decreed a perpetual injunction, strictly enjoining and restraining the appellants from proceeding to collect the execution beyond what should be proportional to Crenshaw, Porter, and Barron among other creditors of the insolvent estate of Hovey, deceased, but that the injunction should not extend to such proportional part. From this decree, Crenshaw, Porter, and Barron appealed to this court. After judgment in the case by *scire facias*, Gwyn resigned his position and duties as an administrator, and the bill was filed by Delgado as sole administrator.

The errors assigned upon the record are the overruling of the demurrer and the decree of perpetual injunction. The principal inquiry in this case is, were Crenshaw, Porter, and Barron, as judgment creditors, entitled to their full pay out of the insolvent estate of Hovey? The demurrer admits the insolvency as stated in the bill. The court can not fail to regret that during about fifteen years of territorial legislation, the assembly of New Mexico has omitted to pass acts fully defining and establishing what liens result upon property upon the rendition of judgments, and the manner of distributing among creditors the assets of the insolvent estates of deceased persons. In the absence of such legislation the courts are often troubled with great anxiety in the search to find some rule or law among the civil laws of Spain and Mexico, to aid or guide them in their decisions.

In this case Crenshaw & Co. contend that their debt is of such nature and dignity in law, that they are entitled to levy and coerce by execution the full payment of their judgment, in defiance of, and to the exclusion of all other creditors, be their claims of whatever nature they may, and the condition they occupy towards the estate. The administrator contends that as the estate is insolvent, the creditors in this case are entitled to no more than a share *pro rata* among other creditors.

To determine this controversy, it is proper to refer to the Spanish and Mexican civil law as it existed at the time New

Mexico became a portion of the United States. To ascertain what the law was, very high authorities are provided for consultation to aid us in the investigation, such as Escriche, Sala, Asso, Manuel, Tapia, Domat, Febrero, the Partidas, and Nuevo Recopilacion, with Schmidt's Civil Law of Spain and Mexico. Domat distinguishes three classes of creditors, and two sorts of privileges: "Those who have neither mortgage nor privilege; those whose credit has some privilege that distinguishes their condition from that of other creditors, and which gives them a preference to those whose credit is prior to theirs."

One privilege is that which is "given the creditors on all the goods without any particular privilege on any one thing." The other, "which assigns to the creditors their security as certain, and not on the other goods." "The privilege of a creditor is the distinguishing right which the nature of his credit gives him, and which entitles him to be preferred before other creditors." Among creditors who are privileged, some of them are preferred before others, according to the nature of their privileges, and the disposition of the laws and customs. Thus he who has furnished money to repair a house, which was in danger of falling, is preferred to the seller of that house, who demands the price of the sale. This at law, being the debt of all the parties, they are preferred to all privileges whatever. Thus funeral charges are preferred before the rent due to the landlord of the house on the movables of the tenants. Thus those who have privileges on movables, are preferred to the privilege of the king. Thus in all the cases of a concurrence of privileges their reference is regulated by the distinctions which the nature of the said privileges makes. "It follows that among creditors there are three orders; the first is of those that are privileged who go before all the others, and take place among themselves according to the distinctions of their preferences." The second is of those who have mortgages, who have their rank after the privileged creditors according to the dates of their mortgages; and the third is of creditors by writing, and others who have only personal actions, who, not being distinguished either by privilege or

mortgage, come in, therefore, jointly together, and share equally in proportion to their debts.

Schmidt's Civil Law is regarded as a treatise prepared with great care and accuracy from the various authorities and authors before mentioned. He divides the creditors of an insolvent estate into five classes. In the fifth and last are placed "ordinary creditors," such as those by "public act;" those whose debts are evidenced by acts under private signature, written on "properly stamped paper," "and those who justify their claims by witnesses when the obligation is on common paper." It is manifest that the Spanish and Mexican laws attached great importance to solemn acts of parties when evidenced by writing on stamped paper. Such paper was one of the sources from which the governments drew their revenues. The stamped paper gave no intrinsic merit to the person using it, but was prescribed among the public policies to maintain the public credit and officers. Our general government has now established the like policy, which did not exist with us when New Mexico became a portion of the United States. The courts of this country did not regard as binding upon them the Mexican stamp laws.

Much stress has been placed by complainant's counsel upon section 1, p. 32, of the Revised Statutes. It was promulgated September 22, 1846, by General Kearny, then commanding here, after the conquest of the country from Mexico. The same section was adopted by a general legislative enactment after the organization of the territory (by authority of congress), as defined in the organic act. It says: "The laws heretofore in force concerning descents, distributions, wills, and testaments, as contained in the treatises on those subjects written by Pedro Murillo de Loarde (Larde) shall remain in force so far as they are in conformity with the constitution of the United States and the state laws in force for the time being."

Now, as to the stamp duties upon legal instruments, it is seen the constitution, as a supreme law, required none, and there does not seem anything in the state laws, which, by the local law of New Mexico, stamped paper became essen-

tial, nor any of the consequences of the Mexican law remained in force, whether the written instrument was stamped or not.

As regards "public acts," they doubtless were such as documents "under private signature, signed by the debtors and three witnesses," with the latter's acknowledgment of their signatures in court, or a judicial acknowledgment by the debtor of the existence of the debt. The Partidas assert the rule, that when there exist conflicts between ordinary creditors whose debts are written on unstamped paper, or proved by witnesses or confession of the debtor, priority of time does not give preference, and all must be paid *pro rata*. The language in the section from the Kearny code, "the state laws in force for the time being," must be taken to have some signification. In doubtful cases, and where the equity is strongly marked, the rules of distribution enacted by states as state laws may properly be considered as high authority in the absence of direct and positive territorial legislation. The sentence quoted seems intended to refer the courts to sources not emanating from the civil law. By such reference we think it will be found that the privilege which the appellants seek to enforce, to the exclusion of all other creditors, has but slender support. We are of opinion that the general rule will be found in harmony with that asserted in Las Partidas and Domat as to distributions *pro rata*.

The complainants contend that by their judgment in Hovey's life-time, they obtained a lien upon all his property for its satisfaction. As to the effect of the judgment as a lien, our statutes are silent. When executive process or execution was taken from the judicial tribunal (as we learn from the Nuevo Recopilacion), and placed in the hands of the executive officer, it was his duty to indorse upon the process the time at which it came to his hands. This would seem to indicate that it should operate as a lien from that time, and against other creditors.

The complainants in this case, by their proceedings, show they regarded themselves as having no lien by virtue of their judgment, as against other creditors, for they went

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into court to revive it. By reason of their laches while Hovey was living, they neither levied upon his property nor took out an execution. The court, in reviving their judgment, adjudged it should be paid in "due course of administration." This was correct. While the amount was not impaired, the court took notice that the positive law of the land had intervened upon the consequences which followed the death of the debtor. His personal property and credits had passed to administrators as trustees for all the creditors. His real estate had vested in his heirs, subject to the liens of creditors in the due course of administration. Beyond all dispute, there were some classes of debts, such as funeral expenses and those of the last illness, with several others, which were privileged before all others, and no priority of ordinary debts would defeat them.

The district court was not so blind to its duties, as to adjudge to the complainant a full and absolute sweep in their favor upon all the means of Hovey's estate, in defiance of the administration the law was making; yet in the attempts made by them by the execution which has been enjoined, they sought to accomplish what the district court gave them no authority to do. This court recognizes that the probate court is the tribunal where is specially vested jurisdiction over the estates of deceased persons. Administrators are subject to its supervision. It has the power to apportion the assets of estates for distribution, subject to appeals to the district courts. For this purpose, it examines all debts and claims of whatever dignity or privilege. While the district and supreme courts will restrain the probate courts from attempts to transcend the legitimate bounds of their jurisdiction, the former will be equally careful to preserve to the probate courts the powers, duties, and jurisdiction with which they are vested by the organic act.

It is the opinion of this court that the demurrer was properly overruled in the court below, and that the perpetual injunction was correctly decreed, and that the decree of affirmation in this court is justly rendered.

**WILLIAM TIPTON v. JOSE MANUEL CORDOVA.**

**BOND ON APPEAL FROM JUSTICE IS "PROCESS," AND REQUIRES STAMP.—**

An appeal bond on an appeal from a justice is the "process," or principal step in taking the appeal, and requires a stamp under the United States revenue law, or the appeal will be invalid.

**INVALID APPEAL NOT CURED BY AMENDMENT.—**An appeal from a justice, which is invalid for want of a stamp on the appeal bond, can not be cured by an order in the district court permitting the appellant to amend by filing a new bond, properly stamped.

APPEAL from the district court for Mora county. The case appears from the opinion.

*Wheaton and Clever*, for the appellant.

*R. H. Tompkins*, for the appellee.

By Court, BENEDICT, C. J.:

This was an action of forcible entry and detainer, by Cordova against Tipton, before a justice of the peace, in which, upon the trial, judgment was rendered against Tipton, and he sought to appeal, and entered into bond for such purpose, but omitted to place a revenue stamp of fifty cents upon the bond. In the district court the appellee moved to dismiss the appeal for want of a revenue stamp upon the bond. The appellant moved for a rule upon the justice to send up a perfect transcript, which was granted, and the clerk annexed a revenue stamp of fifty cents to the notice issued to the justice. The justice also attached a like fifty-cent stamp to his answer to the rule. The court gave leave to the appellant to amend his appeal bond. To the amended bond a like stamp was affixed. The court, after all these acts were performed, dismissed the appeal, upon the ground that the original bond upon which the cause was taken from the justice's court to the district court was not stamped in conformity with the requirements of an act of congress, approved June 30, 1864.

The judgment dismissing the appeal is the error assigned upon the record in this court.

The one hundred and fifty-eighth section of the cited act provides: "That any person or persons who shall make,

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sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, or shall accept or pay, or cause to be accepted or paid, any bill of exchange, draft, or order, or promissory note for the payment of money, without the same being duly stamped or having thereon an adhesive stamp for denoting the duty chargeable thereon, with intent to evade the provisions of this act, shall for every such offense forfeit the sum of two hundred dollars, and such instrument, document, or paper, bill, draft, order, or note, shall be deemed invalid and of no effect."

Section 170, schedule B, declares that a stamp of fifty cents shall be upon "writs or other process on appeals from justices' courts or other courts of inferior jurisdiction to a court of record."

In the Revised Statutes of this territory, sec. 81, p. 162, it is provided that "any person aggrieved by any judgment rendered by any justice may appeal by himself, his agent, or attorney to the district court of the county where the same was rendered, provided, however, that no appeal shall be allowed unless the party appealing shall file a bond to the adverse party in a sum sufficient to secure such judgment and costs, with one or more securities to be approved by the justice.

"Sec. 82. Upon an appeal being made according to the foregoing section, the justice shall allow the same, and make an entry of such allowance on his docket, and all further proceedings on the judgment shall be suspended by the allowance of the appeal.

"Sec. 83. On or before the first day of the next term of the district court for the county, the justice shall file in the office of the clerk of said court, a transcript of all the entries made in his docket relating to the case, together with all the papers relating to the suit."

The chief inquiries in this case are, what is the process by which appeals in this territory are taken from a justice's court to the district court, and where and when the revenue stamp shall be applied. An appeal "signifies the removal of a cause from an inferior court or judge to a supe



rior." "Process," says Jacob's Law Dict., p. 302, vol. 5, "hath two significations: first, it is largely taken for all the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end."

No statute of New Mexico commands any summons or notice to issue to the adverse party when an appeal is taken in the ordinary mode. Indeed, should such a requirement be made, the appeal must first be in the district court upon which to base a summons. It has been urged in argument, that as no specific process or writ is ordained in appeals from the justices' to the district court, no stamp duty is required. This court can not tolerate such a proposition, although it is made by a counsel holding the position of United States district attorney for New Mexico. Revenue laws are necessarily arbitrary and positive in their character. They must be so in all countries and governments. The temptations to evade them, or the attempt to evade them, should, in this republic, be removed, as far as human wisdom can establish. The integrity and life of the union has been preserved through appalling sacrifice of blood and an immense accumulation of debt. This is a sacred debt, and must be faithfully discharged. To this end, and to perform justice and maintain the honor and credit of the United States, such heavy taxation is now laid upon the business of the people in so many varied forms. The revenue from appeals in New Mexico is not to be defrauded or evaded by any want in this court to understand what is, under our laws, the process of appeal or removal of a cause from a justice's court to a superior court. The process includes the steps and forms of proceeding by which the aggrieved party carries his cause to a higher tribunal. He must file a bond as required by law, and when done his appeal is granted. He has done all the laws require of him. All further proceedings upon the judgment in the justice's court must at once cease. The party by his acts has put the cause beyond the justice's control. He must transmit a transcript of his acts in the case to the district court. This is another step, but not the chief or principal one. It is not the act of the party, it is a duty

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enjoined upon the justice by law. The moving for the appeal, and making of the bond, are the chief and essential steps in the proceedings or process of appeal. All the subsequent steps result as a matter of course. Somewhere and at some time the revenue stamp must be affixed. It is our opinion it should be applied upon the chief act of the party in the process or proceedings of appeal. This is the making of the bond. The bond must be made within the time prescribed by statute and duly stamped when made and perfected.

It is urged that bonds required in legal proceedings are exempt from stamp duties. The position seems to be correct from the reading of the statute. The appeal bond is not required to be stamped because it is a bond, but because it is the principal step or means taken in the process or proceeding of appeal. To affix the stamp upon the justice's transcript could not be contemplated, for the appeal has already been taken and allowed, and the justice but sends a history of the proceedings before him to the district court, together with the papers. In this he performs only a ministerial duty, and it would be unjust to charge him with the expense of furnishing the stamp.

Did the omission to fix a stamp when the bond was made render the attempt to appeal invalid? We think it did in view of the necessary interpretation of the act of congress. It is said, and doubtless said truly, that the omission of the revenue stamp was not with intent to evade the act of congress. The appellant's intention might avail him in a defense against a prosecution to recover the penalty of two hundred dollars, but can not in his proceeding of appeal. This proceeding must be "deemed invalid and of no effect," as the statute declares.

As, therefore, the attempt to appeal was wholly invalid and of no effect, it could not have validity infused into it in the district court. Should this court permit parties to remove causes into the district court, and there affix revenue stamps, the door would be open for evasions and frauds upon the act of congress. Many appeals are settled and dismissed by the litigants themselves, without any action of

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the court. In this case the appellant evidently resorted to several plans to cure, in the district court, his failure to stamp his appeal at the proper time. His appeal being wholly invalid and without effect, there was nothing which could be cured, and the court properly dismissed the proceeding.

It is the opinion of this court that the judgment of the court below be affirmed, with costs.

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**TERRITORY OF NEW MEXICO v. GREGORIO  
MIERA AND JACK COLLINS.**

**OMISSION OF "UNLAWFULLY" IN INDICTMENT FOR AGGRAVATED ASSAULT.**

An indictment, under section 11, chapter 55, of the Revised Statutes, for an aggravated assault, charging that the accused "did beat, bruise, and wound" a certain person, but omitting the word "unlawfully," contained in the statutory description of the offense, is fatally defective.

**APPEAL** from the district court for Santa Ana county.  
The case appears from the opinion.

*O. P. Oliver, attorney-general, for the appellant.*

*Tompkins and Ashurst, for the appellee.*

By Court, BENEDICT, C. J.:

This cause was an indictment against the defendants under the eleventh section of chapter 55, page 360, of the Revised Statutes, which provides: "That if any person shall unlawfully assault or threaten another in a menacing manner, or shall unlawfully strike or wound another, the person so offending shall, upon conviction thereof, be fined in any sum not exceeding one hundred and fifty dollars, or imprisoned in the county jail not exceeding thirty days, or both, at the discretion of the court, and shall moreover be liable to the suit of the party injured."

The defendants, upon trial, were found guilty by the jury. They then moved in arrest of judgment, upon the ground of the insufficiency of the indictment, and the court sustained the motion, and arrested the judgment. The attor-

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Points decided.

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ney-general then appealed to this court, in pursuance of a statute of this territory. The indictment charges that the defendants "did beat, bruise and wound" one Guadalupe Lopez, but omits to aver that it was done "unlawfully," in the language of the statute above quoted.

The offense specified is one created by the statute, and is usually termed an "aggravated assault and battery." An indictment which describes an offense in the language of the statute which declares and defines it, is held in courts and practice to be sufficient in substance. Any material omission in charging the offense as the statute defines it will render the indictment bad. In this case there was a fatal omission, in not charging that the acts of the defendants were "unlawfully" done.

"Unlawfully assault or threaten another," or "unlawfully strike or wound another," is the language of the statute upon which the indictment in this case was intended to be framed. There are many strikings which are not unlawful, and so are not offenses which the laws punish; such as parents correcting their children, or an executive officer executing the sentence of a court upon a person convicted of a crime. So, too, one man may lawfully beat, bruise, and wound another in the necessary defense of himself, wife or child.

By using the word "unlawfully" in the statute, the legislature intended to discriminate between acts of violence which may be lawful and those which are not. To the evident intention disclosed, the indictment in this case should have conformed. The omission was a substantial omission, and the court below decided properly in arresting the judgment.

The judgment of the court below is affirmed by this court.

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JOSE SECOU ET AL. v. LUIS LEROUX AND ESTEBAN ORTIZ.

**MUNE PRO TUNC PROCEEDING.**—An act done *mune pro tunc* under the statute must be done at the discretion of the court; and to obtain the facts upon which to proceed, the court must confine itself to its own records and to the officers immediately connected with it.

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Opinion of the Court—Benedict, C. J.

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INVALID APPEAL NOT PERFECTED NUNC PRO TUNC.—An appeal from a justice's court which is invalid, from the omission of a revenue stamp upon the appeal bond, can not be perfected by an order of the appellate court permitting the stamp to be affixed *nunc pro tunc*.

APPEAL from the district court for Mora county. The opinion states the case.

*S. B. Elkins*, for the appellant.

*A. P. Oliver*, for the appellees.

By Court, BENEDICT, C. J.:

This, like the case of *Tipton v. Cordova*, ante, 388, was an appeal dismissed from the district court, because no stamp had been affixed to the bond in the proceeding of appeal. The appellants moved for permission to affix a stamp *nunc pro tunc*. This the court refused, and dismissed the appeal, and the appellants assign for error this action of the court. The like principles and reasonings asserted in the case of *Tipton v. Cordova* apply in this case. One feature of fact, however, varies from that case. In this the appellants moved, in the district court, for leave to affix a revenue stamp to the appeal bond *nunc pro tunc*, and the refusal by the court is assigned for error. In the other case no such motion was made, but the party stamped papers as he willed.

In the court below, the appellants seem to have misconstrued the practice when a thing may be done *nunc pro tunc*. It is a thing, say the books, "done at one time which ought to have been done at another." It is used when a court has done some act, or some one of its immediate ministerial officers, which from some omission, by neglect, forgetfulness, or some other cause, was not entered of record or otherwise noted, at the time the order or judgment was made by the court, or should have been made to appear upon the papers or proceedings by the ministerial officer.

Our practice act (see Rev. Stat., sec. 34, p. 198,) says: "It shall be the duty of the clerk, when any paper is filed in his office, immediately to enter on the back thereof his certificate of the day on which it was filed, in the words,

filed in my office, this — day of —, 18—, and sign his name as clerk to the same. But in case he should at any time neglect so to do, it may, at the discretion of the court, guided by the justice of the case, be entered *nunc pro tunc* when the ends of justice may require it."

The phrase *nunc pro tunc* signifies now for then, or, in other words, a thing is done now, which shall have the same legal force and effect as if done at the time when it ought to have been done. It is to be done at the discretion of the court, and the refusal is not a matter of error to be examined and corrected in this court. The district court is to judge whether the ends of justice require it to be done. This court said at the January term, 1854, in the case of *Waldo, Hall & Co. v. Beckwith*, ante, 97, referring to the section quoted: "We do not suppose that the legislature intended to confer upon the courts an unlimited power to exert their discretion *nunc pro tunc*. The rule is universal that no act shall be done *nunc pro tunc*, or now for then, which shall work injustice to a party in court."

Again: "In prescribing to the courts below a rule of practice by which to obtain the facts upon which to exercise their discretion, in pursuance of section 34, we think they should be confined to their own records and to the officers in immediate connection with the courts."

This rule, so prescribed, remains as when declared, without modification or change, and we see no reason now to revoke it. The courts in this territory have been liberal in allowing parties, in appeal cases from justices' courts, to amend defective papers or proceedings in furtherance of justice. They have not hastened to turn litigants from the tribunals on account of the unskillfulness or omission of their counsel, or the ignorance, want of education, or mistakes of the inferior courts not of appeal. This court in the case of *Sanchez v. Luna*, extended to amendments full and ample liberality.

Since then the legislature has enacted in unison with the spirit and judgment this court had manifested, that, "the court shall allow all amendments which may be necessary in furtherance of justice in all cases appealed by petition

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Opinion of the Court—Benedict, C. J.

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and certiorari, or in the ordinary mode." The permission asked in the district court in this case was, not to amend; it was to perform an act which must be performed in the justice's court by the party seeking to appeal. It was to do what an act of congress required to be done before the appellant could present himself with his appeal in the district court, and then it was to be valid by its having been duly stamped. It was not a case where leave to do a thing *nunc pro tunc* could be granted. As well might it be claimed that a declaration never filed or made should be allowed to be made and filed *nunc pro tunc*. With equal propriety might the court, in the case where no affidavit or bond had been made and filed in attachment, nor any writ issued, order that an affidavit and bond should be filed and an attachment issue *nunc pro tunc*, to relate back with full legal force and effect to some previous period of time.

The appeal, or rather attempt to appeal, carried with it no validity, for the want of a United States revenue stamp upon the process or proceeding of appeal in the office of the justice of the peace. The affixing of the stamp preparatory to the removal of the cause to a superior tribunal, was not an act which the district court, nor any of its immediate officers, had any duty to perform. Upon them rested no responsibility. This court can not save litigants from the consequences of ignorance of a positive and published act of congress, although it may sometimes seem to work hardship resulting from such ignorance. The courts have to interpret and administer, and not to make the laws.

In this case, as in the case of *Tipton v. Cordova*, we are of the opinion that the district court decided rightly in dismissing the appeal, and its judgment is affirmed in this court, with costs.

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Opinion of the Court—Benedict, C. J.

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**LEANDRO GUTIERRES v. MARIA REFUJIO PINO  
AND MIGUEL ROMERO Y BACA.**

**CHANCERY JURISDICTION OF TERRITORIAL COURTS.**—The chancery jurisdiction of the courts of this territory is derived from the organic act and other acts of congress, and is the same as is vested in the courts of the United States possessing chancery powers, combining the jurisdiction of United States circuit and district courts with that arising under territorial laws.

**EQUITY GIVES NO RELIEF AGAINST VOID JUDGMENT, WHEN.**—A bill in equity will not lie to restrain the execution of a judgment which is absolutely void, because the party aggrieved has an adequate legal remedy by an action of trespass against any officer attempting to enforce such judgment.

**EXPENSE AND INCONVENIENCE OF LEGAL REMEDY.**—The fact that the legal remedy for a wrong is expensive or inconvenient, or that the party is likely to obtain insufficient damages, will not give a court of chancery jurisdiction.

**STATUTE ABOLISHING DISTINCTION BETWEEN LAW AND EQUITY.**—The territorial statute of July 12, 1851, abolishing the distinction between courts of law and equity as to their jurisdiction and practice, is not binding on the courts of the territory, the legislature having no power to pass such a law.

**APPEAL** from the district court for San Miguel county.  
The opinion states the case.

*O. P. Clever*, for the appellant.

*R. H. Tompkins*, for the appellees.

By Court, **BENEDICT, C. J.:**

This was an action in chancery for an injunction. The bill shows a suit was tried before a justice between Leandro Gutierrez and Maria Refujio Pino for a cow. The justice of the peace gave judgment in favor of the plaintiff, and the defendant appealed to the probate court of the county, of which court Don Miguel Romero y Baca was judge. The bill charges fraudulent conduct upon the judge of probate in falsely representing to the complainant that the appeal was not pending in his court, and then clandestinely trying the cause *ex parte*, and rendering judgment against him, that he "should deliver to the said Maria Refujio Pino a cow with calf, and a calf one year old."



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Opinion of the Court—BENEFIT, G. J.

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No further proceedings were ever had in the probate court. No execution was issued, but the bill charged that the judge of probate threatened the issuance of one. It also charged that the "judgment itself is null and void, and can not and ought not to be enforced." It prayed an injunction against Maria Refugio to restrain and enjoin her from enforcing, or attempting to enforce, the said judgment, and against the judge of probate restraining and enjoining him from issuing, or causing to be issued, an execution.

The defendants filed separate answers denying all fraud or collusion. The judge of probate denied that he had informed or represented to the complainant that the appeal was not pending in his court. He averred that when the appeal was tried, the complainant was represented by an agent who contested the case in his behalf. The cause was then set down for hearing by the agreement of the parties upon the bill and answer. After hearing the case the court dismissed the complainant's bill for the want of equity, and from the decree of dismissal he appealed.

There are but few points to be considered in this case. The chancery jurisdiction of the courts in this territory is derived from the organic act and other acts of congress, and is the same as is vested in the courts of the United States, possessing chancery powers, to institute, hear, and determine causes in equity. The organic act (Stats. at Large, 450) enacts, that the "supreme court and district courts, respectively, shall possess chancery as well as common law jurisdiction." The legislature of this territory has never attempted to prescribe any rules of procedure, or in any manner interfere with the chancery practice in the circuit courts of the United States, except to attempt to destroy all distinctions between actions at law and in equity.

The organic act declares (Stats. at Large, 452) "that the constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory of New Mexico as elsewhere in the United States." Also, page 450, "each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United

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Opinion of the Court—Benedict, C. J.

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States as is vested in the circuit and district courts of the United States."

The district courts vested with such large powers are those of this territory. They combine the jurisdictions of the circuit and district courts of the United States, with such as flow from the local laws and legislation of the territory. These courts in the exercise of chancery jurisdiction, and in the administration of the principles of equity, and the remedies peculiar to that branch of jurisprudence, look to the legislation of congress, and the rules promulgated, and the practice of the supreme court of the United States. That court said "the rules which govern the practice of the circuit courts in chancery have been prescribed by this court, and should be followed:" See 7 Curtis Cond. Rep. 732.

The sixteenth section of the judiciary act of 1789 declares: "That suits in equity shall not be sustained in any of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law." Remedy, as a legal term, means, "the action or means given by law for the recovery of a right." Jac. Law Dict. 462. In the case now under consideration, the plaintiff himself, in his bill, charges that the judgment against which he was seeking relief "was null and void, and ought not and can not be enforced." According to his own showing, when he approached the district court, the judge of probate, who should cause execution to issue upon the alleged judgment, and all ministerial officers who should proceed upon the property of the injured party against whom such execution should run, would be trespassers, as doubtless they would. In such case, the remedy of the party damaged would be plain, adequate, and complete at law, in view of the before-quoted section, and which section the courts of the United States have decided, introduced no new rule, but was declaratory of the common law in courts of chancery and equity proceedings. That it was but declaratory, is well known to every lawyer even moderately versed in the knowledge and principles of his profession.

It is sometimes said in argument by the profession in this

country, that the expenses and risks are often so great in the courts of New Mexico, and the unavoidable outlays in the prosecution of a remedy by an action of trespass so large, that an injured party is by no means secure of obtaining adequate redress by a suit at law; that juries may commit grave mistakes in their verdicts, or not fully appreciate the wrongs and damages inflicted upon a party under color and pretense of an execution, though a void one. These considerations, even if well founded, can have nothing to do in controlling the courts in finding and maintaining the distinctions between courts of law and courts of chancery. The inconveniences in the prosecution of a suit, and the insufficiency of damages which may be obtained, can not determine the remedy, "or action, or means given by law for the recovery of a right." If the action or means is at law, then the suit should be prosecuted at law. If the action given by law is a proceeding in chancery, then the party seeking relief should pursue that description of action.

It is true that the legislature of New Mexico enacted in the practice act of July 12, 1851, sec. 5, "that the distinctions known to the common law of England and the United States, between courts of chancery or equity, and of courts of common law, and the distinctive jurisdiction of said courts in regard to the subject-matter in controversy, shall not be regarded or recognized in the practice of the courts of said territory." No court in New Mexico has regarded this section (though it still exists) as binding upon its action or practice. The distinctions intended to be destroyed have been carefully preserved. The supreme court of the United States has decided that it is not in the power of even a state to abolish these distinctions in the United States courts in proceedings in chancery. If a state can not, much less can a territory, created and organized by an act of congress.

By the constitution of the United States, no person in their courts can be deprived of the right of trial by jury, when the sum in controversy shall exceed twenty dollars. In equity and admiralty cases, parties may be denied such trial. When a court usurps jurisdiction in chancery over

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Opinion of the Court—Benedict, C. J.

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a subject-matter which pertains to an action at law, the usurpation denies and deprives the parties of a mode of trial solemnly guaranteed to them in the supreme law of the land. Reference is here made to causes belonging exclusively to actions at law. This court does not forget that the arm of the chancellor may sometimes be extended to prevent and restrain trespasses, where the danger is threatening and imminent, and the damages great and irreparable, and the wrong-doer, from his precarious and insolvent state and condition, shall not be able to pay the damages he may cause and inflict.

The case now before this court shows no such state of facts. The opinion and judgment of this court is, that the decree of the court below in dismissing complainant's bill, was correctly rendered and is affirmed.

REPORTS OF CASES  
DETERMINED IN  
**THE SUPREME COURT**  
OF THE  
**TERRITORY OF NEW MEXICO.**

JANUARY TERM, 1867.

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**JOHN DOLD v. ANDRES DOLD.**

**CONTINUANCES BECAUSE OF ABSENCE OF TESTIMONY, PRACTICE AS TO.**—The established practice in the courts of this territory where a continuance is asked on the ground of the absence of witnesses, is, that the affidavit must set forth what is expected to be proved by such witnesses, and the court then determines as to the competency, materiality, and relevancy of the testimony, and refuses or grants the continuance accordingly.

**IDEM—OMISSION TO SHOW EVIDENCE MATERIAL.**—Where an affidavit for a continuance on such a ground omits to state a fact necessary to make the testimony of the absent witness relevant and material, the presumption is, that the fact was not so, and the continuance will be denied; as where the affidavit states that the affiant expects to prove by the witness that he received from the affiant a certain sum of money "for and on account of" the adverse party, which is claimed to have been a payment, without showing any agency or privity between the witness and the adverse party.

**APPEAL** from the district court for San Miguel county.  
The opinion states the case.

*B. H. Tompkins*, for the plaintiff and appellee.

*M. Ashurst*, for the defendant and appellant.

By Court, **HUBBELL, J.:**

This cause was brought to this court by appeal from the first judicial district court, for the county of San Miguel,

Chief Justice Slough presiding. On the seventeenth day of February, A. D. 1866, the plaintiff filed his petition in assumpsit, to recover two thousand eight hundred and fifty dollars and forty-four cents, alleged to be due from defendant.

On the twenty-first day of March following, it being the seventh day of the March term of A. D. 1866, defendant filed his answer to plaintiff's petition, wherein is pleaded, first, the general issue, and, second, a plea of set-off, in which he avers that the plaintiff was indebted to him in the like sum of two thousand eight hundred and fifty dollars and forty-four cents, for so much money lent and advanced for the plaintiff, at his special instance and request. On the same day defendant also files his application for a continuance of the cause. The application was overruled by the court, to which ruling the defendant excepted.

Subsequently, at the same term, issue was joined and a trial had, which resulted in a judgment in favor of the plaintiff for two thousand eight hundred and fifty dollars, from which judgment the defendant appeals to this court, and prays that the same may be reversed and a new trial granted.

The plaintiff in error contends that the court below erred in overruling the application for continuance. Upon recurring to the record, it will be found that the application is drawn in the usual form and supported by the proper oath. The reason stated in the application, and upon which the continuance was sought to be obtained, is on account of the absence of a material witness, by whom the defendant in the court below avers that he expected to prove "the payment by said defendant to said witness, some time about the month of September, A. D. 1865, for and on account of said plaintiff, about the sum of two thousand eight hundred and fifty dollars, or the same amount specified in the petition of said plaintiff in this cause."

The defendant in error contends that the testimony above set forth is not material, and is insufficient to authorize a court to grant a continuance. The statute provides that all applications for a continuance shall be supported by oath,

unless the facts be within the knowledge of the court, in which case it shall be so stated upon the record. There is no other statutory provision upon the subject of continuances, and, although by the foregoing it is not expressly declared that continuances shall be granted in any case, yet, it is fair to presume that the legislature intended to confer upon the courts the power to grant continuances in certain cases, to the end that parties litigant, having a good and meritorious defense, should not be driven into trial without being allowed a reasonable time for preparation. The only positive provision of the statute is, that no application for continuance shall be entertained by the court unless it be supported by oath. Upon this point the court can not exercise a discretion. It is an imperative command and must be obeyed. But the legislature having failed to make any provision as to what shall be cause for continuance to be embodied in the application, it is reasonable to suppose that it was intended to leave the courts free to determine in each case the sufficiency of the cause as set forth in the application, keeping in view always the exercise of good conscience and a sound discretion.

The act above referred to was passed in A. D. 1851, and under it all the courts of the territory have universally ruled that, where a cause is sought to be continued upon the ground of the absence of a material witness, it is absolutely necessary to set forth in the application, among other things, what is expected to be proved by the absent witness. The application being sufficient in all other respects, the court then determines whether the evidence expected to be obtained from the absent witness, as embodied in the application, would be relevant and material to the issue in the case at bar, or whether such evidence would be irrelevant, immaterial, insufficient, and not legally entitled to be considered by the jury, and inasmuch as the courts have steadily followed the above rule for the period of fifteen years, we think that it deserves to be regarded as the established rule of practice upon that point, and we so adjudge it to be.

It only remains for this court to determine whether the

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Points decided.

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evidence embodied in the application for continuance, in the case now being considered, was relevant to the issue or of sufficient importance, and so material as to require the court, under the rule of practice as above laid down, to delay the trial and grant a continuance. The evidence entirely fails to establish that the witness who is said to have received the money from Andres Dold, "for and on account" of John Dold, was an authorized agent of John Dold to receive the money in question, or that Andres Dold had ever been requested by John Dold to pay the money to the witness; nor does the evidence reveal any privity between the witness and John Dold. Unless such privity should have been established, the evidence was not legally entitled to consideration by the jury.

The presumption is, that where a party applies for a continuance he makes as strong a case as the facts will warrant, and the failure to set forth a privity as existing between John Dold and the witness in the application, fully authorized the court below to presume that no such privity existed.

For these reasons the court are of opinion that the application for continuance in this cause is insufficient, and was very properly overruled by the district court.

It is therefore unanimously ordered that the judgment of the district court be affirmed, with costs.

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### FRANK METZGER v. JOHN W. WADDELL

**JURISDICTION, DETERMINATION OF, FROM ADDRESS OF PETITION.**—Where the petition in an action on a note is addressed to the judge of a particular judicial district, "holding session in and for" a particular county, in which no United States court is held, and the parties are described as "residents" of Missouri and New Mexico respectively, the territorial court of the particular county is presumed to be the court intended, and has jurisdiction of the cause.

**JUDGMENT BY DEFAULT MAY BE ENTERED ON SECOND DAY OF TERM.**—It is not error to enter a default and render final judgment thereon against a defendant, on the second day of the term, where he has been served with process, and, being called on that day, does not appear in person or by attorney.



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Argument for Appellant

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**JUDGMENT RENDERED WITHOUT INTERVENTION OF JURY.**—After a default in an action on a note, or in any other action in which the amount sued for is certain and liquidated, or can be made certain by computation, the court may render judgment without the intervention of a jury.

**SETTING ASIDE DEFAULT TO LET IN MERITORIOUS DEFENSE.**—A motion to set aside a default to let in a defense on the merits is addressed to the sound discretion of the court, and will never be denied if the defendant shows that he has a meritorious defense, and has not been guilty of gross negligence.

**DEFAULT NOT SET ASIDE WHERE DEFENDANT GROSSLY NEGLIGENT.**—A default will not be set aside even though the defendant has a meritorious defense, if it appears that he willfully and grossly neglected to make such defense after being repeatedly informed, by attorneys of the court, of his rights, and of his duty as to making such defense.

**DEMAND AGAINST MAKER, WHAT SUFFICIENT.**—A demand at any time before suit, is sufficient in an action against the maker of a note, and if a demand is alleged a default confesses it.

**APPEAL from the district court for Mora county.** The opinion states the case.

*Kirby Benedict*, for the appellant. 1. The setting aside of a default rests in the sound discretion of the court, a discretion intended to supply remedial justice in cases, the circumstances of which can not be clearly foreseen, and upon which the judge must act when they arise. This discretion is a legal discretion, not to be exercised through caprice, prejudice, ignorance, or carelessness; but for the promotion of justice. It is a kind of equitable principle applied to the practice of courts, and is never to be exercised to defeat, hinder, obstruct, or embarrass justice. It ever extends its hand to aid in obtaining right and resisting wrong; otherwise it is a "discretion abused," which an appellate court will hasten to correct. Furtherance of the right is the object of all judicial discretion. Were it not so the courts would be the most odious of tyrants, to be dreaded by all suitors asking nothing but justice.

2. The defendant below was not chargeable with gross negligence. Much stress is laid upon the order of the court in September, 1865. The affidavit of R. H. Tompkins aids in explaining that order. He was not the attorney of Metzger; had never been employed by him. He arose, in the case, when called as an attorney of the court and not otherwise;

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Argument for Appellant

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In other words, he arose as *amicus curiae*, and gave certain information to the court. Upon this the court gave "leave," not an order, that he might answer by the first day of January next. It is said Metzger was informed he must make his answer. He denies he knew there was any compulsory order upon him. His denial is in no manner disproved by the substance of the affidavits filed by the plaintiff below. The court of September, 1865, seems to have acted upon the mere professional statement of one of the attorneys practicing before it. If the action of the court, however well intended, in furtherance of justice, tended to mislead the defendant as to what he should do in his own defense, he should not be deprived of the presentation of his case upon its merits. It has never been the practice of the courts in New Mexico to finally shut down upon a party all right to be heard upon the merits of his case, because he did not answer upon the second day of the term. For reasons growing out of the strictness of the laws in some countries, the law was so modified as not to compel the court to wait till the third, nor was it required to act any certain day. That statute now exists. It contemplates that upon the calling of all causes, the court shall grant such time to plead, answer, and defend, as the nature and circumstances of the case shall seem to demand. It is well known that in the county of Mora it has seldom been that the officers have so arrived as more than to complete the organization of the court, with the juries, upon the first day of the term. There is but one resident lawyer in the county. The default was in this case taken early on the second day of the term.

3. The defendant had the whole term in which to move to set aside the default. That term was two weeks. Judgment was rendered against him upon the twenty-seventh; on the twenty-ninth he moved to set it aside. On a subsequent day of the same term he filed his grounds of merits. These are substantially and tacitly admitted by all the affidavits filed by the plaintiffs below, and the proceedings in the case. The merits disclosed by the defendant below are manifest to the court. If he shall be denied the right to avail himself of them, then he is made to pay twice, and more, too; a

debt he was always willing to pay and did pay so soon as lawfully required. If this court hold that he, by his negligence or laches, forfeited to the plaintiff in the court below, more than four thousand five hundred dollars, he can have no hope of redress in any court of equity in New Mexico. His loss and injury will be final and complete, and without remedy.

*Charles P. Clever*, for the appellee.

By Court, SLOUGH, C. J.:

This cause is appealed from the district court of the first judicial district, Mora county. It appears from the record that Waddell, the plaintiff in the court below, brought his action against Metzger the defendant, in the month of July, 1865, for the recovery of the amount of a note for the sum of three thousand three hundred and thirty dollars, made by the said Metzger, payable to the order of Russell Majors and Waddell, in three months after date (January 12, 1860), which was indorsed by them to the said plaintiff. It further appears that on the twelfth day of August, 1865, the said Metzger was duly served with process, and thereby required to answer the said plaintiff's petition, on the "fourth Monday after the first Monday of August, 1865."

It further appears that at the September term of said court, the said Metzger failed to answer as required by said process; that at said term, R. H. Tompkins, Esq., a member of the bar, as a friend of the court, appeared, and requested for said Metzger time until the first day of January, 1866, to plead, which motion was allowed by the said district court; that on the second day of the next (March) term of said court, the following proceedings were had in the case.

"JOHN W. WADDELL	}	Assumpsit.
v.		
FRANK METZGER.		

"Now this day comes the said plaintiff, by his attorney, and it appearing to the satisfaction of the court, that the said defendant has been duly served with process, and

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Opinion of the Court—Slough, C. J.

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though solemnly called, came not, but made default, whereupon it is considered by the court that the said plaintiff ought to recover his damages by reason of the premises, and no jury being required, the court being fully advised in the premises, does assess his damages four thousand five hundred and twenty dollars and forty-nine cents. It is therefore considered by the court, that the said plaintiff recover of the said defendant, the said sum of four thousand five hundred and twenty dollars and forty-nine cents, his damages assessed as aforesaid, and also his costs in this behalf expended, to be taxed, and that execution issue therefor."

It further appears that on the fourth day of said term, the said Metzger made his motion in writing to set aside and make null the judgment rendered against him in the cause, which motion was overruled.

It further appears that on the sixth day of said term the said Metzger made his motion to set aside the judgment and default in this case, based upon affidavit of said defendant filed in said court, which affidavit among other things sets forth and says, "that since the said judgment was rendered he has been informed for the first time, that the court at said last term made an order requiring this defendant to plead in this action by the first day of January last," "and for this reason he took no steps to make any answer or plea." He now repeats, he knew nothing of the order of the court of the last term which required him to plead by the first day of January last in explanation of his not having been present by himself or attorney at the calling of this cause at the present term; that he was ignorant of the necessity of his answering by writing the plaintiff's action; that from what he had heard, all he would be required to do in his defense in the present action would be the appearing in court when he should be called, and show to the court the receipts mentioned.

It further appears that on the eighth and ninth days of said term, the plaintiff filed counter affidavits of R. H. Tompkins and M. Ashurst, Esqs., and Adam Heamer, which affidavits show that the said Tompkins, attorney-at-

law, during the said September term of said court, "personally called upon the said defendant, the said Frank Metzger, and informed him of the order of the court in the premises, and also explained to him what was required of him in the defense of the said action;" that he had, as an attorney, before and at the same time "informed the court that the said defendant could not plead to the action of the said plaintiff during that term, for the reason that certain receipts, copies of which had to be filed with such plea or answer, were then in Santa Fe, and not within the reach of said defendant; that upon the representation of this affiant, the said court then granted leave to the said defendant to file his answer to said action on or before the first day of January, 1866." That afterwards, and as he believes, about the middle of the month of November, 1865, he wrote to Frank Metzger, "informing him again that he, the said defendant, would have to answer said action on or before the first day of January, 1866." That he wrote him not to procure a fee, "but only to apprise him of what was required of him in the defense of his said cause." That he received an answer to his said letter, signed Frank Metzger, informing him that his (Tompkins') letter had been received. "That he (Frank Metzger) knew his own business, and that if his (this affiant's) advice in the matter should be desired, he (Frank Metzger) would inform him (this affiant) thereof." The receipt of this letter of Tompkins is confirmed by the affidavit of Hesmer.

The affidavit of M. Ashurst, Esq., attorney-at-law, shows "that some time in the month of November or December, 1865, he wrote a letter to Frank Metzger, the defendant in the above-entitled cause, informing him that it was necessary for him to file his answer in the above-entitled cause on or before the first day of January, 1866; that he has received no answer to the same, and does not know whether the said defendant received said letter or not."

Hesmer swears that he was Metzger's clerk in November, 1865; that Tompkins' letter was received by Metzger, and that Metzger signed a response to the same. He further says, "that some time during the week preceding the

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Opinion of the Court—Slough, C. J.

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commencement of the session of the present term of the district court in the county of Mora, Theodore D. Wheaton, Esq., attorney-at-law, in the presence of this affiant, called upon the said Frank Metzger, in his (Metzger's) store, and handed to him (Metzger) some papers, which he, the said Wheaton, said were copies of records, which he had procured for him (Metzger) from the clerk of the district court at Santa Fe, and for which he (Metzger) owed the said clerk the sum of twelve dollars and seventy-five cents; that upon the refusal of the said Metzger to receive said papers or records from said Wheaton, said Wheaton stated to Metzger that he had better receive them, as he would need them to make his defense in the above-entitled cause, upon which Metzger remarked that he knew his own business, or words to that effect."

The affidavit of Metzger exhibited many items going to show that he had a meritorious cause of defense to said action.

Various motions were made by plaintiff and defendant, and bills of exceptions signed. The appellants' assignment of errors sets up many grounds of error, and asks of this court to reverse the action and judgment of the court below; therefore we will proceed to examine them in the order of assignment.

It is claimed, first and second, that the court erred in taking jurisdiction of the parties and cause. As the petition all the way through shows that it was the intention of the plaintiff to bring his suit in the court sitting for the trial of causes arising under the laws of the territory, and not in the court sitting for the trial of causes arising under the constitution and laws of the United States, this objection is not tenable. The petition is addressed to the then judge, as "judge of the first judicial district court, holding session in and for the county of Mora." The description of residence, instead of citizenship, goes to strengthen this view. If intended to be brought in the United States district court, the petition would have so stated, and the parties, instead of being described as residents of Missouri and New Mexico respectively, must necessarily have been described as citi-

zens of those places, to give the court jurisdiction. There is no United States court held in Mora county. The court there held is a territorial court, held under the laws of the territory; and in such cases as the present, had concurrent jurisdiction with the United States court for the district, and which is held in Santa Fe.

The next is that "the court erred in rendering a final judgment against the defendant upon the first calling of him upon the second day of the term." There is no statute of the territory forbidding the entry of a judgment by default on the second day of a term, neither is there any law forbidding the entry of a final judgment at any time after a defendant is defaulted. In this cause the party had failed to answer, although served with process, and had been called at the court-house door, was clearly in default, and the right had, therefore, accrued to the plaintiff to take his judgment, not only by default, but as well his final judgment. This court knows of neither law nor practice of the courts in this territory to forbid such action.

The next is, in addition to the last, that the court erred "in finding such final judgment without the intervention of a jury." The statutes of the territory except from the necessity of a trial by a jury causes in which the sum in controversy is certain or liquidated. This is such a cause, this suit being upon a promissory note, and requiring nothing to determine the amount, but a simple calculation of the principal and interest upon the same from the date of its maturity. The sum was certain and liquidated. No jury was therefore required.

The next, viz., the fifth, sixth, and seventh, are to the effect that the court below erred in not sustaining the motions to set aside the default and judgment and permit the defendant to plead and have a trial upon the merits of the action. This is the important question raised in this cause. Motions of this kind are addressed to the sound discretion of a court, and in all ordinary cases where merit is shown, the courts consider it the exercise of a sound discretion to grant such motions. In the effort to administer justice, which is the plain duty of all courts, such a motion

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Opinion of the Court—~~Blough~~, C. J.

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is never refused unless there is no merit in the defense set up, or there has been gross negligence on the part of a defendant. In the effort to administer justice, courts must look to the rights of all the parties litigant, and be guided by the lights of the decisions of other courts upon similar questions, under similar circumstances.

Metzger sets up a good defense to the action in his affidavit. The only question, then, is, was he guilty of gross negligence in his failure to answer or plead in this case? Did he so sleep upon his rights—did he so neglect his duty to himself, as to forfeit the ordinary right to be heard in a court in his defense to this action. This court is of the unanimous opinion that under the circumstances of this case he willfully and grossly neglected his rights until the court could not, in the exercise of a sound discretion, set aside the default against him and open up the judgment rendered. The affidavits show conclusively that at least two members of the bar, attorneys of this court, of respectability, advised him of his duty; of the necessity for him to plead to the action; of what was necessary to his defense, etc. Mr. Wheaton went so far as to tender him papers, just before the meeting of the court, at which judgment was rendered against him, which he had not only neglected to obtain, but refused to receive and use. Not only did he refuse to act upon the gratuitous advice of these men skilled in the legal profession, but spurned their friendly advice and action with insult.

Metzger failed to answer when required by the original writ; failed to answer by the first of January, 1866, to which time the court, although he was then in default, allowed him to file his answer; failed to plead or make any preparation to do so, refusing offers of aid and advice on the first day of the second term of said court, which was held nearly eight months after he was originally served; failed to answer on the second day of said term, or even to be in attendance, although he swears that he was at his place of business, three or four doors from the court-house, at Mora, at the time, and failed to make any effort to appear in any manner until two days after the default was rendered and the judgment entered in the cause.



Frank Metzger not only failed under all these circumstances and during this long time to answer, but met advice kindly given to aid and assist him with scorn and insult.

It will be noticed that Metzger's affidavit of merits was filed four days after the default and judgment. It is true that Metzger swears that he did not know that he had to answer in writing, or that he had to answer by the first day of January, 1866; pleads ignorance of his duty to himself and the court; but as his oath is that of a party deeply interested, and as he is contradicted in these very material matters, so fully and so directly, the court is driven to the necessity of discrediting and disbelieving his sworn statement in this respect. The court is constrained from all the facts presented to believe that Metzger stubbornly and willfully, with a full knowledge of his duties to the court, refused to plead and permitted the default, and thereby denied to himself the rights he now sets up. Metzger is estopped by his own conduct, and can not, if wrongfully compelled to pay the amount of the judgment in this case, blame any one but himself. It rarely occurs in the history of jurisprudence that such a case of gross negligence is shown as in this case is presented.

The last error claimed is that, "the court erred in rendering judgment against the defendant without any proof of the presentation of the note sued upon at the place at which it was specified to be paid, and the refusal of payment, and the notice to the defendant." It is a well-settled principle of the law merchant, that as against the maker of a note, a demand at any time before suit is brought is all that is necessary. In this case the demand is alleged. To hold an indorser, a demand on the day of maturity of a note, and notice of non-payment given to him, is necessary. Never to hold a maker is this required. The default which Metzger permitted was a confession of the allegations of the petition, that of demand among others.

This court therefore approves and confirms the proceedings and judgment of the court below, with costs, and remands the case for its further action.

**RAMON GALLEGOS v. MARIANO PINO, DIONICIO CHAVES, AND FRANCISCO ANTONIO CHAVES.**

**SECTIONS OF STATUTE RE-ENACTED ON SAME DAY, HOW CONSTRUED.**—Where sections of statutes on the same subject, enacted originally at different times, are re-enacted by a revisory act, they are to be construed together, if possible, as continuous sections of the same act; and this principle should be applied in construing the sections of the statute relating to service of process, where the sheriff is a party.

**SERVICE OF PROCESS AGAINST SHERIFF.**—Where the sheriff is a party defendant, upon the affidavit of the plaintiff showing that fact, the clerk must direct the process to the United States marshal, and the latter must serve it, the section requiring service of such process by the coroner being nugatory, because there is no provision that process shall in such cases be directed to the coroner.

**APPEAL** from the district court for the county of Valencia. The case appears from the opinion.

*Charles P. Clever*, for the appellant.

*R. H. Tompkins*, for the appellees.

By Court, HUBBELL, J.; SLOUGH, C. J., concurring:

This cause was brought to this court by appeal from the district court, second judicial district, county of Valencia. Mr. Justice Houghton presiding, May term, 1866. It appears from the record that the appellant filed his petition in an action of trespass, in this cause, on the ninth day of March, A. D. 1866, and on the same day he also filed in the clerk's office the following affidavit:

United States of America, Territory of New Mexico, County of Valencia.

Ramon Gallegos, on his oath, states that he has this day instituted a suit against Mariano Pino, Dionicio Chaves, and Francisco Antonio Chaves, all residents of the county of Valencia, to wit, an action of trespass; that one of the said defendants, to wit, Dionicio Chaves, is at present the sheriff of said county of Valencia, and that there is no coroner for said county. He therefore prays the honorable judge of said court to grant an order to issue process herein to the

marshal of the territory of New Mexico, or any of his deputies.

His  
RAMON X GALLEGOS.  
mark.

Subscribed and sworn to before me, this seventh day of March, 1866.

MEOLHIOB WERNER,

Clerk District Court, Second Jnd. Dist.

The clerk will issue process to the marshal of the territory in the above cause.

SYDNEY A. HUBBELL, Judge.

Subsequently summons was issued to the marshal and served and returned by him on the twenty-eighth day of April, 1866, at the May term, 1866. Upon the calling of this case a motion was interposed by Messrs. Ashurst and Benedict, attorneys, as *amici curiæ*, to quash the writ, "because the said writ is not directed to the proper officer under the law qualified to serve said writ; because there is no service of said writ by any officer authorized by law to serve the said writ." Upon this motion the court below quashed the writ, and directed the costs to be taxed against the appellant. From this judgment an appeal was taken to this court.

The only question presented to this court is, was the summons in this cause directed to and served by the proper officer? On page 670, Rev. Stat. sec. 2, it is provided, that "all processes issued by the clerk of the district court, shall be directed to the sheriffs of their respective counties, who shall execute such process according to law, and shall attend upon such courts during their sittings." This provision is from the Kearny code of 1846. On the same page, 670, sec. 7, the act of fourth of February, 1854, provides, "that whenever the sheriff of any county of this territory shall be a party to a suit, or shall be absent, dead, or shall in any other manner be incapacitated from the discharge of the duties of his office, the process in any proceedings shall be directed to the marshal of the territory, who is hereby fully empowered to execute the same."

An act approved January 13, 1863 (see Rev. Stat., sec. 3, p. 266), provides, "that the coroner shall, within his

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Opinion of the Court—Hubbell, J.

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county, serve and execute all orders and mandates, and perform all other duties of the sheriff, when the sheriff be a party to or interested in a suit, or in any manner disqualified from acting."

These are the only provisions of the statute that prescribe who is the proper officer to serve process issued by the clerks of the district courts, and although they were originally passed at different sessions of the legislature, yet they were all revised and re-enacted by an act relative to the revision of the statutes, approved January 24, 1865. Section 1, Rev. Stat., p. 742, declares, that the revision of the statutes, commencing with article 1, entitled "*acequias*" and ending with article 67, entitled "*woods and prairies*," with all and each of the articles and chapters inclusive, be and the same are hereby declared to be the "revised statutes and laws of the territory of New Mexico, and as such shall have full force and effect in all courts thereof."

Thus it will be observed that all the sections above referred to were each and all enacted and approved on the same day, to wit, the twenty-fourth of January, 1865, and unless the sections conflict with each other in their practical operation, they are each in full force and effect. The first section imperatively commands that all process issued by the clerks of the district court "shall be directed" to the sheriff. The next one, that when the sheriff be a party to, or interested in, a suit, or in any manner disqualified from acting, the coroner shall serve all process, and perform all other duties of the sheriff. And the next one, that whenever the sheriff shall be a party to a suit, or shall be absent, or shall in any other manner be incapacitated, etc., the process in any proceeding shall be directed to the marshal. As these sections were all enacted at the same time, they must be regarded as continuous sections of the same act, and relating to the same subject, and hence must be construed together.

Upon a careful analysis of the language employed in these sections, it will be found that the one relating to coroners nowhere commands that process shall be directed to the coroner; it simply directs that the coroner shall serve the pro-

cess upon the happening of a certain contingency; whereas the one relating to the sheriff commands that the process shall be directed to the sheriff; and the one relating to the marshal also commands that the process shall be directed to the marshal. No authority is given anywhere by the legislature to direct the process to the coroner, but the officer issuing the process is expressly commanded, first, to direct the process to the sheriff, when he is present in the county, not a party to the suit, nor otherwise disqualified; and, second, in case the sheriff is a party to the suit, or otherwise disqualified, then the process must be directed to the marshal.

In construing the two sections relating respectively to coroner and marshal, we are impelled to the conclusion that they so conflict in their essential provisions as to preclude attaining harmony in their practical operation. The coroner is authorized to serve process upon the happening of a certain contingency, but how can he serve the process if it does not come to him? And how will it reach his hands if it can not be directed to him? It can not be upon the ground of necessity for want of sufficient legislation upon the subject, for it is provided in another section of the same act to whom the process shall be directed, and also who shall serve it, and that officer is the marshal; nor does it require any order from the judge to authorize the clerk to issue process to the marshal. The law points out to him in the plainest language when he shall issue process to the sheriff, and when he shall issue process to the marshal. It can only be issued to the latter upon the happening of the contingency laid down in the statute. The clerk can not take notice officially that such contingency exists, but it must be shown to exist by the affidavit of the party praying the process, or his agent, and when such affidavit shall be filed with the clerk, then it is made his duty by law to issue and direct the process to the marshal, who is fully empowered to execute the same. No discretionary power is given to the clerk; the law is full, concise, and positive.

In this case the appellant filed his affidavit, stating that

Dionicio Chaves, one of the defendants, was at that time sheriff of Valencia county, and that there was no qualified coroner in said county. Upon this affidavit the clerk issued process, directed to the marshal of the territory of New Mexico, and in so doing he simply followed the plain and unmistakable direction of the statute. The averment in the affidavit that there was no qualified coroner in the county was unnecessary, because in no contingency is the clerk authorized to direct process to the coroner.

The writ having been lawfully directed to the marshal, the law fully empowered him to execute the same. The return upon the writ is: "I certify that the within has been served by leaving a true copy of the original with each one of the within-named defendants, this, the twenty-eighth day of April A. D. 1866," signed by the marshal. This return shows that the service was made in conformity with the requirements of the law.

It is ordered that the judgment of the district court in this cause be reversed and annulled, and that the cause be remanded to the district court of Valencia county to be proceeded in according to law.

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

JANUARY TERM, 1869.

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NESTOR GARCIA v. TERRITORY OF NEW MEXICO.

**BILL OF EXCEPTIONS, ABSENCE OF.**—Although an affidavit, purporting to set forth the evidence given on the trial, appears in the record on appeal, if the record does not show that a bill of exceptions containing the evidence was presented and signed by the judge, no question relating to the introduction or competency of evidence, or to the instructions to the jury, will be considered by the appellate court.

**WHIPPING NOT A "CRUEL OR UNUSUAL PUNISHMENT."**—The punishment of the crime of stealing mules by the infliction of not less than thirty, nor more than sixty, lashes on the bare back, as prescribed by the laws of New Mexico, is not a "cruel and unusual punishment," within the meaning of article eight of the amendments to the constitution of the United States, so as to render void the act authorizing it.

**APPEAL** from the district court for Bernalillo county. The facts are stated in the opinion.

*M. Ashurst*, for the appellant.

*S. B. Elkins*, attorney-general, for the appellee.

By Court, WATTS, C. J.:

Nestor Garcia was indicted by the grand jury for Bernalillo county, in the second judicial district, at the May term of said court, 1868, for larceny. The indictment charges him with stealing one mule of the value of two

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Opinion of the Court—Watts, C. J.

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hundred dollars, of the goods and chattels and personal property of Felipe Chaves.

A warrant for his arrest was issued and Garcia was arrested and brought into court. Garcia being without counsel to defend him, W. H. Henrie, an attorney-at-law of that court, was appointed to defend him. Garcia, on hearing the indictment read to him, pleaded not guilty; and a jury was called to try the case, and after hearing the evidence, brought into court the following verdict: "We the jury do find the defendant guilty in manner and form as charged in the indictment herein." A motion was made for a new trial, and to set aside the verdict upon various grounds set forth in the motion, and after argument had, said motion for a new trial was overruled by the court. A motion was then made to arrest the sentence and judgment in the case, which motion was overruled by the court. The court then proceeded to render the following judgment in the case: "Now the said defendant being asked if he had anything to say why sentence should not pass in conformity with the verdict, answered, nothing. It is therefore considered by the court, that the said defendant Nestor Garcia, be whipped on Monday next, in conformity with the law, receiving thirty lashes on the bare back, well laid on, and that he be confined in the county jail of Bernalillo county until the costs in this behalf laid out and expended, to be taxed, be fully paid and satisfied."

The defendant in the court below, Nestor Garcia, then made the usual affidavit and gave the usual bond, and his case was appealed to the supreme court. A bill of exceptions setting forth the motion for a new trial, and in arrest of judgment, and the overruling of the same, was then tendered to the judge and signed by him. The record then contains what purports to be a copy of an affidavit of J. Bonifacio Chaves, purporting to set forth the evidence upon the trial of the case; but as the record does not show that any bill of exceptions containing all the evidence in the case as given by the witnesses was ever presented to the judge in the court below for signature, or ever signed by him, it is not important to consider what the evidence might



have been on the trial, or any questions as to the legality or illegality of the evidence admitted by the court below for the consideration of the jury, or the legal accuracy of the instructions to the jury.

In the compiled laws of New Mexico under the head of crimes, punishments, etc., sec. 37, pp. 340, 341, we find the following enactment upon which the indictment in this case is based, to wit: "Every person who shall be convicted of stealing a horse, mare, colt, or filly, horse mule or mare mule, ass or jennet, bullock, cow, or calf, sheep, goat, or hog, shall be punished by not less than thirty lashes, well laid on his bare back, nor more than sixty, at the discretion of the court trying such cause, and shall be confined in the county jail until the costs of the prosecution are paid and the sentence fully complied with."

The only point made by the appellant in this case is, that the law above cited, upon which this indictment is based, is unconstitutional, as it inflicts cruel and unusual punishment, prohibited by the eighth article of the amendments to the constitution.

Under the seventh section of the organic act of the ninth of September, 1850, power was given to the legislative assembly to legislate upon "all rightful subjects of legislation consistent with the constitution of the United States and the provisions of that act," and it was further provided that "all the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and if disapproved shall be null and of no effect." There can be no doubt that the punishment of larceny is a rightful subject of legislation. This act was submitted to the congress of the United States, and has never been disapproved by that body.

The question now presents itself to the court thus: Is the law of New Mexico punishing the stealing of mules with not less than thirty nor more than sixty lashes, such cruel and unusual punishment as to render its infliction unconstitutional and the act itself void? All punishment is more or less cruel, and the kind of punishment to be inflicted upon criminals to induce reformation and repress and deter

the thief from a repetition of his larcenies has generally been left to the sound discretion of the law-making power. In old communities where law and order prevail, and some security exists for property in the honesty of the people, the mild remedy of imprisonment for theft is usually adopted, but in new countries, without jails, with many opportunities for thieves to steal and escape with their plunder, and no secure jails in which to confine them when convicted, a pressing necessity for the adoption of the punishment of whipping for the offense of larceny exists. At some stage in the existence of almost every state and territory, they have resorted to this mode of punishment, and in no instance has its infliction been held to be unconstitutional. Until recently, it was the common punishment in the army for disobedience of orders and other trivial offenses, and was never held to be unconstitutional.

In many of the states the practice of whipping criminals convicted of theft has prevailed for over fifty years, without any doubt as to its constitutionality. The state of Texas, prior to the fifth of February, 1840, punished the larceny of a slave with death: but that act mitigated the punishment to thirty lashes and imprisonment not less than one year, nor exceeding five: See Hart Dig., art. 2340. The practice of whipping for theft was planted here by the Spanish adventurers who first settled the valley of the Rio Grande. It was found here as a usual mode of punishment in 1846, when General Kearny took possession of New Mexico, and was adopted and practiced by him, and has been sanctioned by the legislative assembly ever since, and certainly can not be considered an unusual punishment. The word cruel, as used in the amendatory article of the constitution, was no doubt intended to prohibit a resort to the process of torture, resorted to so many centuries as a means of extorting confessions from suspected criminals, under the sanction of the civil law. It was never designed to abridge or limit the selection by the law-making power of such kind of punishment as was deemed most effective in the punishment and suppression of crime. If a father, without the charge of cruelty, may administer

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Points decided.

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stripes to his vicious and disobedient child, may not the supreme power of a territory, state, or nation administer the same kind of punishment to its vicious and lawless citizens? However averse the court may be to this mode of punishment, it can not authorize the court in disregarding and annulling the law providing for the punishment of this crime, and, until repealed, it is the duty of the court to enforce it.

It is ordered by the court that the judgment of the district court for the second judicial district, in and for Bernalillo county, territory of New Mexico, in the case of *Nestor Garcia, appellant v. The Territory of New Mexico, appellee*, be affirmed, and the sheriff of Bernalillo county is ordered to execute the judgment rendered in this case, in the court below, on Friday, the twenty-ninth day of January, 1869; and that the said Garcia be confined in the county jail until the costs of the prosecution are paid and the sentence fully complied with; and that a duly certified copy of this order be sent to the sheriff of Bernalillo county, and the clerk of the United States district court for the second judicial district, under the seal of the clerk of this court, which shall be ample authority to the sheriff of Bernalillo county for the execution of the judgment of the United States district court for the second judicial district, herein now affirmed by this court.

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JUAN ARCHIBEQUE AND WIFE v. PANTALEON  
MIERA, ET AL.

**OBTAINING RESTITUTION IN REPLEVIN AFTER SATISFACTION.**—Where a defendant in replevin obtains a dismissal of the action and an order of restitution, and, after accepting from the plaintiffs a deed of certain land in full satisfaction for the replevied chattel, procures a writ of restitution to be issued and executed, he is liable as a trespasser, the property in such chattel being transferred to the plaintiffs by such acceptance of satisfaction.

**SHERIFF EXECUTING SUCH WRIT NOT LIABLE.**—The sheriff executing the writ of restitution in such a case, the writ being regular on its face, and no actual complicity on his part in the wrongful acts of the defendant being shown, is not liable in trespass therefor.

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Opinion of the Court—Houghton, J.

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**DEFENDANT'S AGENT NOT LIABLE FOR RECEIVING THE PROPERTY.**—The defendant's agent receiving such chattel from the sheriff, and taking it beyond the plaintiffs reach, is not liable in trespass if not shown to have been privy to the facts rendering the execution of the writ wrongful.

**APPEAL** from the district court for the county of Santa Fe. The opinion states the case.

*Baird and Ashurst*, for the appellant.

*T. D. Wheaton*, for the appellees.

By Court, HOUGHTON, J.:

This is an appeal from the judgment of the district court of the county of Santa Fe, whither the cause had been brought by change of venue from the county of Santa Ana, originating as follows: There was pending at the April term, 1865, of the district court of the county of Santa Ana, a replevin suit between the plaintiff in the above-entitled cause and Pantaleon Miera, one of the defendants, for a certain horse. The court, on motion, dismissed the replevin suit of plaintiffs against Miera, and ordered restitution of the horse to this defendant. Whereupon, as it appears in the evidence of record, an agreement was entered into between Juan Archibeque and Guadalupe Lopez, his wife, on the one part, and Pantaleon Miera on the other part, to the effect that Pantaleon Miera should receive from Juan Archibeque and his wife a deed for certain lands, in full satisfaction for the horse in question. Subsequent to this agreement, counsel for the defendant, Miera, sued out a writ of restitution of the horse to Miera, which was placed in the hands of Manuel Biscarra, sheriff of said county of Santa Ana, who took possession of the horse, and had him delivered into the possession of Pedro Baca, agent of Miera, who, as the testimony states, immediately rode the horse off, to prevent his being a second time replevied by Juan Archibeque and Guadalupe Lopez, his wife. Whereupon Archibeque and wife brought an action of trespass against Pantaleon Miera, Manuel Biscarra, sheriff of the county of Santa Ana, and Pedro Baca, for the recovery of the value of said horse.

The cause came on to be heard at the February term 1867, of the district court for the county of Santa Fe. The jury found for the plaintiffs, and assessed their damages at one hundred dollars, for which judgment was given by the court. From which judgment Miera, Biscarra, and Baca appealed to this court.

It appears clearly from the evidence of record in this case, that Pantaleon Miera, the defendant in this cause in the court below, did accept, as full satisfaction and consideration for a certain black horse—the horse in question—a deed of certain lands from the plaintiffs, Juan Archibeque and wife. What became of this deed afterwards, or what disposition Pantaleon Miera made of the same after its acceptance by him as in full satisfaction for the horse, is a matter that does not in any manner interpose in this question. The acceptance of the deed in full satisfaction for the horse from Archibeque and his wife was a closed bargain. The horse became the property of Juan Archibeque and wife—the deed property of Pantaleon Miera.

It further appears in the evidence of record, that after this transaction, the acceptance of the deed for the horse, Pantaleon Miera sued out from the same court in which the replevin suit for the same horse had been pending, a writ of restitution, placed it in the hands of the sheriff, Manuel Biscarra, who, as one of the witnesses testifies, caused the horse to be run off for fear that another writ of replevin would issue. Pantaleon Miera necessarily being conscious at this same time, the time of suing out the writ of restitution, that he had conveyed all his right, title, and interest in the said horse in question to Archibeque and wife, clearly renders him a trespasser, and the verdict of the jury, as to him, must be held as undoubted and substantial justice.

As regards the two other defendants, Biscarra and Baca, it does not appear from the evidence of record, that they were privy to the taking and carrying off of the horse in question for the purpose of aiding Pantaleon Miera in wrongfully obtaining possession of the same, and notwithstanding the suspicion that is cast upon the transaction by the evidence that the writ of restitution was placed in the hands of

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Points decided.

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the sheriff and hurriedly served, and the horse hurriedly taken off for the purpose of avoiding a writ of replevin, yet nothing appears in the evidence, or record, to conclusively show complicity on the part of Manuel Biscarra or Pedro Baca with Pantaleon Miera, in unlawfully or wrongfully running off the horse. On the contrary, it appears that Biscarra had placed in his hands a writ *de retorno habendo* issued out of, and by authority of the district court for the return of the said horse to Pantaleon Miera, and that in executing this writ, he was in the lawful performance of his duty as sheriff of the county of Santa Ana, and, therefore, not liable to the charge of trespass.

In view of the facts contained in the record, it is ordered and decreed by this court, that the judgment of the court below as to Pantaleon Miera be, and is hereby affirmed; but as to Manuel Biscarra and Pedro Baca, the same is reversed. And it is hereby ordered and decreed that execution issued for the amount of said judgment and costs, against the defendant, Pantaleon Miera, alone, and that Manuel Biscarra and Pedro Baca, as to this suit, be dismissed, and go hence without day.

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### UNITED STATES OF AMERICA v. JOSE JUAN LUCERO.

**PUEBLO INDIANS, RIGHTS OF, AS CITIZENS.**—The pueblo Indians of New Mexico were, at the date of the treaty of Guadalupe Hidalgo, citizens of the Mexican republic, and by virtue of the provisions of that treaty became citizens of the United States, none of them having elected to retain the character of Mexican citizens. Their property rights are therefore guaranteed by the treaty equally with those of other Mexican citizens of the territory.

**PUEBLO INDIANS NOT SUBJECT TO INTERCOURSE ACT OF 1834.**—The pueblo Indians of New Mexico are not within the provisions of the intercourse act of 1834, not being tribal Indians, and are not subject to the jurisdiction of the Indian department of the United States government.

**JUDICIAL NOTICE OF STATUS OF PUEBLO INDIANS.**—The court will take judicial notice of the history and status of the pueblo Indians, and of the title by which they hold their lands.

**TITLE TO PUEBLO LANDS.**—The pueblo of Cochiti, and other pueblos of New Mexico, had an indefeasible title to their lands at the date of the treaty of Guadalupe Hidalgo, and that title is guaranteed by the treaty and has been confirmed by congressional legislation.

such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the president of the United States to take such measurers and employ such military force as he may judge necessary, to remove from the land as aforesaid any such person as aforesaid."

It will not be forgotten that the intercourse act, which contains this penal section, was passed on June 30, 1834. The petition in this case charges the defendant, Lucero, with having entered upon lands belonging to the pueblo tribe of Indians, of the pueblo of Cochiti, and then sets out the boundaries of the land upon which Lucero settled, belonging to the said pueblo tribe of Indians, of the pueblo of Cochiti aforesaid, secured to them by patent from the United States. To this petition the defendant, Lucero, put in a general demurrer, to which the United States filed her joinder in demurrer, and at the July term of the United States district court, for the first judicial district of the territory of New Mexico, the cause was heard on demurrer, fully argued by counsel, and duly considered by the court, and the demurrer was sustained.

The United States declined to amend her petition, and judgment was rendered on the demurrer, that the said plaintiff be barred from further having or maintaining her aforesaid action against the said defendant, and that the costs be taxed against the United States. The United States now bring this case into this court by writ of error, and the only question of error made in this case is, that the demurrer to the petition was sustained by the court below, when it should have been overruled. This settlement of Lucero is alleged in the petition to have been made on the first day of January, 1866. February 27, 1861, congress passed an act, the seventh section of which was as follows:

"Section 7. And be it further enacted, that all the laws now in force regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be and the same are hereby extended over the Indian tribes of New Mexico and Utah." See 9 Stat. at Large, 587.

A careful consideration of this act thus extending over New Mexico, the acts and all the acts regulating trade and intercourse, will satisfy the most incredulous, that, in the opinion of congress, some of these acts were, in some of their provisions, unsuited to be extended over all classes of people in New Mexico called Indians. The question now presents itself: Is there a class of Indians in New Mexico who do not come within the letter or spirit of said acts, and who are not operated upon by said acts, unless specially named and designated by congress as being within the provisions of those acts? When the intercourse act of June 30, 1834, was passed, and for ten years thereafter, New Mexico constituted a part of the republic of Mexico, and within the extended jurisdiction of the United States there existed no class of Indians called pueblo or town Indians. The term pueblo Indian is a term used to separate and distinguish them from the general class of Indians, such as existed within the United States in 1834; no such Indians then existed within the limits of the United States, and the law then passed could not have been intended to operate upon or effect a class of Indians differing widely from the Indians of the United States in their habits, manners, and customs. Who and what are the Indians for whom said laws were passed, and upon whom they were intended to operate? They were wandering savages, given to murder, robbery, and theft, living on the game of the mountains, the forest, and the plains, unaccustomed to the cultivation of the soil, and unwilling to follow the pursuits of civilized man. Providence made this world for the use of the man who had the energy and industry to pull off his coat, and roll up his sleeves, and go to work on the land, cut down the trees, grub up the brush and briars, and stay there on it and work it for the support of himself and family, and a kind and thoughtful Providence did not charge man a single cent for the whole world made for mankind and intended for their benefit. Did the Indians ever purchase the land, or pay any one a single cent for it? Have they any deed or patent for it, or has it been devised to them by any one as their exclusive inheritance?

Land was intended and designed by Providence for the



use of mankind, and the game that it produced was intended for those too lazy and indolent to cultivate the soil, and the soil was intended for the use and benefit of that honest man who had the fortitude and industry to reclaim it from its wild, barren, and desolate condition, and make it bloom with the products of an enlightened civilization. The idea that a handful of wild, half-naked, thieving, plundering, murdering savages should be dignified with the sovereign attributes of nations, enter into solemn treaties, and claim a country five hundred miles wide by one thousand miles long as theirs in fee simple, because they hunted buffalo and antelope over it, might do for beautiful reading in Cooper's novels or Longfellow's *Hiawatha*, but is unsuited to the intelligence and justice of this age, or the natural rights of mankind. The government of the United States, while thus dignifying these savages with the title of *quasi* nations, with whom the United States has, from time to time, and quite often, entered into stipulations to purchase their lands, have generally purchased at an average of about two cents an acre, and then sold it out to the people at from one dollar and a quarter to ten dollars and fifty cents per acre, thus making a speculation off of the Indian lands of over fifty millions of dollars, if their title is anything but an ingenious and benevolent fiction. This property of over fifty millions of dollars, the treaties with the Indian tribes and sales of public lands to the people will demonstrate. Let us now look at the pueblo Indians of New Mexico, and see if there is anything in their past history or present condition which renders applicable to them a set of laws designed and intended to regulate the trade and intercourse of civilized man with wandering tribes of savages. Columbus, the daring hero of the seas, discovered America in 1492. December 11, 1620, the pilgrim fathers landed on a granite boulder lying on the shore of Plymouth bay, in the new world. Now, it is worth while to know, that in 1530, ninety years before that event, Alvar Nunie Cohega de Baca, Alonzo del Castillo, Alejandro Andres Dorantes, and Estefana, a blackamoor, passed from the gulf of Mexico through Louisiana and Texas into New Mexico; spent several years

in this valley of the Rio Grande, visiting the various villages of pueblo Indians in New Mexico during the year 1534, and passing south-west in May, 1536, and near the Pacific ocean, at the village of San Miguel, in Sonora, and finally reached the City of Mexico, after seven years' wandering in the wilderness. Our timid forefathers, who peeped out into the wilderness from their colony of Plymouth, are not to be compared to the true Spanish adventurers who planted the cross of civilization two thousand miles distant, in the valley of the Rio Grande, ninety years prior to their arrival in the new world.

The theory, promulgated by some, and believed by many, that the Spanish adventurers found the pueblo Indians of New Mexico a wild, savage, and barbarous race; that they conquered them, and reduced them to subjection, placed them in villages, and taught them the arts of civilized life, is a pure and unadulterated fiction, and contradicted by the uniform history of the Spanish adventurers for over two hundred years. They found the pueblo Indians, on their advent into New Mexico, a peaceful, quiet, and industrious people, residing in villages for their protection against the wild Indians, and living by the cultivation of the soil. Their villages are described, their locality mentioned, their habits and pursuits delineated, and we learn that the old palace, not one hundred feet from where we are now holding court, was built upon the site of one of their ancient towns. That the Spanish placed them under subjection, treated them with cruelty, but planted the Catholic religion among them, and an improved civilization, is true; but they found them civilized, peaceful, and kind, and on that account they became an easy victim of their cupidity and despotic rule. This condition of domineering on the part of the Spaniards, and meek obedience on the part of the pueblo Indians, continued until 1670, when the pueblo Indians rebelled against their Spanish masters, and expelled them all from New Mexico. It was not until 1688, that the Spaniards obtained sufficient force to conquer, subdue, and chastise them. At the date of 1689, and within a few years subsequent, was executed to

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Opinion of the Court—Watts, C. J.

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the various pueblos of New Mexico their titles to their lands. The Spaniards acknowledged their title to the land on which they were residing, and had resided time whereof the memory of man runneth not to the contrary, and a written agreement was executed and delivered to them; and so long as the Spanish rule was continued in America, these titles were respected. Upon the establishment of the independence of Mexico from old Spain, these titles continued to be respected, and the government of the United States in the treaty of Guadalupe Hidalgo pledged her faith as a nation to maintain and respect them. When the republic of Mexico was compelled by the chances of unsuccessful war to part with a portion of her territory and people, she threw around them by treaty all the safeguards to their civil, religious, and political rights arising out of honor among men and faith among nations.

In the treaty of Guadalupe Hidalgo, signed on the second of February, 1848, ratified on the twelfth of March, 1848, exchanged at Queretaro the thirtieth of May, 1848, and proclaimed on the fourth of July, 1848, ample protection is promised and pledged to the people of New Mexico, and expressly stipulated in the treaty itself, and particularly in the eighth and ninth articles of said treaty. "The citizens of New Mexico can remain in New Mexico or remove to Mexico," and whether they go or stay, it is expressly stipulated that they have the right of "removing the property which they possess in said territory, or disposing thereof and removing the proceeds wherever they please without their being subjected on this account to any contribution, tax, or charge whatever." It was further provided in the said treaty, that property of every kind now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of those, and all Mexicans who may acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if the same belonged to citizens of the United States. In the ninth article it is provided, that "Mexicans, who in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with

In considering this question, it is worth while to notice that after the conquest of the city of Mexico by Cortez in 1521, the Spanish viceroys in Mexico assumed and exercised all the privileges of royalty. He was commander-in-chief of the troops, and filled up all vacancies; judgments and decrees bear his signature, and from his decision there was no appeal or writ of error. In everything but name he was a despotic sovereign. Cortez, with his handful of Spaniards, was joined by one hundred and fifty thousand Indian allies, and the great multitude of people found by him in the valley of Mexico, numbering several millions, lived in towns, cultivated the soil, and irrigated the country by means of extensive ditches and canals, and were called Indians, and it will be found that at as late a date as 1851, the population of this republic of Mexico consisted of one million of whites, four millions of Indians, and six thousand negroes.

The Spanish rule in Mexico was partial and unjust. Its few favorites of the Spanish crown held all the offices in church and state, made the laws, executed the laws, and considered the great body of the Mexican people, equally honest and more industrious than themselves, a sort of upper servants and peons to the wants of their whiter skin and more refined civilization. The Indians and Mexicans rebelled against such tyranny and injustice, and under the leadership of Iturbide, struck for independence and successfully maintained it. The Indians, as they were called of Mexico on account of their numbers, their courage, their patriotism, rendered easy the overthrow of the unjust, arbitrary, and partial rule of the viceroys of Spain, and they established upon its ruins the empire under Iturbide, their successful leader. The Spanish scholar will not fail to remember that when Spanish law books and Spanish legislators speak of Indians, they mean that civilized race of people who live in towns and cultivate the soil, and are often mentioned as *naturales* and *pueblos*, natives of the towns, and as *Indios del pueblos*, Indians of the towns; and for the other distinct and separate class of Indians whose daily occupation was war, robbery, and theft carried on against the pueblo Indians, as well as the Spaniards, the term

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equality of civil rights to all the free inhabitants of the empire, whatsoever may be their origin in the four quarters of the earth." The act of the ninth of April, 1823, reaffirms the three guarantees of the plan of Iguala: 1. Independence of New Spain; 2. The perpetuity of the Catholic religion; and 3. The union of all Mexicans, of whatever race. It will thus be seen that the Indian race of Mexico, and that portion, and a vast portion, of the inhabitants to whom that term was properly applicable, were recognized as citizens of the republic of Mexico, in all her plans of government and acts of solemn obligation putting into practical operation that plan. Now, if there is no law of the republic of Mexico (and we are unable to find any) taking away the right of citizenship with which the Indian race was invested as far back as the twenty-fourth of February, 1821, the conclusion is forced upon us, that they (the Indian race) were in fact Mexican citizens at the date of the treaty of Guadalupe Hidalgo, and are entitled to the benefit of all the articles in said treaty designed to protect the life, religion, and property of Mexicans under the new sovereign, in whose hands the destinies of war had placed them.

If the republic of Mexico has never passed any act taking away from the Indians their rights of citizenship, it must be evident that at the date of the treaty of Guadalupe Hidalgo the Indian race, in the Spanish sense of the term, were as much and fully citizens of the republic of Mexico as Europeans or Africans. On the seventeenth of September, 1822, the Mexican congress passed a preamble and act carrying into effect these fundamental principles of the new government, as follows: "The sovereign Mexican constitutional congress, with a view to give due effect to the twelfth article of the plan of Iguala, as being one of those which form the social basis of the edifice of our independence, has determined to decree and does decree: Article 1. That in any register, and public and private documents, on entering the name of citizens of this empire, classification of them with regard to their origin shall be omitted." This view of this question is not original with us. In the December term of the supreme court, 1854, this point was before the

supreme court of the United States, and by the carefully considered opinion of the court, by Justice Nelson, in the case of *The United States v. Ritchie*, 17 How. 525, this identical question was finally settled, so far as human reason and the able opinion of the highest judicial tribunal in the land was capable of settling anything. It was supposed that the opinion in that case had closed this controversy, but the inevitable and infallible Indian, however, never rests satisfied with acts of congress or decisions of its courts when not responsive to his plans of patronage and plunder, and always invents some plausible excuse to disregard or evade them. Justice Nelson, after reciting the plan of Iguala and acts of congress above cited, says: "The Indian race having participated largely in the struggles resulting in the overthrow of the Spanish power and in the erection of an independent government, it was natural that, in laying the foundations of the government, the previous political and social distinction in favor of the European or Spanish blood should be abolished and the equality of rights and privileges established. Hence the article to this effect in the plan of Iguala and the decree of the first congress declaring the equality of civil rights, whatever may be their race or country. These solemn declarations of the political power of the government had the effect necessarily to invest the Indians with the privileges of citizenship as effectually as had the declaration of independence of the United States of 1776, to invest all those persons with these privileges residing in the country at the time, and who adhered to the interest of the colonies." The learned judge, in his able exposition of the law on this point, proceeds to say, that "the improvement of the Indians under the influence of the missionary establishments in New Spain, which had been specially encouraged and protected by the mother country, had doubtless qualified them, in a measure, for the enjoyment of the benefits of the new institutions. In some parts of the country very considerable advancement had been made in civilizing and christianizing the race. From the degraded condition, however, and ignorance generally, the privileges extended to them in the admin-

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istration of the government must have been limited, and they still doubtless required its fostering care and protection. But as a race, we think it impossible to deny that, under the constitution and laws of the country, no distinction was made as to the rights of citizenship and the privileges belonging to it, between this and European or Spanish blood. Equality between them, as we have seen, has been repeatedly affirmed in the most solemn acts of the government. Solano, the grantee in this case, was a civilized Indian; was a principal chief of his race on the frontiers of California; held a captain's commission in the Mexican army, and is spoken of by the witnesses as a true and meritorious officer. Our conclusion is that he was one of the citizens of the Mexican government at the time of the grant to him, and that, as such, he was competent to take, hold, and convey real property the same as any other citizen of the republic."

It is true that in the close of the opinion the judge said: "It is conceded that the lands in question do not belong to the class called pueblo lands, in respect to which we do not intend to express any opinion, either as to the power of the authorities to grant, or the Indians to convey." This remark does not lessen the value of the opinion upon the subject of citizenship, nor destroy its applicability when the stronger claim and better rights of the pueblo Indians shall come under review, as to their right to citizenship, or to hold, purchase, or convey property as citizens and as men, without having to ask the sanction of any department of the government. The pueblo Indians of New Mexico thus being, at the date of the treaty of Guadalupe Hidalgo, Mexican citizens, they were, by the sixth article of that treaty, made citizens of the United States, inasmuch as not one of them elected "to retain the title and rights of Mexican citizens, but acquired under that treaty those of citizens of the United States." This brings us to the consideration of the second proposition, which is this: If the pueblo Indians were citizens of the republic of Mexico at the date of the treaty of Guadalupe Hidalgo, and by the operation of that treaty became citizens of the United

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"Provided, that this confirmation shall only be construed as a relinquishment of all title and claim of the United States, to any of said lands, and shall not affect any adverse valid rights, should such exist:" See 11 Stat. at Large, 374. In 1857, congress appropriated three thousand seven hundred and fifty dollars, for the survey of Indian pueblos in New Mexico: See Id. 184. In 1854, congress appropriated, "for the expenses of making presents of agricultural implements and farming utensils, to the bands of pueblo Indians in the territory of New Mexico, ten thousand dollars:" See 10 Id. 330. When appropriations were asked for the Indians proper, or uncivilized Indians, a very different form of estimate and appropriation took place. The appropriations ran thus: "For general incidental expenses of the Indian service in the territory of New Mexico, and in making to the Indians in said territory, presents of goods, agricultural implements, and other useful articles, and in assisting them to locate in permanent abodes and sustain themselves by the pursuits of civilized life, to be expended under the direction of the secretary of the interior, forty-seven thousand five hundred dollars:" See 11 Id. 79.

It must be manifest to all that the appropriations asked for and granted to enable the Indian department "to locate in permanent abodes" the pueblo Indians of New Mexico, who had been so located in permanent abodes, and supporting themselves by the pursuits of civilized life, was never dreamed of by congress in making these annual appropriations for a long series of years. Let us now see what has been the legislation of congress with regard to agents for the Indians of New Mexico. It will appear by reference to 9 Stat. at Large, p. 587, sec. 5, that four agents for Indians in New Mexico were authorized to be appointed, and when so appointed to be assigned to duty by the superintendent of Indian affairs for New Mexico. This act was passed February 27, 1851, and the seventh section extends such of the provisions of the intercourse act as are applicable over New Mexico. An additional agent for New Mexico was authorized by act of congress in 1854: See 10 Id., p. 332, sec. 6 [5]. In vol. 11, Id. 169, an additional agent for the Indi-



and in New Mexico was authorized. In vol. 12, Id. 11: an additional agent was authorized by congress for the Indians in New Mexico. In vol. 13, Id. 323, it will be found that congress abolished the southern Apache agency. In all the legislation of congress upon the subject of the Indians of New Mexico, the pueblo Indians have been mentioned but four times: first, in the act of July 22, 1854 regarding their titles to be investigated and reported upon they are called "pueblos;" in the act of July 31, regarding their lands to be surveyed, they are called "Indian pueblos;" in the act of July 31, 1854, when ten thousand dollars is given them, they are called "pueblo Indians in the territory of New Mexico;" in the act of December 22, 1858 confirming the lands to the pueblo of Cochiti, in the county of Santa Ana, the word "Indian" can not be found anywhere in the act. In the same act it will be seen that in confirming other village titles, congress does not say the pueblo of Tecolote, the pueblo of Chillili, and the pueblo of Belen, but the word "town" is substituted instead of the word "pueblo." If these pueblos, twenty-one in number, were really included in the provisions of the intercourse act, intended for a different class of Indians, the Indian department, during the last twenty years that they have been under their pretended control, would have had spread upon our statutes at large certainly not less than eighty treaties with these twenty-one *quasi* nations. How has it been with the Navajos, a single tribe in New Mexico? November 22, 1846, Colonel Doniphan made a treaty with them: See Doniphan's Expedition, 188. May 20, 1848, Colonel Newby made a treaty with them: See Santa Fe Republican, June 17, 1848. September 9, 1849, Colonel Washington made a treaty with them: See 9 Stat. at Large, 974, 975. And the court now has before it another treaty with the Navajos, not yet in the Statutes at Large, dated June 1, 1868, ratified July 25, 1868, and proclaimed August 12, 1868, and which last treaty the official report of United States army officers, on file at the military headquarters of this district, show to have been violated by theft and robbery of the people of New Mexico, in less than twenty days after it was signed.

Here we have with a single tribe of Indians in New Mexico four solemn treaties made by the high plenipotentiaries on the part of the United States of America (*E pluribus unum*), with the high chiefs and council of the great Navajo nation, all of whom, except Delgado, sign the solemn document with a neat and beautiful "his X mark." What a beautiful field for Indian agents, if the intercourse act is applied to these twenty-one pueblos located two hundred and fifty miles up and down the valley of the Rio Grande, all separate and distinct nationalities living in our midst, cultivating the soil, raising a large supply of wheat, corn, apples, peaches, plums, and melons in the fields and gardens, and only to think that they have been doing this for the last three hundred years without a treaty! It will thus be seen by a reference to the acts of congress above cited, that no person has ever been authorized by congress to be appointed agent for the pueblo Indians, nor has any one ever been commissioned as agent for them, and the designation of an agent for the pueblos by the Indian department is without any authority of congress or the decision of any judicial tribunal authorized to pass upon the question, and the transfer of eight thousand of the most honest, industrious, and law-abiding citizens of New Mexico to the provisions of a code of laws made for savages, by the simple stroke of the pen of an Indian commissioner, will never be assented to by congress or the judicial tribunals of the country so long as solemn treaties and human laws afford any protection to the liberty and property of the citizens. Let us now look at the history of territorial legislation with regard to the pueblo Indians of New Mexico. General Kearny, after taking possession of New Mexico, eighteenth of August, 1846, established a system of civil government in New Mexico, organized courts, appointed judges, and convened a legislative body, and in December, 1847, that legislative assembly passed the following act:

"INDIANS.

"Section 1. That the inhabitants within the territory of New Mexico, known by the name of pueblo Indians, and living in towns or villages built on lands granted to such

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"all laws passed by the legislative assembly and governor, shall be submitted to the congress of the United States, and if disapproved, shall be null and of no effect."

As this act of the sixteenth of February, 1854, passed by the legislative assembly of New Mexico, has never been disapproved by congress, it must be regarded as in force in New Mexico, and deprives the pueblo Indians of one of the dearest and most valued rights, the right to be heard by their ballots in the selection of agents to make laws for their government.

Let us now consider the stipulations of the eighth and ninth articles of the treaty of Guadalupe Hidalgo. That article gives the Mexicans established in New Mexico the right to retain the title and rights of Mexican citizens, or acquire those of citizens of the United States, and the election was required to be made within one year after the exchange of ratifications of that treaty. Colonel Washington made proclamation requiring the people to elect by signing a declaration before the clerk of the courts in the different districts, if they wished to retain the title and rights of Mexican citizens. In that test, which is a public printed document, the name is not found of a single pueblo Indian; and hence, by the express terms of the eighth article of the treaty, they became citizens of the United States, as they were previously citizens of the Mexican republic. The ninth article provides "that Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the union of the United States, and be admitted at the proper time (to be judged of by the congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution, and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." Whether the right to vote shall be given to the African or taken away from him; given to the Mexican or taken away from him; given to the American or taken

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away from him; given to the pueblo Indian or taken away from him; are questions not properly before us, and are to be judged of by the congress of the United States. It is to be presumed that congress has the right, if congress thinks proper to exercise it, to repeal the organic act, to disfranchise all the citizens, and legislate hereby directly for this territory without the aid of the legislative assembly; and whether political rights are given or withheld by congress is no business of ours; but it is the right and duty of the courts to see that every citizen of the territory of New Mexico, in conformity with the ninth article of the treaty of Guadalupe Hidalgo, "shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

This court, under this section of the treaty of Guadalupe Hidalgo, does not consider it proper to assent to the withdrawal of eight thousand citizens of New Mexico from the operation of the laws, made to secure and maintain them in their liberty and property, and consign their liberty and property to a system of laws and trade made for wandering savages and administered by the agents of the Indian department. If such a destiny is in store for a large number of the most law-abiding, sober, and industrious people of New Mexico, it must be the result of the direct legislation of congress or the mandate of the supreme court. This court feels itself incompetent to construe them into any such condition. This court has known the conduct and habits of these Indians for eighteen or twenty years, and we say, without the fear of successful contradiction, that you may pick out one thousand of the best Americans in New Mexico, and one thousand of the best Mexicans in New Mexico, and one thousand of the worst pueblo Indians, and there will be found less, vastly less, murder, robbery, theft, or other crimes among the thousand of the worst pueblo Indians than among the thousand of the best Mexicans or Americans in New Mexico. The associate justice now beside me, Hon. Joab Houghton, has been judge and lawyer in this territory for over twenty years, and the chief justice for over

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seventeen years, and during all that time not twenty pueblo Indians have been brought before the courts in all New Mexico, accused of violation of the criminal laws of this territory. For the Indian department to insist, as they have done for the last fifteen years, upon the reduction of these citizens to a state of vassalage, under the Indian intercourse act, is passing strange. A law made for wild, wandering savages, to be extended over a people living for three centuries in fenced abodes and cultivating the soil for the maintenance of themselves and families, and giving an example of virtue, honesty, and industry to their more civilized neighbors, in this enlightened age of progress and proper understanding of the civil rights of man, is considered by this court as wholly inapplicable to the pueblo Indians of New Mexico.

What is the true character of all the tribes of wild and roaming Indians west of the Mississippi, and what has it been for over seventy years last past? Take the expedition of Lewis and Clark, from the Mississippi to the Pacific ocean in 1804, and the expedition of Lieutenant Pike in 1806, to the Rocky mountains, and then take the vast multitude of reports resting in the pigeon-holes of the Indian department, upon the subject of the thefts, murders, and robberies of the Indians, which have never seen the light, and never will, if that department can prevent it, and it will be found that not a single tribe, beyond the Mississippi, of wild Indians can be found whose constant habit is not to steal, rob, and murder the white man, and to war against their own neighboring tribes and plunder one another, whenever a suitable occasion presents itself. This utopian idea, that kind treatment and a few agents and missionaries can civilize and christianize these wicked and wild savages in a few years, is a sad and fatal delusion. When you can tame a million wild buffalos by sending a yoke of oxen among them; when a single tame pony let loose among a herd of wild horses will reduce them to subjection; or when you can clear the muddy waters of the great Mississippi by running a spring branch into it, then, and not till then, will you accomplish these utopian schemes of elevation and

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been shown that Otibsko lived on his own land, granted to his father's father by a foreign grant in 1689, and confirmed to him by the congress of the United States; and that Holliday sold him a quart of liquor at his own house on his own farm, the opinion of Justice Miller would have been that it was no violation of the United States laws, for Holliday to sell liquor to a citizen of the United States on his own farm in a sovereign state.

It has already been shown that the people of Cochiti are a corporate body, and that a full and ample remedy is given them to protect and defend their title to their individual and common lands, and that they do not need any assistance from the penal statutes of the United States to accomplish that purpose. There is a world of influence produced upon individuals and whole communities by the suggestions of a single word or sentence. You take the healthiest village in the world, where no person ever died with disease, and where a doctor had never been for half a century, and just let a neat shop be fitted up with a bay window, and big bottles with different-colored water, and then hang up a neat sign with Doctor J. Snooks, physician and surgeon, painted on it; and one third of the people will imagine that premonitory symptoms of consumption are upon them, and in less than one year, the doctor will be engaged by the year as family physician, and papa will have to drop his pen in the midst of a half-finished opinion and run for the doctor if the baby sneezes. Take the case of a peaceful community, where they have not had a lawyer or a lawsuit for half a century, and let a young lawyer put up his law books on nice shelves, hang out his sign, O. Gammon, Esq., attorney and counselor at law, and in less than six months, one half the village will have hatched up a lawsuit against the other half; and no man will pass the counselor's law office, without trying to arrange in his mind a lawsuit for the counselor. So let the Indian department have placed under their control the twenty-one pueblos of New Mexico, and get the laws of trade and intercourse, designed to regulate the commerce of the country with savages, extended over these peaceful and industrious citizens, and in less

than six months they will have fifty lawsuits on hand about questions settled by a former government fifty years ago.

The object and purpose of the eleventh section of the act of June 30, 1834, was to protect Indians in the peaceable enjoyment of lands set apart for their use by treaty with the United States; they were considered as the tenants of the government, and that the government was bound to protect them from intrusion and trespass. But does any such right or obligation exist where title is not held by treaty with the United States? By no means. The court is bound to take notice of the title of the pueblo of Cochiti, for it has been confirmed by congress in a public act as above shown. As that act has not disclosed what the title is, we must go to the public document containing a copy of that title, in order to see what it is and whence it emanated.

The following is a true copy of the original as properly translated from Spanish into English:

“1689.

“In the town of Our Lady of Guadalupe del Paso de Rio del Norte, on the twenty-fifth day of the month of September, in the year one thousand six hundred and eighty-nine:

“His Excellency Don Domingo Jerouse Petrez de Conzate, governor and captain-general, stated that: Whereas, in overlooking, in the kingdom of New Mexico, the Quereas Indians, and the Apostates, and the Theguas, and those of the ~~Thanas~~ nation, and after having fought with all the other Indians of all the pueblos of Tia, called Bartolome de Ojedas, who distinguished himself the most in the battle, tendering his aid everywhere, and surrendered, being wounded with a bullet and an arrow; who, as aforesaid, I ordered to declare under oath the condition of the pueblo of Cochiti, that apostatized and took part in the wars in the kingdom of New Mexico, as they were very rebellious Indians.

“Questioned, if the pueblo will rebel again at any future time, as it was customary with them, the deponent answered no; that they were very much intimidated; that although they were very arrogant Indians, and it was a very rebellious pueblo, but that with what had happened to

them at Tia, in the year previous, he judged that it was impossible for them to fail in yielding obedience. Questioned, if he had anything further to state in regard to the Indians concerning their rebelling and associating with the apostates, and the deponent answered no; and that it is true that it was a very rebellious pueblo, but with what had happened to them in the previous year, in the pueblo of Tia, he judged that it was impossible for them to fail in yielding obedience.

"Therefore, his Excellency Don Domingo Jerouse Petrez de Conzate, governor and captain-general, designated the boundaries as herein set forth: On the north one league; on the east one league; on the west one league, and on the south to the point of a high hill, near a stream of water running in the direction of the rising sun, and which empties into the Bravo river.

"This we owe for being rebels, and this his confession having been read and explained to him; and the deponent answered that what he had stated was the truth under the oath which he had taken, which he affirmed and ratified several times, and such being the case, he signed, with said governor and captain-general, before me, the present secretary of government and war, to which I certify.

"(Signed) DOMINGO JEROUSE PETREZ DE CONZATE

"(Signed) BARTOLOME DE OJEDAS."

"Before me, DON PEDRO LALLERON GAITANA."

To this letter is appended the following certificate, to wit:

"SANTA FE, NEW MEXICO, May 9, 1856.

"I, David V. Whiting, translator, certify the foregoing to be a correct translation of the original on file in this office.

"(Signed) DAVID V. WHITING,  
"Translator."

This is the title confirmed to the pueblo of Cochiti by congress December 22, 1858. It will be manifest by reference to this title that it did not arise out of any treaty between the United States and this pueblo, nor out of any



important in this case to go into the question of the right of sale existing in the pueblos of their lands under the Spanish government, under the republic of Mexico, and as held by the decisions of the supreme court of the United States in numerous cases, for the question before us is not a question of sale, but of a penalty claimed for settlement on Indian lands.

As far back as 1571, in the reign of Philip II. of Spain, the Indians were allowed to sell their real estate and personal property in the presence of the judge; the former on thirty and the latter on nine days' notice: See *Ordenanzas de Tierras y Aguas*, 110. In 1642, under Phillip IV. of Spain, a total prohibition existed, and the Indians could not sell: See *Id.* 105. In 1781, the Indians were prohibited from selling lands without first obtaining the sanction of the supreme government: *Id.* 106. Over half a century ago, this identical pueblo of Cochiti sold Peña Blanca, the present county seat of Santa Ana county, and the supreme court of Guadalajara, twenty-fourth of October, 1816, annulled the sale of the Cochiti Indians to that place: See *Id.* 109, 110. It is proper for the court to say that the question of the validity of this sale by the Cochiti Indians of the locality where the town of Peña Blanca now is, and has been for over fifty years, was presented to the supreme government of Mexico after the separation from old Spain, and was by it confirmed. This confirmation will be found in the first volume of the Decrees of the Republic of Mexico, but as this supreme court has never been able to find but few Spanish works in the territorial library, and most of them were taken away during the occupancy of Santa Fe by the Texas forces, the court is unable to cite the page of the volume where the confirmation will be found; but the court is bound to notice that Peña Blanca has existed as a town for the last fifty years, and that the settlement is within the limits of the grant to the pueblo of Cochiti. We are also bound to notice that the proviso in the act of congress, passed twenty-second of December, 1858, reserved to the town of Peña Blanca whatever rights they had there. This question was settled by the republic of Mexico nearly half

ferred was to the "pueblo of Cochiti," without alluding in the most distant manner to their being "a tribe of Indians." We are also of opinion that it was the intention and object of this statute to protect lands consecrated to the use of Indian tribes by treaty with the United States, from an unlawful settlement or wrongful settlement, and in the petition claiming the penalty of one thousand dollars, it ought to be stated that the "settlement" which subjected the offender to so heavy a penalty was either unlawful or wrongful. The chief justice who decided this case in the court below, has passed from this life to the life to come, and as a suitable tribute of respect to an honest, good friend and true patriot, we append his opinion in the court below, in a case identical with this, as a part of our opinion in this court, which is as follows:

"In the United States district court, of the first judicial district of the territory of New Mexico.

"THE UNITED STATES	} Debt on Statute.
v. .	
BENIGNO ORTIZ.	

"Opinion. This action is brought as alleged, to recover the statutory penalty, for settlement upon lands belonging to an Indian tribe, in violation of the provisions of section 11 of the act of congress of June 30, 1834, entitled 'An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers,' and commonly called the 'intercourse act,' which section is as follows:

"Section 11. And be it further enacted, that if any person shall make a settlement on any lands, belonging, secured, or granted by treaty with the United States to any Indian tribe, or shall survey, or shall attempt to survey, such lands, or designate any of the boundaries by marking trees or otherwise, such offender shall forfeit and pay the sum of one thousand dollars.'

"The petition filed herein alleges that the defendant, at the time named therein, 'did make a settlement on, and now occupies and is settled on lands of the pueblo tribe of Indians, of the pueblo of Cochiti, said lands, then and there, and at the time of bringing this suit, belonging to the

“The area referred to at that time was, with the exception of Missouri and Louisiana and the territory of Arkansas, almost entirely uninhabited by the white race, and was in the almost exclusive possession and occupancy of the savage Indian tribes of the whole country, many of which were originally there, and others of which had been removed there by the government. Within the region excluded from the description, ‘Indian country,’ to wit, that part of the United States peopled by the whites, and organized as states, civilized Indians were permitted to remain, and were exempt from the operations of this law. That it was the intention of the law-making power to exclude from the operations of the law the Indian tribes within the settled regions of the country is further evidenced by the fact that the states of Missouri and Louisiana and the territory of Arkansas, all lying west of the Mississippi river, were excepted, as well as the states lying east of that river.

“The intention, therefore, was manifestly to legislate with reference to Indian tribes beyond the settlements, or on the frontiers; the savage and uncivilized tribes there found, and not with reference to the civilized Indian tribes to be found within the settlements. This view is strengthened by the declaration of the title of the law, that one of its purposes was ‘to preserve peace on the frontiers.’ With civilized Indians, and those within the settled region of the country, no law was necessary for the preservation of peace. It was only on the frontiers that danger was to be apprehended, and for the protection of which legislation was required. If this position is correct, was the effect of the law of February 27, 1851, with reference to this region, more than to extend the provisions of the law of June 30, 1834, so far as same were applicable to the wild or savage and uncivilized Indian tribes of the territory of New Mexico? There is nothing to justify the conclusion that it was intended to extend the intercourse act over the civilized Indians, those living within the settlements of that territory. As to the applicability of these statutes to the pueblo Indians, more hereafter.

“Now let us inquire as to the character of the pueblo In-

## Opinion of the Court—Watts, C. J.

'that all the inhabitants of new Spain, without distinction whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues,' and that 'the person and property of every citizen will be respected by the government.' The treaty of Cordova, twenty-fourth August, 1821, and the declaration of independence of twenty-eighth September, 1821, reaffirmed these principles, as subsequently did the first Mexican congress, by two decrees, one adopted twenty-fourth of February, 1822, the other ninth of April, 1823. The first, 'the sovereign congress declares the equality of civil rights to all the free inhabitants of the empire, whatever may be their origin in the four quarters of the earth;' the other reaffirms the three guarantees of the plan of Iguala: 1. Independence; 2. The Catholic religion; and 3. Union of all Mexicans, of whatever race. By an act of September 17, 1822, to give effect to the plan of Iguala, it was provided that 'in the registration of citizens, classification of them with regard to their origin shall be omitted,' and that there shall be no distinction of class on the parochial books. Upon the subject of citizenship of Mexico of the Indian races, in the case in the supreme court of *The United States v. Ritchie*, Justice Nelson, who delivered the opinion of the court, says: 'These solemn declarations of the political power of the government had the effect necessarily to invest the Indian with the privileges of citizenship as effectually as had the declaration of independence of the United States of 1776, to invest all those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies,' and refers to 3 Pet. 99, 121.

"That the pueblo Indians were declared at that time 'Mexicans' and citizens; that they were recognized as such no one familiar with the history of the Mexican government can question. That they are still recognized as citizens of the republic of Mexico is evidenced by the fact that the present president of that republic is a full-blooded pueblo Indian. Did they retain the character and description of 'Mexicans' or citizens, at the time of the acquis

tion of New Mexico? It is true that subsequently qualifications were annexed to the exercise of the right of suffrage; the freedom of many of the citizens of the republic of Mexico was abridged and narrowed; but I can not find that by any legislation or judicial decisions the character of 'Mexicans' or citizens was taken away from the pueblo Indians as a class of people.

"The robbery of our territorial library during the late rebellion, of its Spanish and Mexican authorities, renders it difficult to obtain definite information upon the subject; but this we know, that as late as the year 1851, the pueblo Indians of this territory, without question or interruption, not only voted, but held both civil and military offices. In many localities, they, by their numerical strength, controlled the political destinies of the same. This period (1851) was more than two years after the treaty of peace between the United States and Mexico, and the erection of a government under the United States over the people of the territory. In the absence of law or decision on the subject, are we not at liberty to conclude from these facts that the laws, the decision of the courts, and the acquiescence of the people, all recognized the pueblo Indians as citizens, as 'Mexicans'? We do so conclude.

"Now, if the pueblo Indians were 'Mexicans,' or citizens of the republic of Mexico, what effect has the treaty of Guadalupe Hidalgo upon their present status? The federal constitution declares: 'All treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land.' As such, the executive, the legislative, and the judicial branches of the government are all alike bound by all treaties so made. The treaty of Guadalupe Hidalgo, made the second of February, 1848, declares, that Mexicans, 'who shall prefer to remain in the said territories (including New Mexico), may either retain the title and rights of Mexican citizens or acquire those of citizens of the United States; but they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories, after the expiration of that

are most familiar with the pueblo Indians, have recognized their capacity and character by passing a general act of incorporation of their pueblos enabling them to sue and be sued in their corporate name, etc. This is more striking when we consider the fact that none of the other cities, towns, or villages of the territory have been incorporated.

"The federal constitution guarantees to all citizens the same privileges and immunities and protection to life, liberty, and property. These rights are as much guaranteed to pueblo Indians as to any other class of citizens of the United States."

The novelty and magnitude of the question involved, and the large number of persons interested in its solution appearing to require the most careful consideration of this cause, the court has endeavored to perform what it believed to be its duty in the premises.

The demurrer is sustained. The decision of the court below in this case is now affirmed by the supreme court:

The United States,	}	Debt on Statute.
Plaintiff in Error.		
v.		
Jose Juan Lucero.		

This cause having been submitted to the court on argument of counsel and briefs filed herein, and the court being sufficiently advised in the premises, affirm the decision of the district court for the first judicial district, at Santa Fe, territory of New Mexico, and order that the costs herein be taxed against the plaintiff in error.

*R. H. Tompkins*, for the appellants.

*S. B. Elkins*, for the appellee.

By Court, PALEN, C. J.; JOHNSON, J., concurring:

The petition in this cause contains two counts in *assumpsit*, for the carriage, conveyance, and freighting of goods, wares, merchandise, and chattels. The defendants interposed a general demurrer to the petition on which judgment was given for the plaintiff in the district court, to which judgment the defendant excepted. The defendants then pleaded *non assumpsit*, and, especially, that the plaintiff was a common carrier to transport goods from Junction City, Kansas, to Santa Fe, New Mexico, and as such common carrier received the goods in question to transport from Junction City to Santa Fe. The plaintiff failed to deliver the goods in question, goods of the value of two thousand and sixty-nine dollars, being part of the goods for the freight of which this suit was brought, and the defendants claimed to set off the value of the goods not delivered against the plaintiff's claim.

Plaintiff replied to the special plea, that he was not indebted to the defendants as alleged by them. The cause was tried March 2, 1869, and the jury rendered a verdict in favor of the plaintiffs for one thousand two hundred and fifty-one dollars and sixteen cents, and the court rendered judgment for that sum and costs. Motions for a new trial and arrest of judgment were made by the defendants and overruled by the court. The defendants excepted to the decisions of the court overruling said motions.

The facts of the case, as gathered from the record, are as follows: In August, 1867, plaintiff, without any prior engagement for freight, sent his train to Junction City, Kansas, for the purpose of bringing freight to New Mexico, and obtained of Chick & Co., forwarders, of Junction City, the articles for freight specified in the bill of lading produced and proven in this cause, amounting to fourteen thousand eight hundred and fifty-eight pounds, including six barrels of liquor. He also had freight for several other persons in

New Mexico on the trip. The bill of lading, signed plaintiff's wagon-master, specified the articles of the defendants, and that they were to be transported and delivered in good condition (unavoidable accidents excepted), defendants at Santa Fe.

On the journey, the plaintiff's train traveled in company with two other trains. Shortly after passing Fort Dodge on the Arkansas river, the trains were stopped by a lieutenant and fourteen or fifteen soldiers of the United States army, who demanded all the liquor in the trains. This demand was refused, when the liquor, including the six barrels belonging to the defendants, was taken by the soldiers and spilled on the ground. The force used was such that it could not be resisted by the plaintiff's wagon-master.

The reason given by one of the plaintiff's witnesses for the destruction of the liquor was, that the wagon-master of a train traveling in company with the plaintiff's train, had on the day previous, sold liquor to the soldiers and some Indians at Fort Dodge. No liquor was sold from plaintiff's train. The goods, except the six barrels of liquor, were delivered to the defendants in good order. The liquor destroyed was worth two thousand one hundred dollars.

The court, among other instructions, gave the following to the jury: "That officers and soldiers of the United States army, who, without excuse or legal right, unlawfully take by force the property of citizens, and destroy it, are the king's enemies in every sense of the term; and if they believe from the evidence that said officers and soldiers unlawfully and wrongfully took this whisky and destroyed it, then in the opinion of the court it would be such an unavoidable accident as would excuse the freighter from liability to pay for the goods so taken from the train and destroyed by said troops." To which instructions of the court the defendants excepted.

The first question involved in the determination of this case arises upon the demurrer to the plaintiff's petition. On the argument, the petition was alleged to be defective because it does not set forth the *termini* of the route, or



places from which and at which the goods were to be taken and delivered.

If the nature of the plaintiff's claim is such that a recovery would be authorized under the common law counts, this objection fails. The petition contains the *indebitatus assumpsit* and *quantum meruit* counts, and there can be little doubt of the sufficiency of these counts in this suit. The rule is, that in respect to claims for work and labor, or other personal services, however special the argument, if not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was in money, it is not necessary to declare specially, and the common indebtedness count is sufficient: 1 Chit. Pl. 380. It does not appear that the services for which this suit was brought were performed under a special agreement, and there is no pretense that there was an agreement under seal.

The judgment of the district court, in overruling the demurrer, must therefore be sustained.

The remaining questions raised on the record, and to be considered by this court, are:

1. Was the plaintiff a common carrier, and subject to the responsibilities and liabilities of common carriers, in respect to the goods carried for the defendants?

2. If a common carrier and subject to the responsibilities and liabilities of common carriers, as respects these goods, was he relieved of such responsibilities or liabilities by agreement of the parties, or by operation of the laws of the territory, or by the nature of the force by which the liquor was destroyed?

The record shows that the plaintiff, without any prior contract for freight, sent his train to Junction City, to freight such goods as he could procure, and from any person who might employ him; that he did carry freight for such persons as employed him, and no question or doubt as to his liability as a common carrier, in respect to the goods in question, would appear to have arisen on the trial of the cause in the district court.

The instructions given to the jury by the judge (to which

the plaintiff took no exceptions) treat the case through as a suit by a common carrier for his services, and apply to consider the plaintiff subject to the duties, responsibilities, and liabilities of a common carrier, but relieved therefrom by the nature of the force employed in the destruction of the liquor.

The plaintiff having sent his train to Junction City without any special agreement, for freight, to transport forward the goods of such as might employ him, and having undertaken to carry goods for the defendants and others thereby assumed the duties, obligations, and liabilities of a common carrier, in respect to the goods carried by him. Redfield on Carriers, p. 16, secs. 20, 27, 28, 37. Was the plaintiff relieved from these obligations and liabilities by agreement of the parties? To establish such release the plaintiff relies upon the exception of unavoidable accidents contained in the bill of lading. This is the common and usual form of exception in bills of lading signed by common carriers, and has never, so far as I can ascertain, been held to limit or restrict the responsibilities or liabilities which the law imposes upon common carriers.

The exception in the bill of lading does not, in my opinion, relieve the plaintiff from his liability for the loss or destruction of the liquor. Does the law of New Mexico concerning freighters, approved February 1, 1866 (Laws of New Mexico, 1865-6, 226), modify, restrict, or alter the liability of the plaintiff in this suit?

This law is difficult of comprehension and almost impossible of construction. The object of the law appears to have been to relieve freighters of the common law liabilities attaching to common carriers, or rather to enable them to relieve themselves of such liabilities by special agreement, written or verbal. The best consideration I have been able to give this law leads me to the conclusion that it does not affect the liabilities of carriers in cases where no agreement is made in accordance with the provisions of the law. If such agreement was made between the parties in this case, and the law is therefore not applicable to them in this suit,

It remains to consider whether the nature of the force

## Points decided.

by which the liquor was destroyed was such as to relieve the plaintiff of his liabilities as a common carrier. Were this question new and open, I should be inclined to decide that it was, but the rule that a common carrier is liable for all losses that occur while the goods are in his possession, not caused by the act of God or the public enemies of the government, has been too long established, and too generally recognized by the courts of this and other countries, to be annulled or set aside by this court: 2 Kent Com. 597, 609; Starkie Ev. 334-338; Story on Bail. 489-491; Jones on Bail. 104-107; Redfield on Carriers, 19.

If the conclusion thus reached is correct, the instructions of the judge to the jury, that the destruction of the liquor by an officer and soldiers of the government of the United States, relieved the plaintiff of his liability for the same, was erroneous.

The judgment of the district court should be reversed, and a new trial granted, with costs of appeal.

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JUANITA VASQUEZ ET AL. v. LEHMAN SPIEGELBERG.

**DISCRETION, MATTERS OF, NOT REVIEWABLE.**—Matters of pure discretion are not reviewable on appeal.

**DISCRETION OF COURT AS TO REASONS FOR NOT FILING PAPER.**—It is left to the discretion of the court to determine as to the satisfactoriness of the reasons given by a party for not filing the original, or a copy of a paper offered in evidence, as required by law, and its action on that subject is not reviewable on appeal.

**GROUND OF OBJECTION NOT APPEARING ON RECORD.**—If the grounds of an objection to evidence do not appear on the record, on appeal, they can not be considered. *Per* Palen C. J.

**SURPRISE NOT GROUND OF NEW TRIAL, WHEN.**—A party is not entitled to a new trial on the ground of surprise, at the introduction of evidence objected to by him, where he does not, at the time of its admission, ask for a continuance as a condition thereof. *Per* Palen, C. J.

**INSTRUCTION ASSUMING FACTS, ERRONEOUS.**—An instruction to the effect that if a transaction, whose fairness is one of the questions in issue, had been an honest one, the party alleging it could have proved it, but that no such proof was offered, is erroneous, because it trenches upon the province of the jury, if, in fact, there was any evidence tending to prove the honesty of such transaction.

APPEAL from the district court for Santa Fe county. The facts, so far as material to the points decided, appear from the opinions.

*Benedict and Elkins*, for the appellants.

*T. B. Catron*, for the appellee.

By Court, JOHNSON, J.;

This is an action of ejectment tried at February term 1869, of the district court for Santa Fe county, in which judgment was entered in favor of defendant in error for possession of the property in his petition described, and forty dollars damages, etc., and brought to this court on appeal by Meyer Kayser, real defendant in the court below.

I deem it sufficient in this case to consider: 1. Whether the admission in evidence by the court below of the execution in *Spiegelberg v. Ivers*, and to which admission plaintiff in error excepted, is reviewable by this court; and, 2. Whether the instructions by the court below properly submitted to the jury the matter in dispute. Revised Statutes, c. 27, secs. 21 and 22, apply to all actions at law triable in the district courts. The first of these sections requires the party wishing to use on the trial instruments of writing, to file the originals or copies of the same; and the latter (sec. 22) says: "If any papers shall be referred to, and the originals or copies not filed as above required, they shall not be used in the trial, unless the party offering them shall give some satisfactory reason why the same were not filed."

The legislature certainly did not intend that either of the parties should judge of the satisfactoriness of the reason why such paper was not filed, as that would render suit interminable, but left the matter to the discretion of the court trying the cause; and matters of pure discretion are not reviewable on appeal.

In my opinion the question to be determined by the jury was not fully presented by the instructions of the court. Ignoring the evidence of Felipe Delgado as to the payment of money, in his presence, by John Robertson to Ivers for

the property in question, they direct the attention of the jury to the fact that a subscribing witness to the deed of Ivers to Robertson did not see Robertson, at the time of signing the deed, pay any money to Ivers, and connecting this fact or "circumstance," with the assumption of the court that, long after the execution of said deed by Ivers to Robertson, Ivers still continued to occupy, use, and manage the property as his own. These facts, if satisfactorily proved, are strong evidence that the sale to Robertson by Ivers was fraudulent.

Then, again, the instructions presented this assumption to the jury: "Had the transaction been an honest and fair transaction, Robertson could have proved if the transaction was an honest one, by some person, that in fact the money was paid by him to Ivers, and that he was in fact in possession of the property claimed as his, but no such proof is produced," which is an encroachment upon the province of the jury to judge the fact; and the tendency of such instructions, as a whole, was suggestive of the verdict expected to be found by the jury.

The judgment of the court below is reversed, at appellee's cost, and new trial granted.

**PALEN, C. J., concurring:**

The admission of the execution against Ivers was a question addressed to and within the discretion of the district court, and this court can not review the exercise of such discretion. The grounds of the objection to the introduction of the sheriff's deed in evidence, do not appear on the record. The objection can not therefore be considered by this court; for aught that appears, if the grounds of the objection have been stated, it might have been obviated on the trial. The defendants were not entitled to a new trial, on the ground of surprise to the defendants. They should have asked for a continuance of the cause as a condition of such admission. Having failed to apply for a continuance, when the execution was offered in evidence and admitted by the court, it was too late to allege surprise as a ground for a new trial. The question whether either or both the deeds,

under which the defendants claim title to the premises, were fraudulent, was a proper one for the consideration and determination of the jury, and if fairly submitted to the jury by the district court should not disturb their verdict.

It remains to consider, whether the instructions of the court fairly submitted the question of fraud to the jury, or whether they were in any respect calculated to confuse or mislead the jury. A comparison of the instructions of the court with the evidence in the cause shows that the jury may have been misled by the instructions, on several points, but it is unnecessary to consider more than one which could hardly have failed to mislead the jury. The instructions (folio 52 of record) state that had the transaction (between Robinson and Ivers) been an honest and fair one, Robinson could have proved if the transaction was an honest one, by some person; that in fact the money was paid by him to Ivers, and that he was, in fact, in possession of the property, and claimed it as his; but no such proof is produced. This instruction appears to assume that the transaction was fraudulent because no consideration money was paid.

It is true that Knapp, one of the subscribing witnesses to the deed, testified that he saw no money or note paid to Ivers (folio 47); but the instructions entirely ignore the testimony of Felipe Delgado (folios 48, 49), who swore that some eight years ago, he thinks in 1861 or 1862, Robinson had some money on deposit at his (Delgado's) store; that about that time, on a certain day, Robinson came to his store with Ivers, and asked for the money he had on deposit there, stating that he had bought property from Ivers, mentioning the property in question; that he drew the money which he had on deposit, which was over three hundred dollars (\$300), and with other money which he had, paid the same to Ivers in his (Delgado's) presence.

This evidence must have been overlooked or forgotten by the district judge when he instructed the jury that no proof was produced that money was paid by Robinson to Ivers on account of the purchase of the premises in question, as there was sufficient proof, if credited by the jury,

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Opinion of the Court—Johnson, J.

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to warrant them in finding that a part, at least, if not the whole of the consideration or purchase money of the premises in question, was paid by Robinson to Ivers.

This plain and palpable error in the instructions given by the district judge to the jury, constrains this court to reverse the judgment of the court below, and grant a new trial.

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IN THE MATTER OF WILLIAM T. STRACHAN, BANKRUPT.

**DISCHARGE OF BANKRUPT—ASSIGNEE'S NEGLIGENCE NOT GROUND FOR WITHHOLDING.**—The neglect of an assignee in bankruptcy to publish notice of his appointment as required by section 14 of the bankrupt act, is no ground for withholding the discharge of the bankrupt, the assignee not being under his control.

PETITION for a discharge in bankruptcy. The facts appear sufficiently from the opinion.

*Tompkins*, for the petitioner.

*Hilgert*, *contra*.

By Court, JOHNSON, J., PALEN, C. J., concurring:

Franz and Charles Hunning are the only creditors who appear and oppose discharge of petitioner, specifying that their opposition is on account of: 1. That notice of appointment of assignee was not published; 2. That the petitioner fraudulently and willfully preferred one of his creditors.

The first specification does not show any valid cause for withholding petitioner's discharge. Section 14 of the bankrupt act, requires the assignee to publish notice of his appointment, but the act does not make such publication one of the conditions on which the discharge shall be granted. The act requires certain things to be done by the bankrupt; petitioning to be declared a bankrupt, making a schedule of what he owes and what is owing to him, and of all his personal and real estate; and thereupon his control of his assets ceases and becomes vested by law in the register in bankruptcy, and they are by him transferred to





that the order made by the chief justice at chambers was not a final one. The case before us may be stated in a few words. It appears from the pleadings that the deceased was a joint partner of the defendants in a mercantile firm, under the name and style of W. H. Moore & Co., and that the complainant in this cause was the wife of the said Nathan Webb, deceased. It also appears that she became the administratrix of the estate of her deceased husband, Webb; and it further appears that she is the sole heir at law of the personal estate of her deceased husband. As administratrix of her deceased husband, and heir at law, she filed her bill in chancery, August 31, 1868, against the defendants, the surviving partners of said Webb, for a settlement of the estate, and on the twenty-seventh of September, 1869, filed her petition and affidavit in this cause, praying the court to make an order on the defendants for the payment to her of the sum of one thousand dollars, out of the funds belonging to said partnership, alleging the same to be necessary for actual support. The court below at chambers, on the pleadings and affidavits presented, in the exercise of its discretionary power, made an order on the defendants requiring them "to pay to the complainant or to her order, or to her solicitor, Stephen B. Elkins, or to his order, the sum of one thousand dollars, said sum of one thousand dollars to be credited to said defendants on the final accounting of this cause."

On the twelfth of October, 1869, the defendants filed a motion asking the court at chambers to set aside and vacate the order aforesaid, which motion by the court at chambers was overruled, and they now appeal to this court. But one question presents itself in the consideration of this motion, and that is, was said order a final decision, judgment, or decree from which an appeal could be taken? Before proceeding to a full consideration of this question, it may be necessary here to state, that any order or decree made during the progress of a cause, which does not wholly dispose of the merits in the case, is an interlocutory order or decree only, and orders of this kind are frequently and necessarily made in the progress of the cause. The causes for which

**AARON ZECKENDORF AND LOUIS ZECKENDORF v.  
JOHN S. HUTCHISON.**

**SALE OF MINING CLAIM BEFORE PERFECTING TITLE.**—In case of a sale of a mining claim within twelve months after its location and before perfecting title thereto by sinking a shaft therein, as required by section 4 of the Revised Statutes, the purchaser acquires only a contingent right, and his claim can only be made valid by complying with the requirements of said section within a year from the original location.

**COMPLIANCE WITH REQUIREMENT TO COMPLETE CLAIM NOT PRESUMED.**—In a bill filed by a purchaser of a mining claim more than a year after the location to restrain other persons from taking mineral therefrom, compliance with the steps required to perfect title to such claim must be alleged, and will not be presumed, being in the nature of conditions precedent.

**SINKING SHAFT ON ONE OF SEVERAL MINING CLAIMS, NOT SUFFICIENT.**—Where a number of persons locate one thousand five hundred feet of mineral land in a body, but not as a company, but divide the same into various claims which they hold in severalty, the sinking of a single shaft on one of those claims is not sufficient to perfect title to the whole.

**PROBATE JUDGE'S CERTIFICATE OF LOCATION OF MINING CLAIM.**—A probate judge's certificate, under the statute, as to the location of a mining claim, and that the requirements of the law have been complied with, is not conclusive evidence of such compliance, as he acts in such a case in a ministerial capacity.

**ACT OF MINISTERIAL OFFICER NOT CONCLUSIVE EVIDENCE.**—Where one acts in a ministerial capacity under a positive statute, his act is not conclusive as to any matter essential to the performance of any statutory provision.

**APPEAL** from the district court for Santa Fe county. The opinion states the case.

*Charles P. O'lever*, for the appellants.

*R. H. Tompkins*, for the appellee.

By Court, **WATERS, J.:**

The complainants in this case filed their bill in chancery in the court below, setting forth that on the fourteenth of August, 1867, the defendant, John S. Hutchison, discovered a certain vein and deposit of gold, mixed with other metals and minerals, on the south slope of the San Lazaro mountains, in the county of Santa Fe. In exhibit A, which is attached and made a part of the bill, it appears that John S. Hutchison, Michael Ward, Paulino Casero,

The questions of the representations made by defendant to complainants of the condition of the claim in question, and the entering on the claim by defendant, have nothing to do with the question before us, and are not considered.

Entertaining these views, our conclusion is that the bill is defective in not stating that all the requirements of the law had been complied with, either on the part of Bernardo Fraise or complainants, and the demurrer was properly sustained, and that the judgment of the court below should be affirmed.

The other judges concur.

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**JUANA TAFOYA v. MANUEL GARCIA ET AL.**

PREVIOUS ACTS NOT CONTAINED IN REVISED STATUTES, REPEALED.—All laws enacted prior to the session of the territorial legislature of 1864-65 which are not contained in the revised statutes adopted at that session, were impliedly repealed by such omission. Hence, the act of January 25, 1860, relating to trials of the right of property, is not now in force. *Contra*, Waters, J., dissenting.

APPEAL from the district court for Bernalillo county. The case is stated in the opinions of the judges.

*R. H. Tompkins*, for the appellant.

*Joab Houghton*, for the appellees.

By Court, JOHNSON, J.:

At the October term, 1868, of the district court for Bernalillo county, judgment was given in an action in favor of Henry Springer against Jose Antonio Tafoya and Cresencio Jaramillo, and afterward upon that judgment execution was issued, by virtue of which Manuel Garcia, then sheriff of that county, levied upon certain property as property of Jose Antonio Tafoya, one of the defendants to said judgment. On the nineteenth of March, 1869, Juana Tafoya commenced proceedings under an act of the legislature of the session of 1859-60, to claim as hers the property referred to. Subsequently, at a special term of the district

act proceeds with the style "be it enacted," etc. (appendix to Rev. Stats. and Laws, 742-744, section 1), "that the revision of the statutes commencing with article 1, entitled '*Aequias*,' and ending with article 67, entitled '*Woods and Prairies*,' with all and each of the articles and chapters inclusive, be, and the same are hereby declared to be the revised statutes and laws of the territory of New Mexico, and as such shall have full force and effect in all courts thereof."

Thus the legislature, six years after the enactment of the statutes authorizing the revision of our statute laws, received the report of the commission in the premises, and by adopting the revision of the commissioners made their work its own; and declared, with all the necessary formality and solemnity, that this "revision of the statutes," described in language so certain as to place their identity beyond question, "shall be the revised statutes and laws, and as such shall have full force and effect in all courts." By the term revised statutes is to be understood not merely the compilation or collecting together of existing statutes, but also the amendment or expurgation of such provisions as the revisers might deem unnecessary. The commissioners may have thought proper, in performing the duties required of them, to amend the statutes by omitting (and they were undoubtedly authorized by law to do so) entire statutes in force or parts of statutes prior to the session of the legislature at which these revised statutes were adopted, and when such acts are not found included among those which the act of January 24, 1865, declares "shall have full force and effect in all courts," as the Revised Statutes and Laws of the Territory of New Mexico. The presumption is warrantable that it was the intention that they should thereafter have "no force and effect." Such intention of the legislature is the more forcibly to be inferred from the use of the word "full" before the words "force and effect." As though not satisfied that the words "force and effect" would sufficiently express its intention, the legislature qualified them with the word "full," meaning complete, no room for anything else, exclusive.

Such intention is further to be inferred from the say in the fourth section of the act, as to laws passed during the session of 1864-65, "that all laws of a general nature which shall be passed and approved during the present session of this assembly shall be included in the said revision as an appendix, and shall have force and effect as a part of the said revised laws and statutes."

"Where the intent of the statute is plain, nothing is left to construction; where the intention is to be ascertained, everything from which aid can be derived is to be regarded, and the title of an act claims a degree of notice, and must have its due share of consideration:" *United States v. Fisher et al.*, 2 Cranch, 358, 386.

"The spirit, as well as the letter of the statute, must be respected; and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in aid that intent:" *Durousseau v. The United States*, 6 Cranch, 307, 314.

"In the construction of the statutory or local laws of a state, it is frequently necessary to recur to the history and situation of the country, to ascertain the reason, as well as the meaning, of their provisions, to enable a court to apply the different rules for construing statutes:" *Preston v. Brown*, 1 Wheat. 115, 121.

It is a fact well known, not only to the bench, bar, and magistracy, but to the people of this territory, that at the time of the passage of the act adopting the Revised Statutes, most of the pamphlet laws of previous sessions of the legislature were, and had been for several years, out of print, and out of the possession of most of the officers whose duty it is to execute the laws. A fact so notorious could not but have been within the knowledge of the legislature of 1858 which authorized the revision, as well as that of 1864 which adopted the revision, and declared it to be "the revised statutes and laws of the territory of New Mexico" and required them, "as such," to "have full force and effect in all courts thereof." Hence, the inference is irresistible, that it was the intention of the act of January

1865, to place before the people in the "revised statutes and laws," all the acts of a public nature, of previous sessions, which the legislature deemed proper to be continued in force. This inference is strongly supported by the fact that the territory had no funds, from the national treasury or any other source, available for reprinting the statutes of sessions previous to that of 1864-65, otherwise than by a revision or compilation.

Now, in this view of the case, it seems that the decision of the court below should be affirmed. A reversal would have the effect of requiring judges, magistrates, other officers, and the masses of the people to act under statutes of the requirements of which they could inform themselves only by procuring, at vast individual expense, from the secretary of the territory, manuscript copies of most, if not all, of the acts of the legislature anterior to the session of 1864-65; and by careful study of such voluminous masses, ascertain what provisions of law have been repealed, and what remain in force; each judge, magistrate, officer, and individual becoming, as it were, a reviser of the laws.

Under such conditions, litigation would be costly and interminable; each stage of a cause, whether in a court of record or not of record, would be attended with difficulty of ruling and decision, and there would result doubt and obscurity as to the law, where the security of society and its individual members requires clearness and certainty. Suppose, for instance, in the discussion of a question arising in the trial of a cause, it be asserted on either side, that there is an unrepealed statutory provision of the Kearny code, or some act existing previous to the adoption of our present Revised Statutes, and omitted from them, applicable to the question. The court or magistrate before whom the cause is trying, if a copy of a pamphlet containing such omitted provisions be presented, is unable to determine whether such provisions may not have been repealed by some other statute, or section or clause of a statute likewise omitted from the Revised Statutes, and not available for reference; a decision sustaining or overruling would make ground of appeal, and ultimately resort to this court might

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Opinion of Waters, J., dissenting.

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be made in almost every cause, to ascertain, not what is law but what is not law.

The affirmation of the judgment of the court below would not leave the appellant or other parties without legal remedy in this or similar cases, nor effect statutes of a private nature, or vested rights under any law of this territory, while a reversal would work great mischief.

WATERS, J., dissenting:

I am compelled to dissent from the opinion of the majority of the court, for the following reasons: This is an action at law, brought by the plaintiff against the defendant for the recovery of certain personal property, under an act of the territorial legislature entitled, "An act providing for the trial of the right of property in certain causes and for other purposes; approved January 26, 1860." The court below refused to have issue joined for the trial of the right of the property claimed, and dismissed the case, whereupon the plaintiff appeals to this court. The court below took the position that the law above referred to was repealed by the adoption of the Revised Statutes.

The only question that presents itself, and which should be considered in this cause, is, whether an act entitled "An act relative to the revision of the statutes," approved January 24, 1865 (and which will be found on page 274 of the Revised Statutes), repealed the act first referred to. In order to arrive at a clear understanding of this question it is necessary to get as near as we can the intention of the legislature, not only at the time the revision was authorized, but also at the time the revision was adopted. The great object in the construction of all statutes is to ascertain the intention of the enacting power, and the rules to be observed for this purpose are simple and too well known to need repetition. "This intention having been ascertained, the court which refuses to carry it into effect must be regardless of its duty. It is our duty to declare, not to make the law." To do this correctly the ordinary rules of construction must be adopted, and the meaning of words

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sentences, and phrases, must not be distorted to sustain an opinion.

In January, 1854, the legislature passed a law, making it the duty of the governor "to appoint a commission of two or more competent persons to collect, revise, and put in systematic order, the laws then in force in this territory, and it was made the duty of said commission so appointed to revise carefully the code and the statutes, etc., and to present and return to the next or some other legislature, and to his excellency the governor, a list of all the laws in force, and also of all those repealed," etc. What the intention of the legislature creating this revising commission was, is clearly expressed in the language just quoted. It was undoubtedly their intention to have a complete and systematic revision of all the laws then in force contained in one volume. This, indeed, is the great object of all revisions.

Six years after the passage of the act creating the commission, a report appears to have been made by said commissioners to the legislature then in session, which was in the year 1865. The legislature, by an act of that session, and heretofore referred to, enacted, "that the revision of the statutes, commencing with article 1, entitled '*Acquitas*,' and ending with article 67, entitled '*Woods and Prairies*,' with all and each of the articles and chapters inclusive, be, and the same are hereby declared to be the revised statutes and laws of the territory of New Mexico, and as such shall have full force and effect in all courts thereof."

Having ascertained the intention, as I think, of the legislature authorizing the revising commission, I will now inquire into the intention of the legislature that adopted this revision of the statute. When this legislature declared the revision to be the Revised Statutes of New Mexico, they did not thereby declare that all laws not found in the revision should be repealed. If such was their intention, they would have said so in express terms, or by the use of words which are equivalent to an express repeal.

There is not to be found in the act adopting the revision any



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provision whereby laws not contained in the revision should be repealed. The words in the section of the act above referred to, "be and the same are hereby declared to be the revised statutes and laws of the territory of New Mexico contain the only language in that law which can in any way be construed as a repeal of all laws not embraced in the revision, and it is very clear to my mind that the language will not authorize the repeal of the law in question by any of the rules known for the construction of statutes.

From an examination of the laws adopting the revised statutes of several of the states of this union, I find in some of them language like this: "That all acts and parts of acts on the subjects whereof are revised or consolidated, and in so far as they are consistent with the laws contained in the revision, are declared to be repealed." In others, again, I find the subject left entirely open, as it is in the law under consideration, and to me it appears very wise, indeed, that the subject of the repeal of all laws not found in a revision of the statutes should be left open. For it is a well known fact in the history of legislation, and one that can not well be denied, that in the hurry of legislation, and in the great anxiety on the part of the revisers to have their work adopted before the adjournment of the legislature, many things are done which should be left undone, and that which should be done is frequently undone. And also for the further reason that those who are charged with the work of revising make as is frequently the case, omit through neglect or otherwise some of the laws intended to be put in the revision which appears to be the case with the Revised Statutes of this territory. And it is safe to presume that the legislature took into consideration this fact, and in order to protect the rights of the people and the interests of the territory, refused to enact that all laws not contained in the revision should be repealed. I think that I am warranted in the opinion that this was the intention of the legislature that adopted the revision.

The law of January 26, 1860, then, if repealed at all, is done by implication, and the rule is well settled, and the result of

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long course of decisions, that repeals by implication are not favored by the courts. That there is no direct repeal is palpably evident, and it can only be impliedly repealed on account of inconsistency or repugnancy. It is not claimed that this law is inconsistent or repugnant to any of the laws in the revision, and it would hardly appear necessary to examine this point, were it not for the fact that I hold that if repealed at all, it must be on account of inconsistency and repugnancy.

If, however, there is in this law any inconsistency or repugnancy with any of the laws contained in the revision, it would then come under the rule of being impliedly repealed, on account of such inconsistency and repugnancy, and should be so declared. An examination of the statutes, however, so far as I have the time to examine, develops nothing that goes to establish the fact that this law is in any way inconsistent or repugnant with any of the laws in the revision. "When the provisions of two statutes are so far inconsistent with each other that both can not be enforced, the latter must prevail; but if by any fair course of reasoning the two can be reconciled, both shall stand."

When the legislature intend to repeal a law, we may, as a general rule, expect them to do it in express terms, or by the use of words which are equivalent to an express repeal. No court will, if it can be consistently avoided, determine that a law is repealed by implication: *Heirs of Ludlow v. Johnson et al.*, 3 Ohio 553 [S. C., 17 Am. Dec. 609]; *Miss. R. R. Co. v. Macon Co. Ct.*, 41 Mo. 453; *Buckingham et al. v. The Steubenville and Indiana R. R. Co.*, 10 Ohio St. 27; *Cass v. Dillon*, 2 Id. 611; Bac. Abr., tit. Statutes. It is no reason that the law should be declared repealed because it is supposed to be out of print. The supreme court is not responsible for this, and should not be called upon to declare a law repealed because it is out of print. That a reversal of the judgment of the court below will work an inconvenience on account of such law being out of print is a question I hold we have nothing to do with. That is for the law-making power of the territory to consider, and if they assume the power and responsibility of keeping laws

## Points decided.

out of print, and thus depriving the people of what properly belongs to them, it is no ground for calling upon this court to declare such laws repealed.

On the whole, my conclusions are, that the law of January 26, 1860, is not repealed by the adoption of the Revised Statutes; and that there is no inconsistency or repugnance in this law with any of the laws in the revision, which by the well-known rules of construction would authorize a repeal of the same by implication; and that the court below erred in refusing to have issue joined for the trial of the rights of the property claimed, and in dismissing the case. The judgment of the court below should therefore be reversed, and the cause remanded for trial.

**GERTRUDE E. HUNTINGTON LATE GERTRUDE E. WEBB  
ADMINISTRATRIX OF THE ESTATE OF N. WEBB, DECEASED,  
AND DAVID L. HUNTINGTON v. WILLIAM H. MOORE AND WILLIAM C. MITCHELL.**

**MATTERS OF DEFENSE NOT RESPONSIVE TO BILL, HOW SET UP.**—Matters of defense in a suit not strictly responsive to the bill must be set up by cross-bill, and not in the answer.

**MOTION TO AMEND PROPERLY REFUSED, WHEN.**—The overruling of a motion of the defendants to amend their answer to a bill so as to add, as a party to the suit, the complainant's husband, she having intermarried with him after the commencement of the suit, is not erroneous, when such party has already been added on the motion of the complainant.

**ANCILLARY LETTERS OF ADMINISTRATION NOT REVOKED, HOW.**—When letters of administration granted in another state, where the intestate was domiciled, are revoked, such revocation does not affect ancillary letters which have been, in the mean time, taken out in this territory by the same person, nor is a suit previously brought by such administrator in this territory on behalf of the estate abated by such revocation.

**WAIVER OF OBJECTION AS TO MARRIAGE OF FEMALE PLAINTIFF.**—When a female plaintiff in a suit in equity marries pending the suit, and the defendant afterwards moves to amend so as to make the husband a party, he thereby waives any objection that the suit ought to have been dismissed because of such marriage, although the motion is overruled because the husband has already been made a party on the complainant's motion.

**MARRIAGE OF ADMINISTRATRIX, EFFECT OF.**—The marriage of an administratrix, plaintiff in an equity suit, it seems, merely suspends the suit until the husband is made a party, while at law it puts an end to the action.

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Opinion of the Court—Waters, J.

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**SUFFICIENCY OF ADMINISTRATOR'S BOND DOES NOT AFFECT SUIT.**—The question as to whether or not an administrator has given a sufficient bond is not one with which a court of equity, in which such administrator has sued, has anything to do.

**FAILURE TO OBJECT TO DRAFT REPORT OF MASTER IN CHANCERY.**—Where a party to a suit in chancery, which has been referred to a master, refuses to comply with the master's summons to appear and file objections to his draft report, it is the settled practice that no objection made by such party to the report after it is filed will be heard.

**RULES OF UNITED STATES SUPREME COURT NOT APPLIED TO TERRITORIAL COURT.**—None of the rules adopted by the United States supreme court except the ninety-second, apply to territorial courts. Therefore, rule 88, giving thirty days to except to a master's report, has no application to those courts.

**CONSOLIDATION OF CROSS-SUIT AND ORIGINAL SUIT.**—There is no such thing in equity practice as consolidating the issue, raised by a cross-bill and answer with those raised by the original bill and answer, although the bill and cross-bill may be heard together.

**ORDER CLOSING PROOFS.**—The supreme court will not disturb a decree in the court below, because that court made an order to close the proofs five months after the issues were made up, where no abuse of discretion appears.

**DEPOSITION NOT SUPPRESSED WHICH CONTAINS SOME LEGAL EVIDENCE.**—It is not error to refuse to suppress a deposition as a whole, when a part of the evidence contained in it is legal.

**REFUSAL TO SUBMIT QUESTION TO JURY IN EQUITY SUIT.**—It is within the discretion of a court of equity to submit a particular question of fact to a jury, but its refusal to do so is not error, particularly after a reference of the whole case to a master, and a finding by him on that question as necessarily involved in his report.

**MATTER NOT RESPONSIVE TO BILL MUST BE PROVED.**—The rule in equity is that matter in an answer not responsive to the bill must be proven, even though the answer is sworn to.

**MASTER'S FINDINGS OF FACT NOT REVIEWED.**—The supreme court on appeal from a decree, will not review findings of fact in the master's report in the court below.

**APPEAL from the district court of the first judicial district.**  
The opinion states the case.

*Tompkins and Noble*, for the defendants and appellants.

*Elkins and Wheaton*, for the plaintiffs and appellees.

By Court, WATERS, J.:

This is a proceeding in chancery. The complainant, Gertrude E. Huntington (late Webb), filed her bill in chancery

on the twenty-second day of January, 1869, in the clerk's office of the first judicial district of this territory, against the defendants, and on the same day and year filed a supplemental bill. The object of the bill is to obtain a settlement of the interest of N. Webb, deceased, in the firm of Wm. H. Moore & Co., and N. Webb & Co., of which firms N. Webb is stated to have been a joint and equal partner with defendants, and doing business under the name and style of Wm. H. Moore & Co., at Fort Union, N. M., and under the name and style of N. Webb & Co., in Southern New Mexico, and at Franklin, Texas. The bill alleges that complainant, Gertrude E. Huntington (late Webb), was the wife of N. Webb, deceased, at the time of his death, and that he died at Franklin, El Paso county, Texas, October 15, 1866, and that she took out letters of administration of his estate before the probate court of said county of El Paso; and that afterwards ancillary letters of administration were granted her by the probate court of Mora county, N. M.; and that the defendants and the deceased entered into a copartnership some time in the year 1859, for the purpose of carrying on and transacting the business of post sutlers at Fort Union, N. M., and also general dealers in merchandise, and contractors, etc., for supplying troops stationed at the various military posts in the territory of New Mexico; and that said Webb put into said firm the sum of fifteen thousand dollars.

Complainant then alleges that she believes the terms of said copartnership were reduced to writing, and that, if not lost or destroyed, it is in the possession and under the control of the defendants, as it never has been in the possession of complainant; and that early in 1863 said copartnership was extended to Las Cruces, N. M., and El Paso county, Texas, under the style and name of N. Webb & Co., and that in both of these firms said Webb was an equal partner in the profits and losses. The bill charges that both of these firms were making large sums of money annually clear of expenses. It also sets forth that complainant made repeated efforts to obtain a settlement of the interest of said Webb in the above-named firms, subsequent to his death and be-

fore the filing of her bill, but without avail. The bill also sets forth that complainant, Gertrude E. Huntington (late Webb), is the sole heir at law of said Webb, deceased. The bill is very lengthy, and contains many statements concerning the property of the firms, and the amounts of goods and money on hand at the time of the death of said Webb.

To this bill defendants filed separate answers, although in substance the same. The answers deny that defendants entered into a copartnership with said Webb, in 1859, for the purposes specified in the bill; but sets forth the fact to be, that the defendants entered into a copartnership with said Webb for the purpose of carrying on a mercantile business as post sutlers, at Fort Union, New Mexico, said Webb to receive an interest of one eighth of the profits of said business for his business talent and for keeping the books and acting as cashier, and that said copartnership did not commence until May, 1861. The answer then denies that said Webb, at the time stated in said bill, paid into said copartnership the sum of fifteen thousand dollars, or any other sum whatever; and denies that said Webb was an equal partner in the business and to share equally with the defendants in the business; and denies that the terms of the copartnership were reduced to writing. The answer admits that from the commencement of the business in southern New Mexico and Franklin, Texas, as stated in the bill, under the name and style of N. Webb & Co., the defendants and said Webb were to share equally in the profits and losses of said business; but that in the business carried on at Fort Union, New Mexico, under the name of W. H. Moore & Co., said Webb was only to receive one eighth interest. The answer is very long, and contains very many statements that are immaterial in the consideration of this cause.

To the answers of defendants, complainants filed replications.

The bill and exhibits, together with defendant's answers and exhibits, and everything pertaining to the cause, was by a decree of the court below, on application of complain-

sented in the bill of errors. Before considering them, however, we desire to say now, that in the consideration of the cause before us, we will treat, as surplusage, everything in the bill that pertains to matters outside of what we conceive to be the real object of the bill—a settlement of the interest of N. Webb, deceased, in the firms of W. H. Moore & Co. and N. Webb & Co. Consequently all that portion of the bill pertaining to the alleged heirship of Gertrude E. Huntington in and to the personal estate of N. Webb, deceased, will not be considered.

That is a question which more properly belongs to another proceeding after the interest of N. Webb, deceased, shall have been ascertained. It has nothing to do with the real object of the bill, and should not have been coupled with it. In like manner whatever may appear in the answers of defendants as responsive to that part of complainant's bill will be treated in the same way, and likewise the issues raised by the replication to said answers, which are altogether outside of the object of the bill. The chancery practice is that matters of defense not strictly responsive to the bill must be set up by a cross-bill, and not in the answers to the bill of complaint. With these observations we will now proceed to consider the alleged errors, except such errors as may be based on the heirship of complainant, and which we have regarded as surplusage.

The fifth cause of error assigned is, that "the court below erred in overruling the motion of defendants to amend their answer." By an examination of the record it will be found that the complainant filed a motion suggesting the marriage of complainant with David L. Huntington, and asking that the said David L. Huntington be made a party to the bill, and that the bill and proceedings in the cause proceed in the name of Gertrude E. Huntington, administratrix of the estate of Webb, deceased, and David L. Huntington, which motion was sustained. The motion of defendants referred to in this assignment of error was made for the same purpose, and subsequent to the motion made by complainant for that purpose. The motion was therefore properly overruled, as the object sought to be accom-

been error had the bill been dismissed under such a state of facts.

The eighth error assigned is, that "the court below refused to dismiss the bill, for the reason that the records show that the suit had abated by the marriage of Gertrude E. Webb with David L. Huntington, and no new letters of administration had been taken out in the name of Gertrude E. Huntington and David L. Huntington, her husband, nor any new bond given as such administratrix." As before stated, complainant suggested her intermarriage with David L. Huntington, and asked that he be made a party to the bill, and that the proceedings in the cause be carried on in the name of Gertrude E. Huntington, administratrix, etc., and David L. Huntington. Defendants subsequently moved the court for the same purpose, which motion was overruled, the overruling of which was assigned as error, and has been already considered. The defendants by this action, as appears of record, waived whatever error there might be, by asking that David L. Huntington, her husband, be made a party to the proceedings, thus acknowledging the right of the cause to proceed as above referred to. If defendants seek to take advantage of this, it should have been done at the time the marriage was suggested, and in the proper manner, and then this court could examine into the error, if error was committed. Outside of this, however, it appears to be pretty well settled in equity practice, that when a *feme sole* is administratrix, and marries during the pendency of the suit, the suit is only suspended in its progress, until such time as the husband is made a party thereto, when the cause proceeds.

The rule is otherwise at law. An abatement in the sense of the common law is an entire overthrow or destruction of the suit so that it is ended. In the case before us the record shows that steps were taken to have the bill amended on the intermarriage of Gertrude E. Webb with David L. Huntington. That a new bond should have been given by Gertrude E. Huntington, administratrix, etc., and her husband, David L. Huntington, is a question we hold this court has nothing to do with. The matter of the bond belongs



and attempted to file exceptions to the report as filed by the master in the clerk's office, which the court below refused to have done, and we think properly. The practice is well settled that if no objections are filed to the master's draft report, no exceptions to the report will be entertained by the court.

The authorities on this point are numerous, and the practice so well settled that we deem it unnecessary to make any reference to them. And counsel for the defendants in the court below appear to have arrived at the conclusion, and present to the court the petition of defendants, asking the court to grant them leave to now file objections to the master's report, and in their petition state that if this permission is granted them, "they will at once, and within such time as the court or master in chancery may indicate, file their objections to the report of the master in chancery, for his action and the action of the court thereon."

This petition was supported by the affidavits of the counsel for the defendants, showing what the practice in chancery had been in this territory. On this petition and affidavits of counsel, the court below granted this request, and ordered that the report be referred back to the master, with liberty to the defendants to file their objections to the same, and authority to the master to consider the same, and with the consent of counsel of defendants, further ordered, "that this cause is set down for hearing on Monday next, on the pleadings, proofs, the master's report, and the exceptions thereto, if any there be."

In pursuance of this order, the master read the report. Counsel for defendants appeared before him and filed their objections to the same, and the record shows that some of the objections were sustained by the master, and others overruled. The master, after having passed upon the objections, filed his then draft report in the office of the court below. Immediately on the filing of this report, counsel for defendants moved the court for thirty days in which to file their exceptions to the master's report. After defendant's agreeing to have the cause tried on a day certain, it was asking the court indirectly to defeat, vacate, and

full examination of this alleged error, we are unable to see that there was error committed by the court below, in overruling the motion asking for thirty days, or that any injustice has been done the defendants by the overruling of said motion. The tenth and thirty-fourth causes of error assigned relate to the same subject and will be considered together. They are to the effect, that the court below erred in overruling the motion to consolidate with this suit the cross-bill of defendants against complainants and one Joab Houghton, and in not disposing at the same time of the issues raised upon the cross-bill and answers thereto.

If it is not understood, it may as well now be, that there is no such a thing known in chancery practice as a consolidation of the issues raised by a cross-bill and answers with the original bill and answer. To permit such a proceeding would be contrary to every precedent in chancery practice, and an attempt to defeat the very ends for which courts of chancery were instituted, by a confusion of issues, parties, and pleadings.

The cross-bill in the case before us brings into this suit a new party and new issues, and in fact is an original bill. In such a case, what is to be done? Counsel for defendants say, Consolidate these causes, regardless of consequences. This we are not inclined to do, but will allow the cross-bill, if cross-bill it can be called, and the issues thereon raised by the answer, to be heard in accordance with the well-settled rules of chancery practice. Either party might have moved the court below so that the original and cross-bill, if cross-bill it could be, might have come on for hearing at the same time. This is the usual practice. In the case before us, however, no such motion appears to have been made, and the parties elected to proceed with the hearing of the original bill. In refusing, then, to consolidate the cross-bill and answer with the original bill and answer, we can see no error or injustice done to either party.

The twelfth cause of error assigned is, that "the court below erred in granting the motion of complainant for an order closing the proofs of this cause." By an examination

wholly within the discretion of the court, and if the court had any doubts as to the propriety of submitting such a question, and from its own knowledge of the facts and circumstances of the whole case, that it was not proper that it should be submitted to a jury, we can see no good reason for interfering with that discretion. The authority of the master, under the decree of reference, to ascertain what interest N. Webb, deceased, had in the firm of W. H. Moore & Co., was incidental to a full discharge of his duty, and was absolutely necessary for the execution of the decree of reference and the pleadings in the case. The master having ascertained what that interest was, there could be no necessity for submitting this question again to the jury. This motion, like the one above referred to, if it meant anything, meant delay, and the court below, in the exercise of its discretionary powers, properly overruled the same.

The remaining errors assigned, except errors two, three, and thirty-six, relate principally to the confirmation of the master's report; hence will be considered together. They all resolve themselves into one question, which is, should the master's report have been confirmed? Counsel for defendants have, in a very able manner, presented numerous authorities to show that the court below erred in the confirmation of the master's report, and entering up a final decree. We have carefully examined most of the authorities referred to, and have bestowed a vast amount of labor in the consideration of this question, and although some of the authorities referred to have some bearing upon the question before us, yet we are unable to see that any error has been committed or injustice done to the defendants, that would justify this court in reversing the decree. We might stop here and pronounce the judgment of the court; but as there were some questions raised in connection with the master's report which deserve notice, we will briefly give our reasons for having arrived at the conclusion just stated above. Counsel for defendants claim that there was no evidence in the case before the master that would justify him in arriving at the conclusion that N. Webb, deceased, had

as debts due and owing to the firm at Webb's death, that being the total shown by exhibit A filed by defendants as a statement of debts due and owing. In this sum was included the amount of "expense account" and "train account," which were assets, and which were deducted from the amount of exhibit A aforesaid, and properly determined the actual amount of debts due and owing to the firm at fifty-six thousand two hundred and twenty-one dollars and fifty-six cents. In making the calculation of fifty per cent. of debts to be allowed as uncollectible, the master deducted the amount of the accounts of N. Webb and wife from the amount of the original statement of debts, instead, as it should have been, from the actual amount of debts found by deducting "expense account" and "train account" from the amount of said statement as above stated. The master thus allowed for uncollectible debts fifty per cent. of forty-seven thousand seven hundred and sixty-two dollars and forty-six cents instead of fifty per cent. of twenty-seven thousand eight hundred and seventy-eight dollars and ninety-nine cents; thus allowing as uncollectible fifty per cent. of "expense account" and "train account," which were not charged or regarded as assets. In other words, crediting these accounts in full once and fifty per cent. of them again. This correction being made, makes the amount to be deducted from gross assets of N. Webb & Co. fifty-nine thousand and sixty-four dollars and forty-four cents, instead of sixty-nine thousand and six dollars and eighteen cents, as stated by the master, and leaves net assets ninety-six thousand five hundred and sixty-one dollars and seventy-three cents, and the amount due N. Webb at his death from the firm of N. Webb & Co. three thousand eight hundred and forty-four dollars and sixty-seven cents, instead of five hundred and thirty dollars and seventy-six cents, as found by the master.

The second error on the face of the record to be considered occurs in schedule B, annexed to the master's report, and consists in charging as assets of W. H. Moore & Co., goods, wares, etc., on hand at Webb's death, ninety-four thousand seven hundred and fifty-eight dollars and

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been charged from six months after his death. The account, properly stated, stands thus:

Amount due N. Webb's estate from assets of N. Webb & Co., at time of Webb's death.....	\$3,844 69
Amount due at same date from assets of W. H. Moore & Co.....	57,713 21
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Total due N. Webb at his death, which was October 15, 1866.....	\$61,557 88
Interest on this amount from April 15, 1867 (six months after death of N. Webb) to August 20, 1870 (date of master's report), at six per cent. per annum.....	12,362 87
<hr/>	
Total .....	\$73,920 75
From this deduct \$1000, paid by defendants to complainant by order of court made October 11, 1869.....	1,000 00
<hr/>	
Leaves due estate of N. Webb, deceased.....	\$72,920 75

So that the decree of the court below should have been for seventy-two thousand nine hundred and twenty dollars and seventy-five cents, instead of ninety-seven thousand five hundred and ninety-six dollars and nineteen cents, as found by the master, and decreed by the court.

We now come to the second and third causes of error assigned, and which relate to the action of the chief justice at chambers in granting an order for the payment of one thousand dollars by defendants to the complainants. This sum appears to have been credited by the master in his report to defendants, and whatever error there might have been in the granting of this order by the chief justice at chambers, can not now, in any way, affect the rights and interests of these defendants. For by the judgment of this court they are found to be owing the complainants, as the legal representatives of the estate of N. Webb, deceased, the sum of seventy-two thousand nine hundred and twenty dollars and seventy-five cents, and this credit having been allowed them, and no injustice done the defendants, it is

## Points decided.

H—," it is not error to permit an amendment so as to conform the copy to the original and then to receive the latter in evidence.

**ATTORNEY COMPETENT WITNESS FOR CLIENT.**—An attorney is a competent witness for his client.

**FORMER ADMINISTRATOR COMPETENT WITNESS FOR SUCCESSOR.**—A former administrator *de bonis non* is a competent witness for one subsequently appointed in a suit relating to the estate, where such witness is not shown to be interested in the event of the suit.

**EXCLUSION OF IRRELEVANT EVIDENCE.**—The exclusion of evidence irrelevant to the issue to be tried is not erroneous.

**INSTRUCTIONS EXCEPTED TO AS A WHOLE.**—Exceptions to instructions must be specific or the instructions will not be reviewed, and if excepted to as a whole, all must be affirmed if one is found correct.

**REFUSAL OF CORRECT INSTRUCTIONS NOT ERROR, WHEN.**—It is not error to refuse instructions asked for by a party, even though correct, where the instructions already given cover the entire case and submit it properly to the jury.

**INFORMAL VERDICT, CORRECTION OF.**—Where a jury find for the plaintiff in an action on an administrator's bond "the sum demanded with interest at six per cent.," it is not error for the court to aid them in putting such verdict into proper form, so as to show that they find for the plaintiff "the sum demanded, and assess his damages at," etc.

**OBJECTIONS TO ARGUMENTS OF COUNSEL.**—The appellate court will not consider an objection urged below as a ground for a new trial, that the opposing counsel used "improper arguments," where it does not appear what the arguments were, or that the court below was applied to for correction at the time, and proper exceptions taken.

**FAILURE TO COMMIT DOCUMENTARY EVIDENCE TO JURY.**—It is not a ground for a new trial that the judge did not, when the jury retired, commit to their hands the papers and documents used as evidence on the trial.

**ACTION ON ADMINISTRATOR'S BOND.**—The provisions of the statutes providing penalties against administrators for not exhibiting their accounts as required by law, do not preclude an action on an administrator's bond to recover damages for the loss of the estate through his unfaithfulness or neglect.

**WHO MAY SUE ON ADMINISTRATOR'S BOND.**—The administrator *de bonis non* is the proper person to sue on a former administrator's bond for a failure to deliver over the assets of the estate.

**PRINCIPAL AND SURETIES ON SUCH BOND SUED JOINTLY.**—An action may be maintained against the principal and sureties jointly for a breach of an administration bond, and judgment against the principal before proceeding against the sureties is unnecessary.

**SURETIES ON SUCH BOND LIABLE FOR PRINCIPAL'S NON-FEASANCE.**—Sureties on an administration bond are liable, not only for the principal's malfeasance as to money of the estate coming into his hands, but also for his non-feasance in not collecting the assets.

**ADMINISTRATOR'S FAILURE TO COLLECT INTESTATE'S SHARE IN PARTNERSHIP.**—An administrator failing to collect the share of his intestate in a

hundred and thirty-eight dollars and sixty cents are stated in the inventory as the value of the deceased's interest, at the time of his death, in a business copartnership composed of deceased, Charles H. Blake, and William V. B. Wardwell. In reference to this interest Beall also says in his inventory: "The undersigned, being satisfied that the sum stated, forty-six thousand five hundred and thirty-eight dollars and sixty cents, is correct, has agreed to receive of the said Charles H. Blake and W. V. B. Wardwell in full discharge of the capital and profits of the said deceased, the aforesaid sum. The said Blake and Wardwell have agreed to pay the said sum as soon as they can arrange their affairs to do so, and within a reasonable time. The undersigned is satisfied that the said arrangement is the best he could make for the interest of the estate, and that the payment will be made in due time."

In his report of May 4, 1868, Beall stated the amount of receipts, from the beginning of his administration till that time, to be five thousand six hundred and sixty-one dollars and seventy-two cents; the estate owing him (Beall) one hundred and nine dollars and thirty-five cents; and further charges himself with the amount of forty-five thousand nine hundred and forty dollars and forty-one cents, due from Wardwell and Blake, and others. In his report of January 26, 1869, Beall states the total amount of receipts to be six thousand six hundred and eighty-nine dollars and seventy-one cents, and disbursements six thousand five hundred and fifty-seven dollars and seventy-one cents; due from himself to the estate one hundred and thirty-one dollars and ninety-six cents; and further charges himself with the amount of forty-five thousand one hundred and forty-eight dollars and five cents, due from Wardwell and Blake, and others, on the twenty-seventh of January, 1869. The probate court accepted Beall's resignation of the executor and administratorship of Hinckley's estate, held Beall responsible under all requirements of law for the assets of the estate, until delivered to his successor, and to perform everything required by law in the premises.

At February term, 1870, of the district court for the

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of January, 1869, had settled his accounts of executor and administrator in the probate court of Santa Fe county, which accounts were duly confirmed and approved by said probate court, and that Beall afterwards resigned his executor and administratorship; that said resignation was accepted by the probate court, and Beall discharged from further liabilities and duties as executor and administrator of the estate of Hinckley. The plaintiff replied, traversing these pleas, and defendants joined issue. On the fifth of March, the defendant Beall made an affidavit for a continuance of the cause, and the cause was continued by the general order of continuance, that being the last day of the term.

At the July term, 1870, of the court below, Emanuel Spiegelberg, a defendant, having been summoned by publication to answer to petition, was, on the second day of the term, ruled to plead the next morning, and the cause was set down for trial on the fourth day of the term. On the third day of the term a demurrer to the petition, on the part of Spiegelberg, was heard and overruled. On the third day of the term defendants filed a motion for a continuance, based on the affidavits of Lehman Spiegelberg (representing himself to be the agent of the defendant, Emanuel Spiegelberg), and of the defendant, Abraham Staab, which motion, after argument, was overruled. On the twenty-first of July (fourth day of the term), the defendant, Spiegelberg, pleaded the general issue, to which the plaintiff joined; and the two pleas *actio non*, to which plaintiff replied and defendant joined issue.

Then a jury was impaneled to try the issue joined between the parties, and on the fifth day of the term returned the verdict: "We, the jury, find that the said defendants do owe the said plaintiff the sum of one hundred and twenty thousand dollars, in manner and form as the said plaintiff hath complained against him, and they assess the damages of the said plaintiff, by reason of the detaining of the said debt, to forty-eight thousand dollars; that the said defendant, George T. Beall, did not well and truly observe, perform, fulfill, and keep all and singular the requirements of



the condition of the bond upon which this action is found according to the tenor and effect thereof, and that the defendant, George T. Beall, was not discharged from further liabilities of, to, and for the estate of Charles S. Hinck deceased, by the probate court."

Upon this verdict the court below entered judgment. On the eighth day of the term the defendants moved the court to set aside the verdict of the jury and grant a new trial. This motion, after argument, was overruled. Next, the defendants moved in arrest of judgment, which motion was also overruled. Next day (ninth of the term), the defendants moved for an appeal, which was granted.

The errors assigned by the plaintiffs in error, defendants in the court below, are thirteen in number:

1. "The court below erred in overruling the demurrer filed to the petition of said territory in said cause by the now plaintiffs." After the overruling of the demurrers the petition and amended petition, and exception by the now plaintiffs to such ruling and judgment, as appears in the transcript, said plaintiffs pleaded over, thereby waiving their demurrer. Pleading over to a declaration adjudged good on demurrer, without any reservation, is a waiver of the demurrer, as held by repeated decisions of this court. *Watkins v. United States*, 9 Wall. 762. Pleading over to a declaration adjudged good on demurrer is a waiver of the demurrer, and when a defendant files a rejoinder to a replication adjudged on demurrer, his act in pleading over must be for the same reason, be held to have the same effect: *Adams v. West*, 7 Id. 92; *United States v. Boyd*, 5 How. 51. Hence, if the plaintiffs in error wished a review of this court of the judgment of the court below on demurrer they should not have pleaded over, but permitted the judgment on the demurrer to stand.

2. "The court below erred in permitting the plaintiff below to amend her petition by striking out of the same the name of Luz Ortiz de Pino, one of the defendants, whilst her plea in abatement to said petition was still pending undecided."

3. "The court below erred in permitting the plaintiff

low to proceed with said cause, without a trial or judgment upon said plea in abatement." The transcript shows that Luz Ortiz de Pino, mentioned in these two assignments of error, is described in the original petition, in the said motion to amend, and in the said plea of abatement, as administratrix of the estate of Pino, deceased; that both the motion to amend and the plea in abatement were for the same object, and filed on the same day; and that the court, on the same day, granted leave to amend. Now, as this court is not informed by the transcript to the contrary, we must presume that the court below acted upon the motion to amend prior to the calling up of the plea in abatement, and as the plea in abatement was solely in behalf of Luz Ortiz de Pino, administratrix, etc., for misjoinder, and her name was stricken from the petition, she is not a party to the record in this court. Furthermore, as the statutes of this territory provide that "each party, by leave of the court, shall have leave to amend upon such terms as the court may think proper, at any time before judgment, verdict, or decree;" and as it does not appear from the record of this cause that the leave granted by the court below to amend the petition injured the lawful rights of the remaining defendants, this court will not review the alleged errors of the second and third assignments herein.

4. "The court below erred in not granting to said plaintiffs, then defendants, at the July term of the district court, 1870, a continuance of said cause." This cause, on the second day of the term referred to, had been set down for trial on the fourth day of the term, and the motion for a continuance was made on the third day of the term. This motion was based on the affidavits of Lehman Spiegelberg, agent of the defendant, Emanuel Spiegelberg, and of Abraham Staab, another defendant; neither of which affidavits, with sufficient certainty, alleged what matter put in issue by the pleadings they expected to prove by the witnesses, except what they allege a hope to prove by one J. R. Hunt, a resident of New Orleans, in the state of Louisiana, and whose testimony Beall, another defendant, said in his affidavit for a continuance at the preceding February term he

expected to be able to procure by the following term. Laches of co-defendants, either in the procurement of counsel, due diligence in securing the attendance of witnesses or in making other necessary arrangements for defense should not influence a court to grant a continuance, otherwise the termination of a suit might be indefinitely postponed, and in a case where the cause of action does survive the rights of a plaintiff, might be irremediably prejudiced, or wholly sacrificed, by a single continuance. The court below did not err in denying said continuance, which was an exercise of its discretionary power.

5. "The court below erred in refusing to defendants said court, after the application for a continuance had been refused, sufficient time to prepare an application for change of venue in said cause." The statutes of this territory upon the subject of practice make it imperative upon the courts to grant a change of venue when the judge is interested in the suit, as when the party moving for a change of venue shall do certain things therein specified; but the statutes do not prescribe at what stage of the proceedings application for change of venue should be made, granting of delay for the purpose of making such application is reasonably within the discretionary powers of the court. In this case, the day of trial was fixed and the delay was asked immediately after the denial of a motion to continue the cause to another term. Under the circumstances it is evident the request was for the sole purpose of postponing the trial of the cause at that term. The provision of the statute, that, "on calling of the docket, cases shall be tried, set for trial, or continued," is imperative; and from it we are to infer that, when a cause has been set for trial, the effort of either party to delay the trial should be discountenanced by the court.

6. "The court below erred in permitting the copies of the letters of administration granted to George T. Beall to be read as evidence in said cause, and in admitting the bond of said Beall and others to be read as evidence." Reference to the transcript in the court below shows "when the aforesaid letters of administration were off

by plaintiffs to be read, the defendants objected on the ground that no copy of the same was filed in the cause, nor the original, but the court overruled the objection on the ground that the original was proved to be in the possession of Beall, and the letters were read to the jury." As to the admission of instruments of writing in evidence, the statute of this territory says: "And if there are any instruments of writing relied upon as evidence or as matters in any way material to the suit, the originals, or copies of the same, shall be filed with the petition if they are in the power or control of the party wishing to avail himself of them. If any papers shall be referred to, and the original, or copies not filed as above required, they shall not be used in the trial, unless the party offering them shall give some satisfactory reason why the same were not filed:" Rev. Stats. 196, secs. 21, 22. As the transcript shows that satisfactory reason was shown to the court below why the original letters of administration, or a copy of them, were not filed, the court below did not err in allowing a copy, proved by the officer who issued them, to be read in evidence. As to the second proposition of this assignment of error, the transcript says: "The bond of Beall, as administrator, was offered by plaintiffs and objected to by defendants, upon the ground that it varied from the copy filed in the case by the plaintiff, in this, that the copy read 'Charles S. Hinckley,' and the original 'C. S. Hinckley.' The court gave permission to plaintiff to amend the copy, and overruled the objection, to which the defendants excepted." The statute provides that "each party, by leave of the court, may amend upon such terms as the court may think proper, at any time before verdict, judgment, or decree:" Rev. Stats. 196, sec. 27. *Utile, per inutile non vitiatur*, says the law maxim, and as the existence of the letters "*harles*" in the copy, and their not being in the original, was not such a variance as would be introduced against them, the court below did not err in allowing these letters to be stricken from the copy and the original bond to be given in evidence.

7. "The court below erred in admitting Stephen B. Elkins, the attorney for the then plaintiffs, and a former

administrator *de bonis non* upon the estate of C. S. Hinckley, deceased, to testify as a witness on the part of said plaintiff." Authorities are on the side of the ruling of the court below as to the competency of an attorney to testify on the part of his client. "The attorney of a party is not an incompetent witness for him." *Robinson v. Dauchy*, Barb. 20. "Attorneys and counselors are competent witnesses for their clients in causes conducted by them." *Little v. McKeon*, 1 Sandf. 607. The competency of a former administrator *de bonis non* to testify in a cause between the former administrator and a subsequent administrator *de bonis non*, as to any matter growing out of the same estate, depends entirely upon whether he had an interest or not in the result of the suit pending, and as it does not appear from the transcript that Elkins had such interest, the ruling of the court below was not erroneous.

8. "The court below erred in refusing to permit the defendants in said court to prove by Samuel Ellison the length of time necessary to settle up the business of a large commercial concern, and by Pablo Delgado, the depreciation of goods between the periods of January, 1867, and January, 1869." Evidence of the nature stated in this assignment was irrelevant to the issue joined between the parties, and therefore the court below did not err in excluding it.

9. "The court below erred in giving the instructions on the part of the plaintiff in said court, which it gave to the jury, and in refusing to give to the jury the instruction asked for on the part of the defendants in said suit." The instructions given to the jury in the court below do not appear by the transcript to have been given on the asking of the then plaintiff. They were as follows: On the part of the plaintiff in this cause it is contended that the defendant George T. Beall, as administrator of Charles S. Hinckley, deceased, sold the interest of Hinckley's estate in the property and effects of the firm of Hinckley, Blake & Wardwell to Blake & Wardwell, the surviving partners of the firm, for the sum of forty-six thousand five hundred and eighty-eight dollars, on credit, without taking any security for the same.

In the opinion of the court the statements of the inventory filed by Beall in the probate court, which are evidence in the cause, and the evidence of Stephen B. Elkins, establish the fact of such sale; by selling this property on credit, Beall becomes personally liable in law to the estate for the amount for which the property was sold, and if the jury, from the evidence, arrive at the same conclusion with the court, they should find for the plaintiff, and assess his damages at forty-one thousand five hundred and fifty-six dollars, with interest at six per cent., such interest to commence six months after the inventory was filed, January 10, 1867.

"The approval by the probate judge of the annual reports of Beall did not release or discharge Beall from his liability, or in any way affect such liability as regards the matter in controversy in this suit." "In this case the fact that Elkins or Griffins, as administrators, may have failed to sue, does not affect Beall's liability on his bond in any way." "If an executor sells at private sale property of an estate and fails to collect the amount due, he is personally responsible." "In civil cases the court is the law, and the jury is bound by the instructions of the court." "The fact that Elkins, as administrator, demanded any money from Blake & Wardwell does not relieve George Beall of any of his responsibility for any of his acts as administrator." These instructions were excepted to as a whole in the court below, and this court, following the practice as ascertained by decisions of the supreme court of the United States, will not review exceptions to instructions to a jury unless made specifically; and, further, if one of the instructions excepted to as a whole was proper, they must all be affirmed. On the part of the defendants in the court below, five instructions to the jury were asked and the refusal of the court to give said instructions was excepted to as a whole. In the case of *Laber v. Cooper*, 7 Wall. 570, the supreme court of the United States held: "It was not error for the court to refuse to give the instructions asked for by the defendant, even if correct in point of law, provided those given covered the entire case, and submitted it properly to the

jury." In the present case the instructions of the court below informed the jury sufficiently of the law applicable to the case, and as to the verdict it should give in case found certain facts from the evidence. So the ruling of the court below in these premises was not erroneous.

10. "The court below erred in receiving and recording the informal verdict of the jury, and in rendering judgment thereon."

11. "The court below erred in rendering judgment on such informal verdict, as it did render in this cause." The transcript shows that as to the "informal verdict" mentioned in both these assignments of error, the facts are that the jury returned into court the verdict in the words: "We, the jury, unanimously find for the plaintiff the sum demanded, with interest at six per cent.;" then the court stated that the verdict should be put in form," which was done, "and then the court stated to the jury: Gentlemen, listen to your verdict as the court has recorded it: You say you find for the plaintiff the sum demanded, and assess his damages at forty-eight thousand dollars, and so say you all?" The jury replied in the affirmative, and the jury was discharged. Thus it appears that the jury found in favor of the plaintiff the sum claimed with six per cent. interest, and that the court, in presence of the jury, put in definite language its finding, namely the sum of damages by it assessed. The sum claimed by the plaintiff was, in round numbers, forty-six thousand five hundred and sixty-six dollars, and the verdict, if found in his favor, should be for that sum, and interest for three years, at six per cent. per annum, amounting to seven thousand four hundred and eighty-one dollars and eighty-eight cents, making the entire sum of damages forty-nine thousand forty-seven dollars and eighty-eight cents, one thousand four hundred and eighty-eight dollars and eighty-eight cents of a mistake in favor of the defendants below. Aside from this mistake this court finds no error on the part of the court below in aiding the jury in putting its verdict into shape to express its true intent and meaning, and in afterwards recording it in such technical form as was necessary to its legal effect.

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In the case of *Laber v. Cooper*, before cited, the supreme court of the United States held that "a verdict, unless it be a special one, is always amendable by the notes of the judge." We think it is fortunate for the litigants, in order to promote the ends of justice, that our common law courts have power to aid juries in putting their verdicts into form to give legal expression to their findings according to the evidence; otherwise it would be very rarely that a verdict would stand, unless the jury happened to have on it a man of sufficient legal attainments to put the verdict in form before returning it into court.

12. "The court below erred in refusing to grant to said defendants a new trial in said cause.

13. "The court below erred in refusing to arrest the judgment in said cause."

In the motion to set the verdict aside and grant a new trial, fifteen reasons are alleged, and as the principles of most of these have already been discussed, it is not necessary to again advert to them, so we will proceed to notice a few of those not before considered:

1. "The jury found against the law and the evidence." The jury found according to law, as laid down by the court, and the evidence submitted to it.

5. "The court permitted the counsel for the plaintiff, in his closing argument to the jury, to make improper arguments to influence the opinions, actions, and verdict of the jury." Except in the motion itself, as above quoted, the transcript contains nothing to inform this court of the statements made and arguments used by the counsel, which the plaintiffs in error styled "improper." It is the duty of counsel to attend to their case from beginning to end, and if "improper" statements have been made, or "improper arguments" have been used by opposing counsel to the jury, they should immediately apply to the court trying the cause for correction, and if not corrected, they should except, and have the exception appear on the record with as much certainty as any other ruling of the court excepted to. Then if arguments in a court below be proper matter of re-



view, the court of review would be informed of the nature of the error sought to be corrected.

11. "The court did not commit into the hands of the jury, upon their retirement to agree upon their verdict, any of the papers, documents, writings, or records introduced in evidence in this case, and the jury retired without any of said written evidence in their hands or possession, and found their verdict without any of the said evidence being present with them." As to this allegation, comment would be superfluous.

14. "The defendants have discovered since the trial new and important evidence which was unknown to them when the trial was had." The motion itself does not disclose the nature of the evidence claimed to have been discovered nor does it allege any document or other paper as made a part of said motion which would inform the court of the nature of such newly discovered evidence. There is, however, in the transcript, immediately following this motion the affidavit of one of the defendants, stating that the defendants were surprised by the testimony of S. B. Elkins, and then states argumentatively what he expects might be proved as against Elkins' testimony by documents, etc. The papers referred to by the affidavit are reports, etc., recorded in the office of the clerk of the probate court for Santa Fe county, but disclose no facts which would do away with the liability of Beall, even if admissible in evidence.

The motion in arrest of judgment mentions no point which has not been hereinbefore treated of. In the argument of this cause here, some legal questions have been raised, which this court will consider, whether they were formally presented to the court below or not.

The plaintiffs in error have insisted that the only remedy authorized by law against executors and administrators on their bond is designated in the Revised Statutes, secs. 11 and 12, pp. 34 and 36, which they cite in their brief. The first of these sections prescribes what the probate judge, clerk of the probate court, and the executor and administrator shall do in the premises of issuing letters of administration, and the only liability therein prescribed is that

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the probate judge for issuing letters of administration without taking bond and complying in other respects with the requirements of this section. Section 12 prescribes the times when the executor or administrator shall exhibit his accounts and vouchers to the probate court for settlement; "and upon every failure so to do, may be fined not more than one hundred dollars, for the use of the county, and shall forfeit to the party injured double the damages sustained by such default." If the hypothesis of the plaintiffs in error be correct, the end and aim of the law in exacting bonds of executors and administrators is merely to secure an annual presentation of accounts to the probate court, or, in default thereof, a fine not exceeding one hundred dollars, for the use of the county, and damages to each person injured by default of such annual *ex parte* statement, but not to secure the estate itself for the benefit of heirs and legatees. It is fortunate, however, for widows, orphans, and all others entitled in the distribution of decedents' estates, that our courts take a broader view of the question. The statute requires the penalty of the bond to be not less than double the estimated value of the estate, conditioned for the faithful performance of his duties as executor or administrator.

The duties of an executor or administrator begin when his letters are issued, and end with the delivery of the estate to those entitled to receive it; and it is incidentally his duty, until such delivery, not merely to marshal the assets and liabilities of the estate, but to manage the estate in such manner that its value be not diminished. The management and care of an estate that the law requires of executors and administrators is at least such as an intelligent and prudent man should exercise in his own affairs, and to that end allows them ample compensation for their services, and reasonable expenses incurred in the interest of the estate. They are also required to settle up the estate as speedily as can be, without loss or diminution; and in some cases they are required to settle within one year from the testator's death, if the estate can not be settled within a shorter period. These are some of the duties that come within the purview

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of the estate be detained from him, it is his right and duty to sue for recovery, either of the detained article itself, or the value of it, and also to sue for damages done to any portion of the estate which belongs to his administration. Now, suppose a former executor or administrator detains assets of the estate, or has diminished its value. The administrator *de bonis non* should certainly have the right to sue in such form of action as would most speedily and certainly secure possession of the assets in kind, or their value in money, in case of waste or diminution in value; and the heirs and distributees can not sue, for the simple reason that no right of action at law in the premises belongs to them, or either of them, until the administration be entirely completed, and the share of each, after paying all liabilities of the estate, ascertained. Under title Executor, Jacob's dictionary says: "If the executor does any waste, or misemploys the estate of the deceased, or doth anything by negligence or fraud, etc., it is a *devastavit*, and he shall be charged for so much out of his own goods: 8 Rep. 133." "And a new executor may have action against a former executor who wasted the goods of the deceased: Hob. 266."

The plaintiffs in error assert that suit can not "be prosecuted against the sureties on the executor's or administrator's bond, until a judgment shall have first been obtained against the administrator," the principal in the bond. Section 8, page 192, Revised Statutes, settles this question in few words: "No person shall be sued as indorser on security unless suit has been first or simultaneously brought and prosecuted in good faith against the principal," and there is no statutory provision making sureties on an executor's or administrator's bond an exception to this rule.

The plaintiffs in error also assume that "the sureties of an executor or administrator are not liable for anything except it should have come into the hands of the executor or administrator." The condition of the executor's or administrator's bond required by statute is for "the faithful performance of his duties," in such capacity, and it is a question of law what he should do, or what he should not do, therein, *i. e.*, to determine what is a "faithful perform-

ance of his duties." The law considers that immediately on the issuing of letters of administration, or executorship, the entire estate of the decedent vests in his personal representatives, and, we expect, it then becomes his duty to take charge of the same and secure it from loss.

It is not alone for the "faithful performance of his duty" in the administration of such portions of the estate as come to mere manual possession, that such bond is required and given, but the liability extends to compensation for or damages resulting to the estate from non-feasance or misfeasance as well as malfeasance, on the part of the principal.

It was not essential as a preliminary to the bringing of this suit in the court below, that there should have been "any judgment in the probate court, or elsewhere, against him, for the amount sued for, or a judgment against him for a *devastavit*." The jurisdiction of the probate court is limited by statute, and when the probate court of Santa Fe county accepted the resignation of Beall as executor and administrator, its jurisdiction as to him, in that capacity, ceased. The gist of this action in the court below is alleged *devastavit*, and the truth of it tried by a jury, and determination given in the verdict.

In law, the partnership of the decedent, Hinckley, with Wardwell and Blake, terminated on the death of Hinckley. *Griswold v. Waddington*, 15 Johns. 57; 16 Id. 438. "[t]he duty of a survivor [of a partnership] to furnish representatives of the deceased partner with a full statement of the assets. He must dispose of the property to the best advantage, and can not take it to himself at a valuation without their [the representatives'] assent;" *Ogden v. Alford*, 4 Sandf. 311. The evidence at the trial in the court below shows that, at the time of his death, Hinckley was a partner with Wardwell and Blake, doing business at Fort Craig and other places in this territory; that one of Beall's early acts of administration of the estate was to dispose of the interests of the deceased in the firm to the surviving partners for the sum of forty-six thousand five hundred thirty-eight dollars and sixty cents. He, Beall, as he

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in his report of January 10, 1867, agrees to receive of the said Charles H. Blake and W. V. B. Wardwell, in full discharge of the capital and profits of the said deceased, the aforesaid sum. The said Blake and Wardwell have agreed to pay the said sum as soon as they can arrange their affairs to do so, and within a reasonable time; that Beall continued to act as executor and administrator for at least two years after making said report, and retired from the administration, reporting the sum of forty-one thousand four hundred and twenty dollars and sixty-five cents, "due from Wardwell and Blake." S. B. Elkins, who succeeded Beall as administrator, testified in part: "When Beall turned over the estate to me he delivered me no indebtedness against Blake and Wardwell. I found only the inventory and reports. Immediately after my appointment as administrator, I made a demand of Blake and Wardwell; they said they had no personal property. I had frequent conversations with Beall about that part of the inventory that relates to the sale to Blake and Wardwell, and stated to him that I thought he did not sufficiently secure the estate; he said he thought at the time they would pay, but they had deceived him. He still hoped they would pay, he seemed to regret their action and to be astonished at it. These conversations with Beall continued up to February, 1870. I stated to Beall that Blake and Wardwell wanted to charge for depreciation of stock and bad debts; he said that could not be admitted; that they owed the sum stated in the inventory less the payment. I told Beall that I had heard that Blake had sold out to Wardwell and left the territory; he said his action was strange and unexpected, and without his knowledge. He said in different conversations that they had paid him on this indebtedness once five thousand dollars, the sum stated in the return, and that was all they had paid him." Cross-examined: "The five thousand dollars has been applied to the payment of the debts of the estate; some five thousand dollars credited in returns. I did not bring any suit against Blake and Wardwell; had no contract with them. I have been attorney for Mr. Griffin; have no suit against them for this claim." The witness was asked by

defendant's counsel if Beall had ever told him that he sold Hinckley's interest to Blake and Wardwell. He answered: "I don't recollect that he ever told me so; I infer so from Beall's conversation, who treated it as a sale."

We think the evidence in effect shows that Beall did the interest of Hinckley, deceased, in the firm of which was a member, to the surviving parties. But, call the transaction an "arrangement," as Beall avers in his report fore referred to, or a taking of the deceased's interest in valuation by the surviving partners with the assent of personal representative, the estate was damaged or was to the amount which Beall said was unpaid at the time his resignation of the administration, and he and the sureties on his bond are liable for that amount, with interest and damages resulting from his mismanagement of the estate. As a foundation for this suit, it was not necessary for the administrator *de bonis non* to try any experiments in collecting the amount from the surviving partners by suit or otherwise. Had Beall not made the "arrangement" with the surviving partners, the aspect of the matter would have been different but as he made a transfer of those interests, he and his sureties must abide the legal consequences of his acts.

In the transcript of this cause appears an affidavit of continuance made by Beall at the February term, 1870, in the court below, in order to produce a witness to testify to what would have amounted to a falsification of his solemn statements in his report hereinbefore quoted; also an affidavit made, for the same purpose, by another of the plaintiffs in error, at the next subsequent term of court. It further appears that, at the trial in the court below, the plaintiffs in error sought to introduce evidence to "show how long it usually takes in this country for surviving partners to wind up and settle a large commercial business," and also to show the difference "of the price of stock of goods in this country between January, 1867, and January, 1869." As such evidence was irrelevant to the issue, the court below rightly ruled it out.

The judgment of the court below is affirmed.

**BUTTERFIELD'S OVERLAND DISPATCH CO. v.  
HUGO WEDELES AND VICENTE ROMERO.**

**DEMURRER DEEMED ABANDONED, WHEN.**—Where, after a demurrer to the petition or declaration is overruled, the defendant pleads the general issue, he is thereby deemed to abandon the demurrer, and it ceases to be a part of the record, and can not be considered on appeal.

**CAPACITY OF CORPORATION TO SUE, HOW TO BE TESTED.**—In an action by a corporation on a note where the general issue is pleaded, the plaintiff is not required to prove its rights to sue as a corporation, before introducing the notes in evidence, and the defendant can only test the plaintiff's capacity to sue by a plea in abatement.

**APPEAL** from the district court. The case appears from the opinion.

*Wheaton and Clever*, for the defendants and appellants.

*Elkins and Wheelock*, for the plaintiffs and appellees. The first error assigned is that the court overruled the defendants' demurrer to the plaintiff's declaration. As the defendants afterwards filed a plea of general issue, their demurrer ought not to be considered by this court: *Young v. Martin*, 8 Wall. 354; 9 Id. 762; *Aurora City v. West*, 7 Id. 92; 4 Id. 598; *Clearwater v. Meredith*, 1 Id. 42; 11 Pet. 80; 5 How. 29. If, however, this court considers the demurrer upon its merits, it can not be sustained. The questions raised by it, were: 1. Can a foreign corporation sue in the courts of New Mexico? This question ought to be raised by a plea in abatement (see 7 Id. 573), but the supreme court of the United States has decided positively that a corporation created by the laws of one state can sue in the courts of another, unless expressly prohibited by the laws or constitution of the United States: *Bank of Augusta v. Earle*, 13 Pet. 519; *Tombigbee Railroad v. Kneeland*, 4 How. 16. The second cause of demurrer argued below, was that the notes declared on were payable to "George E. Cook, treasurer," and not to the plaintiff in this action. The averment in the petition is sufficient to identify "George E. Cook, treasurer," with the plaintiff in this suit, and the question raised is distinctly

## Opinion of the Court—Waters, J.

decided in *Baldwin v. Bank of Newbury*, 1 Wall. 234. The second error assigned is that the "court below permitted the notes to go to the jury without proof of the corporate existence of plaintiff." The existence of a corporate plaintiff can only be called in question by a plea in abatement, and a plea to the merits admits the ability of the plaintiff to sue. This has been so frequently decided by the United States supreme court that it is no longer an open question: *Society for propagation, etc. v. Paul*, 4 Pet. 480; *Canard v. Atlantic Ins. Co.*, 1 Id. 386; *Railroad Company v. Quigley*, 21 How. 202; *Yeaton v. Lynn*, 5 P. 232; 1 Chit. 449, note 2; Bouv. Law Dict., Abatement, s. 10. [The remaining errors not being considered by the court, it is not necessary to report the argument made thereon.—REP.]

By Court, WATERS, J.:

The petition in this case sets forth that the plaintiff Butterfield's overland dispatch company, is a body politic duly organized and incorporated under the laws of the state of New York; and that the defendants, both residents of the territory of New Mexico, executed, delivered, and promised to pay to the plaintiffs, under the name of George E. Cook, treasurer, meaning George E. Cook, treasurer said company, their two certain promissory notes, in the words and figures following:

"MORA, N. M., September 2, 1867.

"\$4,000. Twelve months after date I promise to pay the order of George E. Cook, treasurer, four thousand dollars, value received.

HUGO WEDELES,  
VICENTE ROMERO."

"MORA, N. M., September 2, 1867.

"\$4,000. Eighteen months after date I promise to pay the order of George E. Cook, treasurer, four thousand dollars, value received.

HUGO WEDELES,  
VICENTE ROMERO.'

All the other allegations in the petition are in the usual form. Plaintiff then asks judgment for the amount of said notes.



To the petition defendants filed a general demurrer, which was by the court below overruled. Defendants then filed their plea of general issue, the cause was tried by a jury, verdict given for plaintiffs, and judgment entered accordingly. Motions for a new trial and in arrest of judgment were also filed and overruled. Whereupon defendants appealed to this court.

The defendants in their bill of errors assign eight causes why the judgment of the court below should be reversed; all but the first and second, however, were abandoned by them in the argument of the cause, and consequently will not be considered.

The first cause of error assigned is that the court below erred in overruling the demurrer to plaintiff's petition. The counsel for the plaintiff take the ground that as the court below overruled defendants' demurrer to the petition, and defendants afterwards filed their plea in general issue, this demurrer ought not to be considered by this court, and in support of their position cite a number of authorities.

If the position taken by counsel for plaintiff is correct, the points raised by the demurrer in the court below can not be considered and reviewed by this court. This being, as we believe, the first time that this question has been presented to this court for consideration, it becomes necessary that we give it a careful and considerate examination.

The counsel for the defendants have cited no authorities upon the subject, and we are left with what little time we have for the consideration of other matters before us, to solve this question of practice without their aid. Our code of civil procedure and practice is silent on this subject, and we are therefore left to an examination of the question as construed by the supreme court of the United States, the only court which has power to review the action of this court.

The practice in some of the western states appears to be that exceptions taken at the time to the overruling of a demurrer saves the points raised by the demurrer, and may be reviewed by the supreme court. This practice, we apprehend, is based on some statutory provision, for without it

such a practice is in direct violation of the system of common law pleading, a "system matured by the wisdom of ages, and founded on principles of truth and reason." The common law rule is, that after judgment has been passed upon a demurrer, it has served its purpose and ceases to become a part of the record for any further purpose whatever in the case.

The supreme court of the United States appear to have taken this view of the office of a demurrer, and have adhered to the principles of common law pleading by repeated decisions, to the effect that when a demurrer has been disposed of and the party, instead of relying upon the sufficiency of the demurrer, pleads over, he thereby abandons his demurrer and it ceases to be a part of the record, and can not be considered in a review of the case: *Young v. Martin*, 8 W. 357; *Watkins v. United States*, 9 Id. 762; *Aurora City v. West*, 7 Id. 92; *United States v. Boyd*, 5 How. 29; *Clawwater v. Meredith*, 1 Wall. 42.

This authority we are not only bound to respect, but to sustain; and our opinion is, that when the defendants in the case before us failed to rely upon the sufficiency of the alleged demurrer and filed their plea of general issue, they thereby abandoned their demurrer, and the question raised by it in the court below can not be considered here. The language of the supreme court of the United States "it ceased to be a part of the record." This language is plain, explicit, and pointed, and needs no explanation on our hands.

The second cause of error assigned by the defendants is that "the court below erred in allowing the notes sued upon to go to the jury without proof of the plaintiffs' right to sue in a corporate capacity." On this point counsel for the defendants presented a number of state authorities, that, we are bound by no provisions or decisions of the supreme court of the United States, we would feel inclined to respect. Section 29 of the Revised Statutes of New Mexico, p. 1, disposes of this question. This section provides that the right of a plaintiff to sue is to be tested by a plea in ab-

ment, which is in perfect harmony with the decisions of the supreme court on this subject.

In the case before us, no plea in abatement appears to have been filed, denying the capacity of the plaintiffs to sue. Defendants filed their plea of general issue, which admits the competency of the plaintiffs to sue in the capacity in which they have sued: *Society etc. v. The Town of Pawlet*, 4 Pet. 501; *Conard v. Atlantic Ins. Co.*, 1 Id. 386, 387.

This disposes of the two causes of error assigned in this case. There being no error in the record, the judgment of the court below will be affirmed.

Chief Justice Palen concurs in the views herein expressed with regard to the practice on the demurrer. Having sat in the trial of the cause below, he takes no further part in the consideration of the same.

Associate Justice Johnson concurs in the affirmance of the judgment, but dissents from the opinion of the court on the first cause of error.

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

JANUARY TERM, 1872.

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THE TERRITORY OF NEW MEXICO ON THE RELAY  
OF GERTRUDE E. HUNTINGTON AND D.  
HUNTINGTON *v.* SANTIAGO VALDEZ, PRO-  
JUDGE, AND VICENTE ROMERO.

**DISTRICT COURT MAY ISSUE CERTIORARI TO PROBATE COURT.**—The district courts of this territory have jurisdiction to issue writs of certiorari to the probate courts in the exercise of their superintending control over them.

**REMEDY BY CERTIORARI NOT LOST BY FAILURE TO APPEAL, WHEN.**—Failure to take the lawful steps for an appeal from an adverse proceeding, in probate court at the term at which such proceeding is had, does not preclude a party from the benefit of the writ of certiorari under chapter 1 of the Revised Statutes, in a case where the probate court had no jurisdiction of such party by appearance or service of notice.

**APPOINTMENT OF DEBTOR OF ESTATE AS ADMINISTRATOR.**—The appointment of one who is indebted to an estate, or against whom a suit is pending on behalf of such estate, as administrator thereof, is wholly unwarranted by law.

**REMOVAL OF ADMINISTRATOR SET ASIDE BY CERTIORARI.**—The removal of an administrator, without notice, for a failure to file an inventory, or an order dispensing with such inventory until the determination of a certain suit brought on behalf of the estate to obtain an account of the assets, and the appointment of one of the sureties on appeal of the defendants in said suit as administrator *de bonis non*, may be set aside and annulled on certiorari from the district court, and the probate court may be restrained from any further attempt to remove such administrator until the termination of said suit.

APPEAL from the district court for Mora county. The opinion states the case.

*S. B. Elkins, Wheaton, Olevier and Watts*, for the defendants and appellants.

*T. F. Conway*, attorney-general, for the plaintiffs and appellees.

By Court, JOHNSON, J.:

In the month of March, 1871, the relators petitioned the district court in and for the county of Mora, showing that one of them, then Gertrude E. Webb, was on the twenty-seventh day of July, 1868, appointed by the probate court of said county, administratrix of the estate of Nathan Webb, her husband, then lately deceased; that in January, 1869, she commenced suit as administratrix against William H. Moore and William C. Mitchell, surviving partners of said deceased, for settlement of the interest of said estate in the firms of W. H. Moore & Co. and N. Webb & Co.; that, being unable to make an inventory of said estate, for the reason that all of its assets were in the hands of said surviving partners, she could form no correct estimate of the extent and value of the said assets. On the twenty-seventh of October, 1869, she made report accordingly to the probate court of Mora county (Vicente Romero, one of the respondents to this petition, then being judge of said court), and obtained an order of said court granting her further time until the termination of said suit to make report and said inventory; that at August term, 1870, of the district court for said county, a decree was rendered in said suit against said Moore and Mitchell in favor of said administratrix and her present husband, from which decree said Moore and Mitchell appealed to this court, said Romero, one of the respondents in this suit, becoming one of the securities on their appeal bond; that this court at January term, 1871, affirmed said decree to the amount of seventy-four thousand and eight hundred dollars, against the appellees and the securities on their said bond, including said Romero; that from said decree of this court said appellees appealed to the

supreme court of the United States, where said suit is still pending; that on January 3, 1871, the probate court of said county removed said administratrix from her administration, and appointed said Romero in her stead, notwithstanding the order of said court before mentioned, and the fact that Romero was a judgment debtor of said estate, and without any notice whatever to said administratrix of the pendency in said court of proceedings for her removal from administration. Upon this exhibition of facts, the petitioners pray the court below for a writ of certiorari to the said probate court, etc. On the eleventh and thirteenth of March, 1871, the respondents were served with notice of the pendency of the petition and that on the twentieth of the said month, the district court in and for said county would be moved to grant said writ.

On the twenty-first of said month, after argument of said motion, a writ of certiorari was granted. In obedience to the writ the probate court of Mora county, sent to the court below a transcript of its proceedings, by which it appears that on the third of January, 1871, Gertrude E. Webb, now Huntington, was removed from the administration of the estate of Nathan Webb, deceased, by order of said probate court, on the petition of William H. Moore and William C. Mitchell; that the next day said Moore was, on his own application, appointed administrator *de bonis non* of said estate, and that he resigned his administratorship on the ninth of the same month, when the said court appointed Vicente Romero administrator in his stead. It does not appear from this transcript, that said Gertrude, or any person representing her, was present in said court during any portion of these proceedings, or that she, her agent or attorney, had been notified that such proceedings were pending.

Vicente Romero filed in the court below, on the return of the writ, an affidavit stating, among other matters, that he was probate judge of Mora county in 1869, until the beginning of October, and denying that he, or the said probate court, while he was judge of it, had made the order alleged in the relators' petitions, dispensing with the report

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Opinion of the Court—Johnson, J.

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of the administratrix and the making of an inventory, until the termination of her suit against Moore and Mitchell, but it appears from another transcript from the probate court, filed in this cause in the court below, that such order was made by said probate court on the third of November, 1869, Jose Ledenux being then probate judge of said county.

The court below adjudged the proceedings of the probate court of Mora county, in removing said administratrix from her trust and appointing said Vicente Romero administrator in her place, to be without warrant of law, and fraudulent and void from the beginning, and enjoined said probate court from entertaining any proceedings to remove or suspend the said Gertrude E. Huntington from her trust as administratrix of Nathan Webb, deceased, during the pendency of, and until the final determination of the suit in the supreme court of the United States, in which she and her husband are complainants against said Moore and Mitchell, or until the further order of the court below. From the judgment of the court below the respondents appeal.

The points presented by the appellant's assignment of errors involve: 1. The power of the court below to issue the writ of certiorari; 2. Whether it erred in granting the writ in this cause; 3. Whether the judgment of the court below was erroneous.

The tenth section of the act of congress, approved September 9, 1850, entitled "An act proposing to the state of Texas, etc.," provides that "the judicial power of said territory [New Mexico] shall be vested in a supreme court, district courts, probate courts, and in justices of the peace," and "the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction." It should not be necessary to repeat here what has been so frequently described, namely, that this conferring of jurisdiction upon these courts necessarily includes all power requisite to give full effect to it. The removal of causes by certiorari from an inferior to a superior court is a power which has always pertained to the jurisdiction of courts of common law as well as courts of chancery. Hence, the conferring of this jurisdiction upon the district courts thereby

constituting them superior courts, or courts of jurisdiction, gives them the power, although the territory had been silent on the subject.

The third clause of section 10, chapter Statutes of New Mexico, p. 108, says that the judges shall have "appellate jurisdiction from the orders of the prefects (probate judges and judges) and alcaides (justices of the peace) in all cases authorized by law, and shall possess a superintendency over them."

The statute from which this quotation is taken is dated from September 22, 1846, and was in the Revised Statutes, January 26, 1866, by the assembly of this territory for defining the powers and control the district courts may use, according to the necessities of the case, and the powers pertaining to the judges as courts of common law or courts of chance.

We are now to consider whether the court granting the writ of certiorari in this cause shows ample ground to sustain the prayer of the appellants. The whole of chapter 10 of the Statutes, relating to certiorari, is cited to them. It has been argued that, inasmuch as the appellants have taken lawful steps for an appeal at the term of the court in which the proceedings complained of were held, they are precluded by the provisions of this statute from the benefit of the writ of certiorari. The provisions of chapter 10 are a limitation of the writ of certiorari to cases coming within their purview, but do not operate in those whose circumstances are outside of their purview. We contemplate that at the time of judgment, the writ of the peace rendering the judgment, in both of the subject-matter and of the person against whom the proceedings were held, there would be great room under the provisions of these courts, and before justice for unlimited corruption and oppression, an appeal would be warranted in regarding the writ as against public policy. The allegation of the appellants' petition, that the administratrix was not probate court, either in person, or by her agent,



at the time of the proceedings complained of, and that neither she nor her agent or attorney had any notice of the pendency of said proceedings, is sufficient to show the court below that her case is an exception to the provisions of the statute cited, for the reason that the probate court in these proceedings had neither real nor constructive jurisdiction of her person.

It now remains to consider whether the judgment of the court below was erroneous. In deciding this question we have to consider the material facts set forth in the petition, the answer thereto furnished by the transcript from the probate court of Mora county, the affidavit of the respondent, Vicente Romero, and the law of this territory concerning the appointment of administrators, so far as applicable to this case. The transcript from the probate court does not contradict any material fact alleged in the petition, and the affidavit of Romero does not deny that the order referred to was made by the probate court previous to the commencement of the proceedings complained of, but merely denies that such order was applied for or granted while he was probate judge of Mora county, while a further or supplemental transcript shows that such order had been granted in fact, shortly after Romero went out of office. So it appears there was no issue of fact material to the case presented to the court below. Sections 5 and 6, chapter 2, of the Revised Statutes, p. 34, say as to whom letters of administration shall be granted:

"Section 5. Letters of administration shall be granted: First, to the husband or wife surviving; secondly, if there be no husband or wife surviving, to those who are entitled to distribution of the estate, or one or more of them, as the prefect shall believe will best manage the estate.

"Section 6. If no such person shall apply for such letters within thirty days after the death of the deceased, any creditor shall be allowed to take out such letters, and in default of these the probate judge may select as administrator such discreet person as he may choose."

By the record of the court below it appears that one of the relators was the administratrix of her deceased husband.

and that the probate court, under pretext that she had not made an inventory and annual report, made an order removing her from such administration, notwithstanding the existence of an order of that court suspending or dispensing with the making of such inventory and report until the final determination of a certain suit on behalf of said administratrix, and appointed to said administration a party defendant to said suit, and within a few days afterward appointed another judgment debtor of the said estate in said suit in his stead. Passing over the question of the legality of the removal of the administratrix under the circumstances shown by the record, the appointment to the administration of an estate of a party indebted to such estate, or against whom a suit is pending on behalf of such estate, is unwarranted by either the spirit or the letter of the statute for the guidance of the probate court in using the appointing power. The statute indicating who shall have priority of right of administration, including creditors, manifests a desire on the part of the legislature to secure the management of an estate to the person or persons whose interests it apparently is to administer it to the best advantage for all persons interested in its distribution. Hence, when the estate under the contingency specified empowers the probate judge to appoint some discreet person to the administration, it is to be inferred that the legislature intended the term "discreet" to mean competent and disinterested, and never contemplated that a person indebted to an estate in any manner, or litigating against the same, should have placed in his hands the power to defraud the estate, or delay its settlement.

In this case it appears by the record, that in the administration of Webb's estate there was pending in the supreme court of the United States a suit in which a large sum of money had been adjudged and decreed by the supreme court of this territory to be paid to said estate by Moore and Mitchell, and Romero, one of the respondents in the court below, and others, and from which judgment and decree appeal was taken to said supreme court of the United States by the parties against whom the same were rendered.

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Opinion of the Court—Johnson, J.

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The petition for certiorari alleges that the removal of the administratrix from her trust, and the appointment of Romero in her stead, was fraudulent, and for the purpose of defeating the interests of said administration involved in said suit; and the record of the court below contains no denial, contradiction, or avoidance of this allegation. It is apparent that had the removal of the administratrix and the appointment of Romero been fairly accomplished, Romero would have had it in his power to sacrifice whatever interests of the estate of Webb may be involved in the case referred to, and the inference is warranted by the record of the court below that he would not have hesitated to use that power detrimentally.

It is fortunate, however, in this case, that our district courts are amply empowered by law to protect the status of parties to suits, as well as their persons and interests, and had not the power been seasonably invoked, incalculable mischief could have been accomplished, and the administration of justice delayed, if not altogether defeated. In order to prevent further trouble of similar kind, the court below, besides annulling the proceedings of the probate court removing Gertrude E. Huntington from her administration, and appointing Vicente Romero thereto, enjoined said probate court from entertaining any proceedings "to remove or suspend the said Gertrude E. Huntington from her trust as administratrix, etc., of Nathan Webb, deceased, during the pendency of and until the final determination of the said suit in the supreme court of the United States, or until the further order of this court." This portion of the judgment of the court below the appellants say is erroneous. As it is shown in preceding portions of this opinion that our district courts have ample power to correct the erroneous or unlawful proceedings of an inferior court, further discussion or repetition is not necessary to show that (aside from the powers given them by the act of congress above quoted) the superintending control confided to them by the statutes of this territory is ample to forbid a repetition of like erroneous or unlawful proceedings in relation to the same party and subject.

The judgment of the court below is affirmed.

**IN THE MATTER OF THE PETITION OF JOHN WATTS.**

**REVISED STATUTES OF 1865 ALL RE-ENACTED ON SAME DAY.**—The revised statutes of 1865 were all re-enacted on the same day, and therefore those parts relating to the same subject are to be construed together, and so as not to be repugnant to each other.

**AFFIDAVIT REQUIRED ON APPEAL FROM PROBATE COURT.**—On an appeal from the probate court, as well as in case of an appeal from the district court, the appellant must file during the term at which the decree appealed from was rendered, an affidavit showing that the appeal is not taken for vexation or delay, etc., and the denial of an appeal will not be remedied on certiorari where the petition does not show that such an affidavit was filed.

**REMOVAL OF ADMINISTRATOR NOT REMEDIED ON CERTIORARI, WHEN.**—Certiorari will not issue to the probate court to set aside the removal of an administrator and the appointment of an administrator *de bonis non* where the petition for the writ does not show that such court has acted unlawfully or injuriously to the rights of others.

**APPEAL** from the district court of Santa Fe county. The opinion states the case.

*S. B. Elkins*, for the appellant.

By Court, JOHNSON, J.:

The petitioner, on the fourth day of May, 1870, took out letters of administration on the estate of John T. Russell, deceased, in the county of Santa Fe, and at the May term, 1871, of the probate court in and for said county, was removed from said administration by order of said court. During the months of May and July of the last-mentioned year, petitioner, by petition and supplemental petition, applied to the judge of the district court for the first judicial district for writs of certiorari and error to said probate court, for the alleged reason that said court had refused to grant him an appeal from its judgment and order revoking his letters of administration. The judge of the district court for said district denied the prayer of said petition and supplemental petition; and thereupon petitioner appeals to this court.

The Revised Statutes declared by the act of the legislative

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Opinion of the Court—Johnson, J.

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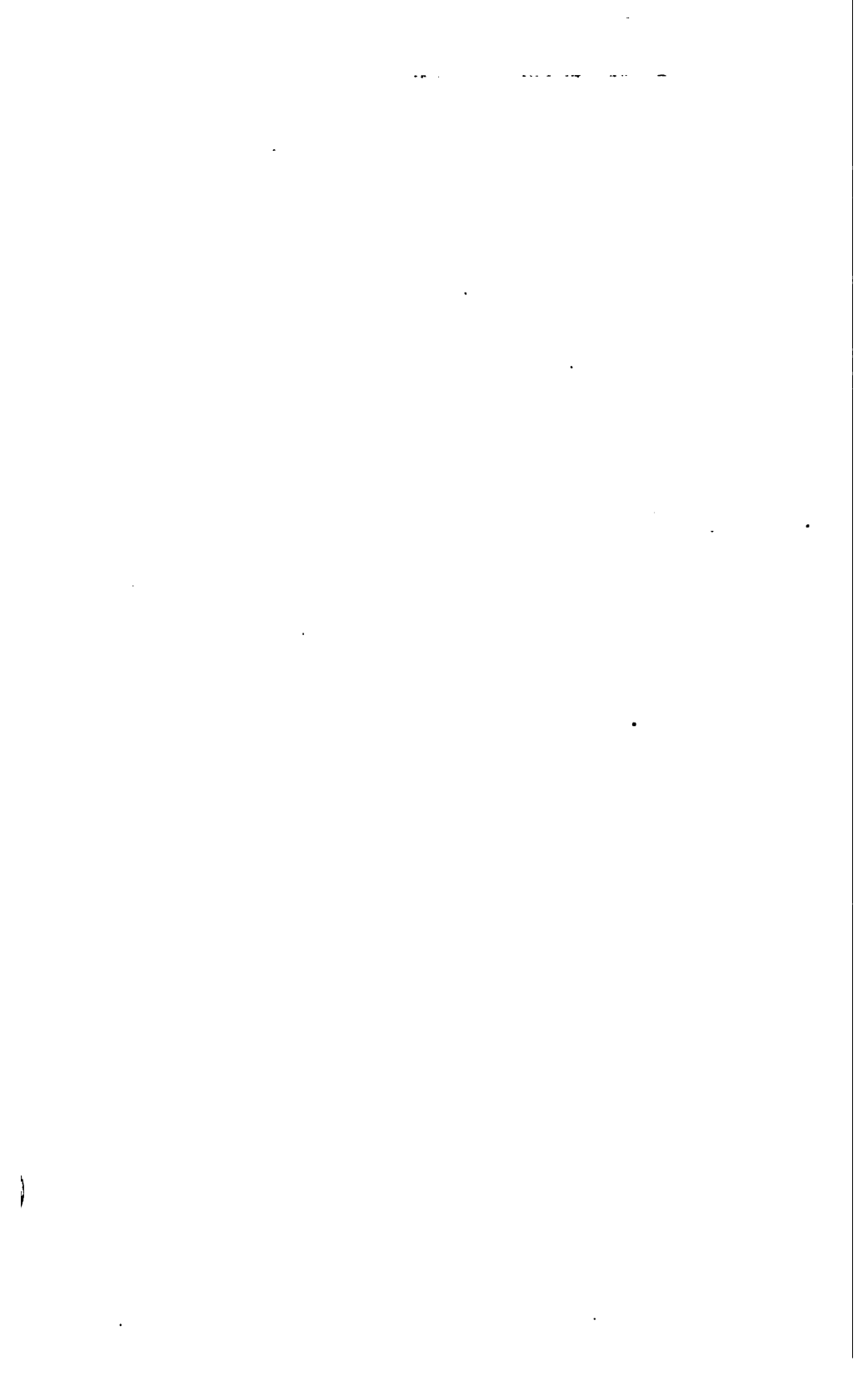
assembly, approved January 24, 1865, are to be considered as all re-enacted on that day, and all parts of them touching the same subject-matter are to be construed in such manner that the one part be not repugnant to the other. This is substantially the rule of interpretation that has governed this court when construing these statutes. The Revised Statutes, sec. 4, p. 122, provide that appeals from the judgment of the probate court shall be allowed to the district court in the same manner and subject to the same restriction as in case of appeals from the district to the supreme court. How are appeals to be taken from the district court to the supreme court? On page 106, section 3, we find that "no such appeal shall be allowed, unless, first, the appeal be taken at the same term at which the judgment or decision appealed from was rendered; and, second, unless the appellant or his agent shall, during the same term, file in the court his affidavit, stating that such appeal is not taken for the purpose of vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court."

The provisions of section 5, page 184, do not dispense with the requirement of this affidavit in appealing from a judgment or decision of the probate court to the district court. In his original petition, the petitioner did not show that the required affidavit had been filed in the probate court during the same term at which the judgment was rendered, and his supplemental petition admits this fact, and undertakes to excuse his not having filed the affidavit. Ordinarily, the failure to show that all the legal steps had been taken to have the appeal allowed would be sufficient ground of denial of the writ of certiorari.

A portion of the exclusive original jurisdiction given to the probate courts by section 3, page 122, Revised Statutes, is the granting of letters testamentary and of administration and the repealing of the same. The petitioner did not show to the judge of the court below that in exercising this jurisdiction, the probate court had acted unlawfully, or injuriously to the rights of others, either in the removal of himself from the administration of the estate, or in the appoint-

ment of another administrator *de bonis non*; but, after avowing in his supplemental petition that personally he has no wish to continue as such administrator, shows that his desire for the appeal was, in his own language, to wipe out the stain attempted to be fastened upon him of having in any manner neglected or mismanaged the interests of said estate. However commendable it may be in a person to seek to vindicate himself, a writ of certiorari, *supersedeas* or error, could not be made effectual touching the irrelevant matters shown in the petition; and it is not proposed to discuss them in this opinion.

Upon full consideration of all the material allegations of the petitions and the supplemental petition, it is the undivided opinion of this court that the judge of the court below did not err in denying to interfere with the proceedings of the probate court in the premises.



REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.

JANUARY TERM, 1873.

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TERRITORY OF NEW MEXICO *v.* PLACIDE  
ABEITA.

**OBJECTIONS TO JURORS, HOW WAIVED.**—Any objection to the mode of the selection of a jury, or to the fact that some of the jurors are non-residents, if known to the defendant in a criminal case at the time of impaneling the jury, and not made at that time, will be deemed waived, and can not be insisted upon after verdict.

**ROBBERY—VIOLENT TAKING, NECESSITY OF.**—It is not error to refuse to instruct the jury on the trial of an indictment for robbery, that in order to a conviction they must find that the defendant did "with force and violence take the property," because it is sufficient if the taking was "with force and arms," or "by assault and putting in fear."

**DISCREDITING WITNESS, INSTRUCTION AS TO, NOT ERRONEOUS, WHEN.**—It is not error to refuse to instruct the jury in a criminal case that if they believe the principal witness for the prosecution "is fully contradicted by other good men as witnesses, and that he was drunk and admitted it before the justice, and denies it here, and in other respects is contradicted by the witnesses, the jury should give no weight to his evidence unless corroborated by other evidence," because such an instruction is too broad, and includes irrelevant matter.

**APPEAL** from the district court for the county of Bernalillo. The case appears from the opinion.

*J. S. Watts*, for the defendant and appellant.

*T. F. Conway*, attorney-general, for the plaintiff and appellee.



By Court, BRISTOL, J.:

Placide Abeita, the defendant herein, at the May term of the district court for the second judicial district, in and for the county of Bernalillo, in the year 1872, was tried and found guilty upon an indictment charging him with having committed the crime of robbery from the person of one Jose Duran. The cause has been removed to this court for review of bill of exceptions and appeal. After verdict a motion was made on behalf of the defendant for a new trial, on the ground of irregularities in the selection and summoning of the petit jurors serving at the term aforesaid, and from whom the jury impaneled to try the cause was taken; that one of such jurors had been summoned from an adjoining county, and was a non-resident of said county of Bernalillo, and that the court below erred in refusing to instruct the jury as requested on behalf of the defendant.

The respective points of error relied on by counsel for the defendant, we will take up and dispose of in the order presented. The first point of error assigned by counsel for the defendant is that the petit jury was not selected by the sheriff of Bernalillo county, but by the United States marshal, and that one of the jurors was a resident of Valencia county. There is nothing before the court from the proceedings in the court below showing how the jurors in attendance had been selected. The only statement appearing on the record in any manner relating to the jury is an admission at some stage of the proceedings that the summons for the petit jury was issued to the United States marshal, and served by him, and that Gregorio A. Otero, one of the jury that tried the cause, was not a resident of Bernalillo county, but a resident of Valencia county. The record does not show that the defendant interposed any objection to the jury until after verdict. Neither does it appear that the grounds of objection then interposed were not known to the defendant at the time the jury was impaneled. Without stopping to inquire whether there were or were not irregularities either in the selection or summoning of the jury, it is evident that none existed which the defendant

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Opinion of the Court—Bristol, J.

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could not and did not waive by omitting to interpose his objections at the time of impaneling the jury. The defendant was at liberty to submit his case to an incompetent jury if he saw fit. If he did so, he was bound by it. It was too late at any subsequent stage of the proceedings, and especially after verdict, for him to interpose his objections unless it appeared that the grounds of objections were previously unknown to him: 1 Bish. Crim. Proc., secs. 783, 793, 807; 6 Cal. 405; 16 Ill. 364; 6 N. H. 352; 5 Mass. 435; 6 Miss. 426; 5 Wis. 324; 1 Pick. 38.

The second ground of error assigned on behalf of the defendant is that the court below erred in refusing to give the jury the first instruction asked for by the defendant. The instruction asked for was as follows: "If the jury believe from the evidence in the case that the defendant did not with force and violence take the property in the indictment, then the jury should find the defendant not guilty."

The indictment herein was found under section 30, chapter 51, page 326, of the Compiled Laws of New Mexico. The indictment does not contain the allegation that the robbery was committed by force and violence, but with "force and arms," and "by assault and putting in fear." This instruction therefore, under the statute, if given, would have been a positive misdirection to the jury, as the force may not have been applied in a manner to convince the jury beyond a reasonable doubt of "violence," while they might have been satisfied beyond any doubt that there was an "assault and putting in fear," which in addition to the other essential ingredients of the offense was all that was requisite for a conviction.

The third and last ground of error assigned on behalf of the defendant is that the court below erred in refusing to give the jury the fourth instruction asked for by the defendant, which was as follows: "If the jury are satisfied that Jose Duran is fully contradicted by other good men as witnesses, and that he was drunk, and admitted it before the justice and denies it here, and in other respects is contradicted by the witnesses, the jury should give no weight to his evidence unless corroborated by other evidence in the

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Opinion of the Court—Bristol, J.

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case." The evidence discloses abundant material out of which proper instructions to the jury upon the testimony tending to discredit that given by the witness, Jose Duran, might have been drafted and presented to the court with the request that they be given to the jury. But the instructions asked for in that connection were too broad in their terms, and too much incumbered with irrelevant and improper matters, to render them a suitable charge to the jury. In the shape presented, they would have tended rather to mislead than to aid the jury in applying the law to the evidence.

There was no error in the rulings of the court below that will justify this court in disturbing the judgment.

Judgment of the court below affirmed.

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### TERRITORY OF NEW MEXICO v. ANTONIO VALDEZ.

**JURISDICTION AS TO ASSAULT.**—Justices of the peace have exclusive original jurisdiction of the crime of assault and battery, or assault as defined by section 11, chapter 55, Compiled Laws, and an indictment for such an offense in the district court may be quashed.

**STATUTE RELATING TO JURISDICTION OF DISTRICT COURT CONSTRUED.**—Section 2, page 120, of the Compiled Laws relating to the jurisdiction of the district courts in civil and criminal cases, simply refers to the territorial jurisdiction of those courts, and does not extend their jurisdiction to all criminal offenses of whatever grade.

**APPEAL** from the district court for Rio Arriba county. The case appears from the opinion.

*T. F. Conway, attorney-general, for the appellant.*

*S. B. Elkins, for the appellee.*

By Court, BRISTOL, J.:

At the September term of the territorial district court for the county of Rio Arriba in the year 1871, the defendant, Antonio Valdez, was indicted by the grand jury for the crime of assault and battery, committed upon one Maria Rosaria Tafoya, the indictment alleging that the defendant assaulted and unlawfully wounded and ill-treated and

other wrongs did to the said Maria, etc. At the next ensuing April term of the court a motion was made on behalf of the defendant to quash the indictment on the ground that the district court had not original jurisdiction of the offense charged. The motion was sustained by the court below, to which the territory, by the attorney-general, excepted.

The indictment evidently was found under section 11, chapter 55, page 360, of the Compiled Laws of New Mexico, which provides that if any person shall unlawfully assault or threaten another in a menacing manner, or shall unlawfully strike or wound another, he shall upon conviction be fined not exceeding one hundred and fifty dollars, or imprisonment not exceeding thirty days, or both such fine and imprisonment. The indictment no doubt sufficiently sets out the offense under this statute. The offense is of no higher grade than assault and battery. Section 17, chapter 22, page 138, Compiled Laws of New Mexico, is broad enough in its terms to confer jurisdiction of the offense charged upon justices of the peace, even to the imposition of a fine of one hundred and fifty dollars, and imprisonment for thirty days, while section 3, chapter 57, page 368, Compiled Laws of New Mexico, restricts the penalty to be imposed by a justice of the peace for that offense to a fine of fifty dollars.

These various provisions of the statute were in force at the time the indictment was found, and are in force still. The offense charged in the indictment being of no higher grade than assault and battery, a justice of the peace no doubt had original jurisdiction of it. The only question to determine is whether the district court had concurrent original jurisdiction of the same offense. There are several provisions of the statutes conferring criminal jurisdiction on the district courts. Section 10, chapter 16, page 108, Compiled Laws of New Mexico, confers on the district courts jurisdiction of all criminal cases that shall not otherwise be provided for by law, and are therefore excepted from such jurisdiction. Section 10, chapter 57, page 368, Compiled Laws of New Mexico, expressly excepts all criminal offenses that are cognizable before justices of the peace from the list of

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Points decided.

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offenses that shall be presented by indictment. But the provision of the statutes on which the attorney-general relies as conferring on the district court jurisdiction of the offense of assault and battery is section 3, page 120, of the Compiled Laws of New Mexico, which provides that "the district courts in the various counties shall have jurisdiction in all civil cases in said counties which according to law belong to the district courts, and of all criminal cases that may originate in said counties or that may be presented by indictment, information, or by appeal."

Taking the whole act together of which this section is a part, it is evident that its purpose was not to change the limits of the jurisdiction of the districts courts, either as to civil or criminal cases, but to adapt the jurisdiction as then limited by law to the several counties organized for judicial purposes. That part of section 3 of this act which refers to criminal cases is in language that necessarily refers to and is qualified by the preceding part of the section, so far as relates to the extent of jurisdiction; that is, the district courts under that section were authorized to exercise jurisdiction, in the various counties, of criminal as well as civil cases arising therein which, according to law, then belonged to the district courts in their respective judicial districts. We are of the opinion that a fair construction of the statutes on the subject justifies the conclusion that at the time the indictment was found and presented the offense of assault and battery was expressly excluded from the crimes of which the district courts had original jurisdiction.

The order of the court below quashing the indictment on motion is therefore affirmed.

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THE UNITED STATES OF AMERICA v. GEORGE W.  
HOWLAND.

SET-OFF AGAINST DEFALCATION OF DEPUTY POSTMASTER, WHAT NOT.—Is an action on a deputy postmaster's bond, to recover for an alleged defalcation, a claim of such deputy postmaster against the United States for rent, etc., can not be pleaded as a set-off unless it is alleged to have been allowed and adjusted by the postmaster-general, and to have been presented to and disallowed by the auditor, or not to have been presented to him because of some unavoidable accident.

APPEAL from the district court for the first judicial district. The case is stated in the opinion.

*R. H. Tompkins*, for the defendant and appellant.

*T. B. Catron*, *United States district attorney*, for the plaintiff and appellee.

By Court, BRISTOL, J.:

This action was brought in the United States district court for the first judicial district of New Mexico against the defendant, George W. Howland, as deputy postmaster at Santa Fe, and the sureties on his official bond, to recover the amount of an alleged defalcation on the part of said Howland, in omitting and refusing to pay over certain moneys belonging to the United States which he had received as such deputy postmaster. The defendant, in addition to pleading performance of all the conditions of the bond to be kept and performed by said Howland, set up as and for a further plea a certain claim against the United States on the part of said Howland as deputy postmaster for rent of post-office, and for lights, fuel, and stationery therefor, and tendered the same as a set-off in the sum specified. To this plea a demurrer was interposed which was sustained by the court below, and to the ruling of the court sustaining the demurrer, the defendants excepted.

The cause is before this court for review on bill of exceptions and appeal. The bill of exceptions presents but a single question for the consideration of the court, and that is whether the court below erred in sustaining the demurrer. There are certain conditions precedent to be complied with in order to entitle a claim like the one set up in the plea demurred to to be pleaded as a set-off in an action of this kind. The claim, in the first instance, must have been allowed and adjusted on a satisfactory exhibit of facts by the postmaster-general: 13 U. S. Stats. at Large, sec. 5, p. 335. And then such claim so allowed and adjusted, before it can be pleaded in set-off, must either have been presented to the auditor, and by him disallowed in whole or in part, or it must appear on satisfactory proof that the defendant How-

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Opinion of the Court—Bristol, J.

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land had been prevented by unavoidable accident from exhibiting such claim to the auditor, and that he was then in possession of vouchers not before in his power to procure: 5 Id. 13, sec. 15, p. 80; 13 Wall. 65.

It does not appear that any of these prerequisites have been complied with. The claim of the defendant Howland set up in the plea demurred to could not, therefore, have been properly pleaded in set-off.

The judgment is affirmed.

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LOUIS BARIO AND PRUDENCIO BENAVIDEZ v.  
CHARLES BLUMNER.

JUDGMENT WITHOUT SUBMISSION TO JURY ERRONEOUS, WHEN.—After a plea of the general issue in an action for the recovery of real property, a judgment rendered in the absence of the defendant, and without a submission to a jury, is erroneous and must be reversed.

ERROR to the district court of Dona Ana county. The opinion states the case.

*S. B. Elkins and T. B. Catron*, for the plaintiffs in error.

*Kirby Benedict*, for the defendant in error.

By Court, BRISTOL, J.:

This is an action brought in the district court, in and for the third district and county of Dona Ana. The defendants appeared and pleaded the general issue. In 1868, at the June term of that court, in the absence of the defendants, and without submitting the case to a jury, the court rendered judgment in favor of the plaintiff for the recovery of the possession of the real property described in the petition, and for costs of suit. The record is before this court for review on writ of error. The court below had no authority in the premises to render judgment except upon trial and inquest by a jury and verdict found: *Vide Comp. Laws of N. M.*, sec. 40, p. 200.

The judgment, therefore, is reversed, and the cause remanded to the court below for trial.

THE UNITED STATES OF AMERICA v. JOHN S.  
WATTS ET AL.

**EVIDENCE NOT EMBODIED IN BILL OF EXCEPTIONS.**—Where the evidence in a cause is not embodied in the bill of exceptions, the instructions given or refused can not be reviewed on appeal.

**RECEIVER AND DEPOSITARY OF PUBLIC FUNDS, LIABILITY OF.**—A receiver and depositary of public funds of the United States is a debtor of the government to the full amount of the funds received by him, and is an insurer of their safety. Hence, in an action against the sureties on the bond of such an officer for an alleged defalcation, it is no defense to show that he was murdered and robbed of the moneys in his custody by an irresistible force.

**APPEAL** from the district court of the first judicial district. The opinion states the case.

*John S. Watts, in propria persona*, for the defendants and appellants: 1. The court erred in not allowing the motion for continuance, because it was shown that a just and meritorious claim against the United States, to the extent of three thousand dollars, existed, had been presented and disallowed, and it was lawful, right, and proper to present to the jury the fact for their consideration, in order that no more should be recovered from the securities than what was lawfully due from the principal.

2. The allowance of interest on the assessment of damages from the date of the loss, or from six months after that date, is illegal and void, and no interest could be lawfully recovered until after the fixing of the damages by the verdict of a jury, so far as the rights of the securities are involved in the question of interest.

3. The refusal of the court to allow one of the defendants, and the attorney of the other defendants, to argue the cause before the jury, was error of such importance as not only to justify, but demand, a reversal of this judgment. A party whose life, liberty, or property is at stake has a constitutional right to be heard in person or by his counsel, and this right is positive, absolute, and mandatory on the court, and not discretionary, and the right of defendant or his counsel to make a respectful and courteous argu-



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Argument for Defendants

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ment to the jury upon any question of fact involved in the case, or comment on or explain the amount found by the evidence to be due the plaintiff, is not left to the discretion or whim of any court, no matter how just, impartial, or intelligent. This error, if none other was apparent on the record, is amply sufficient to demand a reversal of this judgment and require a new trial in the cause.

4. The court erred in excluding the evidence offered by defendants, which was certainly material as to the right of recovery upon the question of interest on the actual amount found due, not by the *ex parte* account of the accounting officers of the treasury, but the amount found due by the verdict of a jury.

5. The court erred in not allowing the evidence offered by the defense to go to the jury in bar of all right of recovery against the securities; for the true intent, meaning, purpose and obligation of the securities was to secure the United States against the loss resulting from neglect, carelessness, misapplication, conversion, or embezzlement of the funds of the United States by the depository to whom intrusted, and not to hold them responsible for loss resulting from the act of God or the king's enemies, and to plunder and ruin securities, without any fault or neglect of the principal, would be a reproach to public justice, and to the honor, justice, equity, and fame of a great and enlightened nation.

In the case of *United States v. Jones*, 8 Pet. 375, it was held, in an action by the United States against an individual debtor, that a mere general charge of an aggregate indebtedness certified from the books of the treasury department, *e. g.*, "to accounts transferred from the books of the second auditor for this sum standing to his debit under said contract on the books of the second auditor, transferred to his debit on those of this office, forty-five thousand dollars," is not competent evidence.

The transcript in this case introduced in evidence on the part of the United States, and made the basis of the judgment, was not legal evidence, and should have been excluded from the jury. In support of the above principle

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Argument for Defendants

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it was decided in the case of *United States v. Laub*, 4 Cranch C. C. 703, that "a transcript charging a balance of a former settlement is not *per se* evidence." and it was so held in the case of *United States v. Edwards*, 1 McLean, 467; and in *United States v. Hilliard*, 3 Id. 324, that "the original items on which the accounting officers acted must be stated."

In the case of *United States v. Patterson*, Gilp. 44, it was decided that the report of an auditor of the treasury department of a balance due from a person accountable for public moneys is a guide to the controller of the treasury as to the amount to be sued for, but is no evidence of the debt on an action against such person. It is not a transcript within the meaning of the act of March 3, 1797: 1 Stat. at Large, 512.

In the case of James L. Collins, the account against him did not arise in the ordinary mode of doing business at the treasury, but after the funds were placed in the hands of other disbursing officers, and then given to the depository at Santa Fe for safe keeping and payment, not to the United States, but to the disbursing officers to whom they had been sent for use, and under such a state of facts it has been repeatedly held "that an account stated at the treasury department, which does not arise in the ordinary mode of doing business in that department, could derive no additional validity from being certified under the act of congress." In support of this ruling the court is cited to the following cases: *United States v. Buford*, 3 Pet. 13, 29; *Cox v. United States*, 6 Id. 173; *United States v. Jones*, 8 Id. 375, 387.

By a careful examination of the above statement, and the cases cited in its support, it must be clear and undoubted that the transcript in this case was not sufficient to authorize or justify the judgment rendered against the appellants, and if the statements of the account and books of James L. Collins are to furnish evidence in the case to establish the supposed indebtedness, they are also evidence, *prima facie*, in favor of James L. Collins, depository, and his securities, and as the books are correct and complete, and lawfully account for every dollar of the public funds in the hands of the depository at his death, some further evidence of

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Argument for Defendants.

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neglect, want of care, conversion, or embezzlement of the funds of the United States was required to fix liability upon him or his securities.

After the death of James L. Collins, the funds were exposed to loss or plunder; they went into the hands of E. W. Little and General Getty without any responsibility or proof, and for days were in their possession, under their control, with opportunity to take and dispose of what funds they might desire, and then charge the deficit on the upright, careful, faithful, and heroic old custodian who sacrificed his life in defense of the funds of the United States, and by that sacrifice of life, saved to the United States several hundred thousand dollars from the plunderers, thieves, and assassins, and for a great and just nation to set up, in its own favor, principles of law and rules of evidence at war with all our notions of human rights and human accountability, would dishonor and degrade it in the estimation of the civilized world, and of all just, intelligent, and upright men.

For these reasons the supreme court of the territory of New Mexico is most respectfully asked to reverse and set aside and vacate the judgment in this case, and direct in the further hearing of this case as follows: 1. That the transcript in the record in this case is insufficient to support the judgment. 2. That the demurrers to the defendants' pleas be overruled, and the plaintiff required to answer them. 3. That the counsel of the defendants be allowed to argue the cause before the jury as to all disputed questions of fact, or conclusions from facts, proven in the case before the jury. 4. That the court below be directed to allow the jury to estimate the damages and interest to constitute the verdict, and not require them to take it prepared from any other source. 5. That the instructions to add interest to the supposed amount of indebtedness, anterior to the finding of the breach of the bond, is erroneous, and should not be given to the jury. 6. In this case, the court below should, on the reversal of the case and the granting of a new trial, be instructed that this suit being for unliquidated damages on the alleged breaches of an official bond, no

## Argument for Plaintiff.

interest is chargeable except on the amount found due by a verdict of the jury.

On this point see *Gilpins v. Consequa*, Pet. C. C. 85, in which the court holds that "interest is not allowable on unliquidated damages." In the case of *Youqua v. Nixon*, Id. 224, it was held that "damages for breach of contract do not bear interest." The supreme court of the United States has decided in a case exactly analogous to this that "if there has not been a previous demand of the penalty of a bond or an acknowledgment the whole is due, interest is recoverable only from the commencement of the suit." See *United States Bank v. Magill*, 1 Paine, 661. In this case the question of interest was discretionary with the jury, and not with the court. In the case of *Killingly v. Taylor*, 1 Cranch C. C. 99, it was held "that interest on a balance of an account was discretionary with the jury." In the cases of *Willings v. Consequa*, Pet. C. C. 172; *Gilpins v. Consequa*, Id. 85, it was held that "it is in the discretion of the jury to give interest in the name of damages." See, on question of interest on unliquidated damages, Sedg. on Dam., pp. 437, 438, note 3.

Without proof of the time when payment was rendered, interest can be allowed only from the time of suit brought: *Rawson v. Grow*, 4 El. D. Smith (N. Y.) '18. See also Sedg. on Dam., p. 437, note 1, citing case of *Holmes v. Rankin*, 17 Barb. (N. Y.) 454.

*S. B. Wheelock*, assistant United States district attorney, for the plaintiff and appellee. The first question raised before this court by the record from the court below is presented in the exception of defendants to the ruling of the court in refusing to allow them to file two additional pleas, five pleas having already been filed at a previous term of the court in behalf of two of the defendants, and default entered against the others. By consent of the attorney for plaintiffs, the default was set aside and the parties allowed to file the same pleas as those already before the court; whereupon all the defendants by their attorneys asked permission to file two additional pleas (6 and 7) which was re-

## Argument for Plaintiff.

fused by the court. Aside from the character of the pleas, which was objectionable, it was entirely within the discretion of the court to admit or reject additional pleas at that stage of the proceedings; and there being no legal obligation resting upon the court to comply with the request, its ruling on the subject is not proper matter for review by this court. This has so frequently been decided by all appellate courts that it hardly merits discussion: 2 How. 263; 13 Id. 212; 16 Id. 14, 571, 599; 20 Id. 264, 535; 2 Wall. 320.

The second point presented by the record is of a similar nature, the defendants excepting to the ruling of the court in permitting an amendment to plaintiff's petition in the description of the bond sued on. As the bond accompanied the petition and was made a part of it, the amendment was a formal one only, and could not result to the prejudice of the defendants; and by the laws of the territory, Revised Statutes, sec. 27, p. 196, the statutes of the United States, 1 Id. 91, and the uniform practice of the district courts, amendments are allowed at any time before judgment.

The third question raised by the record is on the decision of the court sustaining the demurrer to the fourth plea, which sets up the murder of James L. Collins, the principal in the bond, and the subsequent robbery of the depositary, as a bar to this action to recover on the bond. Suits on official bonds have been of frequent occurrence since the foundation of our government, and many cases have been carried to the supreme court of the United States for final adjudication. The decisions of that court from its establishment to the present time have been, without exception, to the effect that robbery, even by an irresistible force and without any suspicion of collusion, constitutes no defense to an action of debt on an official bond; and that nothing but an exact performance of the conditions expressed in the bond will relieve the parties from their liability. Very recent decisions of that court (*Boyden v. United States*, 13 Wall. 17; *Bevans v. United States*, Id. 56) review and affirm the many previous decisions rendered on that point, and are conclusive. The allegation of murder could add noth-

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Argument for Plaintiff.

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ing to the weight of the plea, for the obligation of a bond is not terminated by death, nor is a debt discharged thereby.

Defendants next excepted to the ruling of the court below in refusing to require the United States to file an itemized account. This was an appeal to the discretion of the court, and can not therefore be assigned as error. The record also fails to show any reasons whatever for such a motion, and coming as it did at the second term of the court, after the suit was commenced, it was properly overruled. Defendants also excepted to the refusal of the court to grant a continuance; but this being a matter entirely within the discretion of a court, can not be reviewed.

The statutes of the United States, 1 Stat. 512, require prompt and summary action in suits against delinquent officials. The reasons given in the motion for the continuance were entirely insufficient.

The objection made to the instruction of the court given to the jury is "entirely without merit," as was decided in *Bevans v. United States*, 13 Wall. 62. As the court below in this case also directed the jury to give interest on the amount from the time of the default, the above decision of the United States supreme court disposes of exceptions taken in this case on the same subject. The instructions asked for by the defendants were properly refused, as there was no evidence to justify them. Abstract principles of law are not properly embodied in a charge to a jury, when there is no evidence to render them necessary; and the record fails to disclose any evidence whatever on the part of the defendants. Indeed, none of the evidence supposed to have been before the district court is brought up by the record, and therefore no ruling of that court which might have been influenced by the evidence can be reviewed by this court.

The next question presented by the record is the refusal of the court to allow the attorneys for the defendants to address the jury at the close of the evidence. As there had been no evidence in behalf of the defendants and the court was bound to instruct the jury to find for the plaintiffs,

there being no disputed facts upon which to base an argument, to allow the request would have been frivolous.

The only remaining point is the refusal of the court to allow the defendants to introduce evidence of matters which were admitted in open court by the plaintiffs. Plaintiff's admission was the highest evidence that could be produced, and was conclusive. The proposition of defendants to introduce secondary evidence of that which was not only not denied but was expressly admitted, was novel; but the action of the court in rejecting it can hardly be deemed erroneous.

By Court, BRISTOL, J.:

This is an action of debt, brought in the district court of the United States for the first judicial district of New Mexico, against John S. Watts and others as sureties on the official bond of James L. Collins as receiver of public moneys for the district of lands subject to sale at Santa Fe, and depository to receive payment of moneys due the United States, for the purpose of recovering the amount of an alleged defalcation on his part as such receiver and depository by omitting to safely keep and pay over, according to the terms and conditions of such bond, certain moneys belonging to the United States which he had received by virtue of his office. Before the commencement of the action, said Collins, the principal, and one of the sureties on the bond had died. The action, therefore, was brought against the surviving sureties, who have appeared to defend the suit. The pleas of the defendants admit the execution and delivery of the bond, with the conditions thereof, as alleged in the petition of the plaintiffs, but traverse the allegations showing a defalcation on the part of said Collins, and allege full performance of the terms and conditions of the bond by him to be kept and performed. And for a further and fourth plea, they allege the murder of said Collins while defending the public funds in his possession as such receiver and depository, and that the depository was thereupon robbed of such funds to the amount of the alleged defalcation without fault on his part and by irresistible force.

This fourth plea was demurred to on the ground that it did not allege facts constituting a defense. The demurrer was sustained by the court below, and thereto the defendants excepted. Exceptions were also taken by the defendants to the ruling of the court below in refusing to grant a continuance on affidavits and motion, in refusing to allow the defendants to file additional pleas after the time they had been ruled to plead had expired, in sustaining a motion of the plaintiffs to amend their petition, in refusing to give instructions to the jury asked for by the defendants, in overruling a motion of the defendants to require the plaintiffs to file an itemized account, in refusing permission to the attorneys for the defendants to address the jury, and in refusing the introduction of evidence of facts already admitted by the plaintiffs. The defendants also excepted to the charge of the court to the jury. The foregoing facts and exceptions cover substantially all the grounds of error assigned by the appellants.

The cause has been brought to this court for review on bill of exceptions and appeal. Neither the instructions given to the jury by the court below, nor the instructions asked for by the defendants, can be reviewed by this court, for the reason that the record does not contain the evidence before the jury on which proper instructions to the jury must be founded. In the absence of the evidence, the presumption of law is that there was no conflicting evidence, and that the positive instructions of the court to the jury were in accordance with the legal effect of the evidence submitted: 13 Wall. 56.

The principle question before this court in this case is as to the correctness of the ruling of the court below in sustaining the demurrer to the fourth plea. The facts alleged in this plea are not in all respects identical with those of any other adjudicated case. The theory of the counsel for the defendant is that Collins having been murdered, a vacancy in the office of receiver and depository immediately ensued, and that the depository having been robbed during such vacancy so brought about, the liability of the sureties on the deceased's official bond are discharged from liability



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to the extent of the public funds of which the depository was robbed. It is only by reference to well-established principles of law, defining and regulating the nature and extent of obligations like those contained in the official bond in question, that we are enabled to test the soundness of this theory. Nothing seems to be better settled than that a receiver and depository of public funds under the laws of congress and regulations of the treasury department is not merely a bailee of the government, and bound only to ordinary care in keeping the public moneys: he stands in the relation of a debtor to the government to the full amount of public funds received by him, and this indebtedness can only be discharged by actually paying over the money on orders from the proper authority. The obligations which such an official assumes by the express terms and conditions of his bond are those of an insurer of the safe keeping of the moneys intrusted to his care until they shall have been paid over as required by law, and the sureties on his official bond become sponsors for the discharge of all these obligations assumed by their principal: 13 Wall. 17, 56. How, then, is it possible for such a vacancy in the office to occur as will discharge the sureties from liability prior to the actual paying over of all the moneys received on proper orders? Will murder and robbery under the circumstances alleged discharge an indebtedness or an unconditional contract of insurance against all casualties? Clearly not.

The application of this rule of law to receivers and depositories of public funds may at first sight seem harsh and unjust. But when we reflect that any rule less rigid and arbitrary would afford the greatest temptation to pretended robberies and consequent defalcations, we can not but be convinced of its justness in principle, as well as of its necessity on grounds of public policy.

All the remaining questions presented in the bill of exceptions relate to matters of practice resting in the sound discretion of the court below, and therefore are not subject to review on appeal to this court.

Judgment affirmed.

**ANDREW STEWART v. LUCIEN B. MAXWELL.**

**JUDGMENT OF ANOTHER STATE OR TERRITORY, ACTION ON.**—In an action on a judgment of another state or territory where the transcript of such judgment is duly authenticated as required by act of congress, the fact that the transcript shows that the case was tried without a jury and does not show that a jury trial was waived, does not render the judgment invalid, where it appears that both parties were present at the trial in person or by counsel, and where it is not shown that such judgment could not be enforced in the state in which it was rendered.

**APPEAL** from the district court for Santa Fe county. The case appears from the opinion.

*T. D. Wheaton* for the defendant and appellant. 1. The district court of the state of Kansas had no jurisdiction of the subject-matter, nor of the person of the defendant. The jurisdiction of the district court of the state of Kansas is created and limited by statute: Const. State of Kansas; Laws Kansas Territory, 122-126; Laws Kansas, 1861, pp. 55, 67, 123; General Stats. State of Kansas, 1868, pp. 47, 630. The statutes of the state of Kansas provide that issues of fact arising in actions for the recovery of money, etc., shall be tried by a jury unless such trial is waived in one of the following modes: 1. By the consent of the party appearing, when the other party fails to appear; 2. By written consent in person or by attorney, filed with the clerk; 3. By oral consent in open court entered upon the journal: Gen. Stats. of Kansas, pp. 680, 684; Laws of Kansas, 1861, pp. 55, 67, 123; Laws Kansas Territory, pp. 123, 126. This cause was tried by the court without the intervention of a jury, without any such provision having been complied with, and the judgment was therefore void for want of jurisdiction in the court. There was no such appearance on the part of the defendant as to give the court jurisdiction of his person. The judgment was also for this reason void for want of jurisdiction: 5 Wend. 154-158 [S. C., *Starbuck v. Murray*, 21 Am. Dec. 172]; Story on Const. 119; Story on Conf. Laws, 1004; 1 Pet. 246-249; Id. 168 Stark. Ev. 276; 1 Chit. Pl. 485; 11 How. (U. S.) 460; *Bissell v. Briggs*, 9 Mass. 467 [S. C., 6 Am. Dec. 88];

## Argument for Plaintiff.

*Borden v. Fitch*, 15 Johns. 121 [S. C., 8 Am. Dec. 225]; *Goff v. Russell*, 3 Kansas, 212; *Bartlet v. Knight*, 1 Mass. 401 [S. C., 2 Am. Dec. 36]; *McJilton v. Love*, 13 Ill. 486; *Hampton v. McConnel*, 3 Wheat. 234; *Pauling v. Bird's Executors*, 13 Johns. 205; *Mills v. Duryee*, 7 Cranch, 481.

The paper offered in evidence herein as a pretended copy of the record in this cause is a nullity, and should have been rejected by the court, it being a mere synopsis or schedule taken by the clerk as minutes from which to make up his record: Stats. of Kansas Territory, pp. 143, 144; Laws of Kansas, 1861, p. 122.

*S. B. Elkins*, for the plaintiff and appellee. The case has been stated in the brief submitted by the attorney for the appellant. The points relied on for a reversal of the judgment are briefly as follows: 1. Imperfection of the record; 2. There being no waiver of a trial by jury entered on the record, the court for this reason had no jurisdiction. First, as to the record being imperfect, it shows on its face that all the necessary proceedings anterior to the judgment were had; they are not set out at length, and the law does not so require; the only requirement is that the judgment itself be fully set up, which is perfectly done. In case the proceedings were set up in full in the record, could they be passed on here? Certainly not. Therefore it is unnecessary they should be before the court. It is a principle of law settled in the cases of *Mills v. Duryee*, 7 Cranch, 481. and *McElmoyle v. Cohen*, 13 Pet. 312, which are the great leading cases in judgments, "that a declaration on a judgment relies solely on the judgment itself, and not on the proceedings by which it has been preceded, and on a plea of *nul tiel record* and issue joined. The entry of the judgment when produced gives force and validity to the record of the previous proceedings; not the record of those proceedings to the entry of the judgment." 2 Am. Lead. Cas. 561. If the judgment itself is perfect and regular, and the adverse party made no objections to any previous proceedings, all defects and irregularities which may have preceded the judgment are cured: *Grignon's Lessees v. Astor*. 2

## Argument for Plaintiff

How. 319; S. C., 15 Cur. 131, 132; *Voorhees v. Bank of United States*, 10 Pet. 469; S. C., 12 Cur. 197. In actions on judgments the court looks to the judgment, and if jurisdiction appears, and the judgment is regular, nothing more is required. Article 4, section 1, of the constitution, provides that "full faith and credit shall be given," etc. Here is a record before the court, certified to by the clerk and judge according to law; now, if any question is raised as to the record, is it giving full faith and credit to the judicial proceedings of Kansas? Each state has its own way of making up a record, and the record before the court shows the way adopted by the state of Kansas, evidently relying on the great principle of law before cited, "that the court looks solely to the judgment."

We come now to the question of jurisdiction, which, it is claimed, the court of Kansas did not have, because no waiver of trial by jury appears on the record. "The power to hear and determine a cause is jurisdiction:" *Grignon's Lessees v. Astor*, 2 How. 319; S. C., 15 Cur. 130. In the course of my argument, I propose to refer to the Kansas statutes, although I protest that they were not proven in the court below nor offered in evidence, and deny the right of the appellant to read from said statutes unless proven; but should the court take a different view, I feel confident I can show from the same statutes that this judgment is in full force and binding. It is admitted that under the laws of Kansas the court had jurisdiction to hear and determine a case in assumpsit involving six or seven thousand dollars. The only question that remains is, does the record fail to show jurisdiction for any reason? 1. A judgment of a court will always be presumed to be regular: 5 U. S. Dig. 233. 2. If the record shows on its face jurisdiction, it is conclusive, and in this case it is shown: 2 Am. Lead. Cas. 559, 560; 2 Clinton Dig., sec. 75, p. 1098; 2 Wait Dig., sec. 35, p. 914; *Thompson v. Tolmie*, 2 Pet. 157; S. C., 8 Cur. 68; *Harvey v. Tyler*, 2 Wall. 341; *Grignon's Lessees v. Astor*, 2 How. 319; S. C., 15 Cur. 131, 132, 134; *Ex parte Watkins*, 3 Pet. 193; S. C., 8 Cur. 374, 375. The last two cases cited go so far as to say the jurisdiction need not be shown in the

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Argument for Plaintiff.

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record, but may be inferred. 3. Does the fact, that no waiver of a trial by jury appears on the record deprive the court of jurisdiction? The Kansas Statutes, sec. 226, p 680, provide that "issues of fact shall be tried by jury unless a jury trial is waived." Section 289, page 684, provides that a jury may be waived in certain ways, but don't say that if not waived in those ways the judgment shall be void, or that there are no other modes by which a jury trial may be waived. In order to make this judgment void for want of a waiver of a trial by jury in a manner prescribed by law, the statutes would have to declare so in terms. The record does not show that any objections or exceptions were made or taken by the defendant, although it shows he was in court. The defendant should have availed himself of the advantage of this defect on an appeal or otherwise; he can not take any advantage of it here. The judgment appears regular, and the law compels the presumption that the court took all necessary steps required by law. The attorneys were compelled to bring this irregularity to the attention of the court, and failing to do so it is waived. In the great case of *Voorhees v. Bank of the United States*, 10 Pet. 449; S. C., 12 Cur. 197, it was urged that the record failing to show that the statutes had been complied with in five particulars, the judgment was void. Among the failures one was to file an affidavit. The court decided among other things as follows:

"It is among the elementary principles of the common law, that whoever would complain of the proceedings of a court, must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it before he submits to the process adopted. If the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity; or, if there is any defect in the form or manner in which he is sued, he may assign those defects specially, and the court will not hold him answerable till such defects are remedied. But if he pleads to the action generally, all irregularity is waived; and the court can decide only on the rights of the parties to the subject-matter

## Argument for Plaintiff.

of controversy; their judgment is conclusive, unless it appears on the record that the plaintiff has no title to the thing demanded, or that in rendering judgment they have erred in law; all defects in setting out a title, or in the evidence to prove it, are cured, as well as all irregularities which may have preceded the judgment. So long as this judgment remains in force, it is in itself evidence of the right of the plaintiff to do the thing adjudged, and gives him a right to process to execute the judgment; the errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment." See same case, pp. 198, 200-202; also, 2 Clinton Dig., secs. 82 and 86, p. 1099; 2 Wait Dig., sec. 42, p. 914; *Cocke v. Halsey*, 16 Pet. 71; S. C., 14 Cur. 194, 195; *Thompson v. Tolmie*, 2 Pet. 157; S. C., 8 Cur. 68; *Hovey v. Tyler*, 2 Wall. 342-346; *Ex parte Watkins*, 3 Pet. 193; S. C., 8 Cur. 372-375; *Kempe's Lessee v. Kennedy*, 5 Cranch, 173; S. C., 5 Cur. 186.

These authorities show conclusively that "irregularities and defects in proceedings" can not be made the ground for attacking a judgment, and if not objected to in time, they become waived. But the law, as is admitted, places this judgment on the same footing here as in the state of Kansas. Now I wish to inquire if no objection were made to the waiver of jury during the trial, and no appeal taken or writ of error sued out, could the defendant possibly avail himself of this irregularity? Clearly not. Further than this, under no circumstances under the laws of Kansas, will a judgment be disturbed or made void for any defect in the proceedings, when substantial justice has been done between the parties: See Kansas Stat., sec. 140, p. 655.

In addition to this, the points relied on by the defendant would avail him nothing in the state of Kansas. The fact that the court proceeded to judgment and no objections were made, is the highest evidence that the trial by jury was waived. We are, then, forced to the conclusion that the clerk omitted to make the entry. Now, section 563,

page 741, Laws of Kansas, says: "A mistake, neglect, or omission of the clerk shall not be ground of error until the same has been presented and acted upon in the court where the same occurred." Now, it does not appear that the defendant below ever made any kind of objection, and I beg to ask if this court can go further than the courts of Kansas, viz., correct or take notice of an error that the laws forbid them from doing unless presented first in the court where committed. But the laws of Kansas provide a way in which a judgment may be set aside for irregularity or defects: See secs. 568, 569, pp. 742, 743.

Now, until this judgment is set aside, modified, or vacated for erroneous proceedings, it is good and binding in Kansas and the same here. If the judgment is defective the appellant had a complete remedy under the laws of Kansas, of which he has failed to avail himself. Erroneous proceedings subsequent to a judgment can not affect its validity: 5 U. S. Dig., 233. The effect of a judgment is to settle all matters in dispute between the parties and can not be inquired into on the merits: Am. Lead. Cas., 559, 564, 566, 567, and 574; 2 Clinton Dig., sec. 63, p. 1097; sec. 80, p. 1098; sec. 96, p. 1100; 2 Wait Dig., sec. 39, p. 914. If the plaintiff in this cause can not recover on this judgment, he must lose his debt; he has no other remedy. The whole matter has been settled and adjudicated by this judgment.

By Court, JOHNSON, J.:

This was an action of debt on a judgment tried and determined in the district court of Santa Fe county, at the February term, 1871, wherein judgment was rendered against Maxwell for Stewart for nine thousand five hundred and seventy-two dollars and fifty cents. Maxwell appeals from this judgment to this court. Stewart, the appellee, a resident of the state of Ohio at the time of bringing this suit in the court below, founded his claim on a judgment for the sum of seven thousand dollars damages, and fifty dollars and twenty-five cents costs rendered in his favor against Maxwell by the district court for Morris county, in the state of Kansas, on the twenty-fourth of November, 1865.

With the petition in the court below was filed a transcript of the proceedings and judgment of the Kansas court, which shows that the appellee there sued appellant by attachment; that appellant appeared by counsel, who represented him till the conclusion of the cause. It was claimed in the court below, and is relied upon here by the appellant for reversal of the judgment of the court below, that the judgment of the Kansas court is invalid, for the reason that the cause was tried in that court without a jury, and that the transcript of its proceedings does not show a waiver by appellant of a trial by jury. Both appellant and appellee confine their arguments in this court to the question of the validity of that original judgment.

The constitutional provision to be considered in resolving this point is contained in the fourth article of the constitution of the United States, and is in the following words:

“Section 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”

In accordance with this provision, congress, May 26, 1790, enacted (1 Stats. at Large, 122), among other matters, that “the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be; that said attestation is in due form, and the said record and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken.”

According to the above-quoted enactment of congress, in order to decide as to the admissibility of the record of judgment, it was only necessary for the court below to ascertain by inspection whether said record is authenticated or not, as required by the act of congress. Inspection of the transcript



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Opinion of the Court—Johnson, J.

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here from the court below shows that the record of judgment therein sued on bears both the attestation of the clerk and certificate of the judge, as required by the act of congress.

It is now to be considered whether the omission by the clerk of the Kansas court from his transcript of the proceedings in the original suit of the entry on the record of the waiver of trial by jury by the defendant should have rendered the record of judgment inadmissible in the court below. The appellant, as before stated, was represented by counsel in the Kansas court, and if that court tried the cause without a jury, and without such trial by jury having been waived by the defendant, that was matter of review and correction by the appellate court of Kansas, and the defendant, the appellant here, should there have sought such redress. Such being the case, the attempt of the appellant in the court below to overthrow the record of judgment on the ground of the omission of the formal entry of such waiver was in fact an attempt to get that court to become a court of review and correction to the Kansas court. It has not been shown here, either by argument or by citation of authorities, that this judgment, unreversed as it stands, could not have been enforced in the state of Kansas on account of the omission referred to, and it is therefore to be inferred that such judgment is valid in that state, and consequently, by virtue of the act of congress before cited, it is in every respect as valid in this territory as it was in Kansas. In the case of *Voorhees v. Bank of the United States*, 10 Pet. 449; S. C., 12 Cur. 197, the supreme court of the United States said: "So long as this judgment remains in force it is itself evidence of the right of the plaintiff to the thing adjudged and gives him a right to process to execute the judgment. The errors of the court, however apparent, can be examined only by appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment." So also in *Christmas v. Russell*, 5 Wall. 305 *et seq.*, judgment is defined to be "the sentence of the law pronounced by the court upon the matter appearing from

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the previous proceedings in the suit." Were it necessary, more extensive citations from the opinions of the supreme court upon points similar to those involved in this case might be made, but those already made are amply sufficient for the purposes of this opinion.

Now, as an unreversed judgment is a finality between the parties as to all matters to which such judgment relates, according to the provision of the constitution of the United States before cited, and of the act of congress with reference thereto, the court below did not err.

The judgment of the court below is affirmed.

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### TERRITORY OF NEW MEXICO v. JAMES COPELY.

INDICTMENT DOES NOT CHARGE TWO OFFENSES, WHEN.—An indictment charging that the defendant "did frequent and keep a gaming table, commonly known as monte, at which said gaming table the said, etc., did then and there play with cards the said game, commonly, etc., with various persons then and there being, whose names are to the grand jurors aforesaid unknown," etc., alleges but one offense, that of keeping a gaming table, and can not be quashed for duplicity.

APPEAL from the district court for Grant county. The case appears from the opinion.

*T. F. Conway, attorney-general, for the appellant.*

*A. P. Clever, for the appellee.*

By Court, JOHNSON, J.:

This defendant was indicted at the November term, 1872, of the district court for the county of Grant. The charging part of the indictment alleges that he "did frequent and keep a gaming table, commonly known as monte, at which said gaming table the said James Copely did then and there play with cards the said game, commonly known as monte, with various persons then and there being, whose names are to the grand jurors aforesaid unknown; the said gaming table then and there being a banking game, against the form of the statute," etc. The court below, on motion of

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Opinion of the Court—Johnson, J.

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the defendant, quashed the indictment for alleged duplicity, and from this judgment the plaintiff, by her district attorney, appeals.

The question to be determined here is whether the indictment charges the defendant, in the count, with the commission of more than one offense, or, in other words, is the indictment double in the count? The offense undertaken to be charged in this indictment is forbidden by section, 3, page 400, Revised Statutes, which is as follows: "If any person shall frequent or keep, a gaming table of any kind whatever, such as faro, monte, pass-faro-pass-monte, twenty-one, or any other banking game, by whatever name known, on conviction thereof, he shall be fined in any sum not less than twenty-five dollars nor exceeding one hundred dollars." According to the terms of this section, to frequent a gaming table of a banking game is one offense, and to keep such table is another offense; and either offense has the same punishment prescribed as the other. As the verb to frequent means "to visit often, to resort to often or habitually," and the succeeding section inflicts a fine of not less than five nor more than twenty-five dollars upon any person who "shall bet at any gaming table, embraced in the next preceding section," it seems that to set out or charge the offense of frequenting, such language should be employed as would indicate visitations or a habitual resorting to such table, in order, at least, to distinguish it from single betting, and furthermore, to charge the offense of frequenting, it is necessary to allege who was the keeper of the table frequented; or, if it was kept by a person or persons to the grand jurors unknown, to so allege, as it is certainly not the intentment of the statute to confound the two offenses, nor to punish a person for frequenting a table kept by himself, much less at the same time to punish him for frequenting and keeping the same table.

This indictment, although the word frequent is used in connection with the word keep, joined by the conjunction and, charges but the one offense, viz., the keeping of a gaming table, in adequate terms, the frequenting being barely referred to by one word, and not in terms sufficient

to set out or change the offense of frequenting such gaming table. Hence the words "frequent and" being unnecessary to charge the offense of keeping a gaming table, should be rejected as surplusage, and the defendant required to answer to the charge of keeping a gaming table: See Black. Crim. Proc., sec. 194.

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**SAMUEL B. WHEELOCK v. JOHN MCGEE AND  
MICHAEL MCGEE.**

**ERRORS NOT EXCEPTED TO.**—Errors to which no exception was taken in the court below, will not be considered on appeal.

**PLEAS RAISING NO NEW ISSUES. STRICKEN OUT.**—Pleas which raise no new issue, and present no matter of defense which could not be given in answer to the evidence under the general issue already pleaded, may be stricken out.

**INSTRUCTIONS PRESUMED IN ACCORDANCE WITH EVIDENCE, WHEN.**—When the transcript on appeal contains none of the evidence, the instructions given in the court below will be presumed to have been in accordance with the evidence in the cause.

**APPEAL** from the district court for the county of Santa Fe. The opinion states the case.

*J. S. Watts*, for the defendants and appellants.

*Elkins and Catron*, for the plaintiff and appellee.

By Court, JOHNSON, J.:

At the July term, 1871, of the district court for Santa Fe county, appellee sued appellants on promissory notes for the sum of four hundred and fifty-three, three hundred and four, and one hundred and nine dollars, respectively, for four thousand dollars, for goods, wares and merchandises and moneys, sold delivered, and paid by appellee to appellants; for other moneys paid by appellee to appellants, to the amount of one thousand five hundred and eighty-four dollars and eighty-six cents; and also for breach of contract by appellants in writing to furnish materials and build a house for appellee. Appellee praying judgment for damages in five thousand dollars, with interest and costs of suit.

is one: "If the defendant be absent, by delivering a copy of the original process to some free person residing at a usual place of abode of the defendant over fifteen years of age." But it has here been argued that chapter 27 of the acts of 1869 and 1870 repeals the provisions just quoted, and that publication should have been made as therein required. This chapter is intended to provide for a notice by publication in actions at law commenced otherwise than by attachment, which previous to this enactment were the only writs in which the statutes provided for notice by publication, and the existing statutes on the subject of attachment are merely referred to in this chapter as an example to which the notification provided is required to conform in form, time, and substance, and also as to the mode of publication. This chapter further states that it is to be understood that this act shall not be applicable in any case in which summons can be served in any other manner according to and as prescribed by the laws that govern the serving of summons in this territory," and it was doubtless intended (as it does) to increase, rather than diminish the modes of serving process.

It is further contended for the appellant, that inasmuch as the affidavit for the attachment alleges that the appellant had absconded and absented himself from his usual place of abode in this territory, so that the ordinary process of law can not be passed upon him, the appellants are excluded from service otherwise than by publication under attachment law. Section 10, page 212, and section 36, page 220, Revised Statutes, contain the only provisions of attachment law as to publication of notice. The former provides that "when the defendant can not be cited, and his property or effects shall be attached, if he do not appear and answer to the action at the return term of the writ within the first two days thereof, the court shall order publication to be made," etc. The kind of citation here meant is doubtless that mentioned in the first paragraph of section 9, page 210, of the same book, and that requires to be complied with in the service of the writ in this

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.  
JANUARY TERM, 1874.

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MARY BRANFORD ET AL. v. WILLIAM BRANT

REFUSAL TO ENTER JUDGMENT NOT APPEALABLE.—A refusal of the  
enter judgment is not a final judgment from which either an a  
writ of error will lie.

MANDAMUS THE PROPER REMEDY.—Mandamus is the proper reme  
refusal of a judge to enter a judgment which it is clearly his  
enter.

APPEAL from the district court for Bernalillo county  
opinion states the facts.

*R. H. Tompkins*, for the appellants. Every court  
record has power at a subsequent term to amend its  
ords, and make them conform to, and exhibit the  
*Sheppard v. Wilson*, 6 How. (U. S.) 260. There is no  
time within which verdicts and judgments may be amended  
even after error brought, if within a reasonable time,  
amendments may be allowed: *Murphy v. Stewart*, 2 Id.  
If an appeal be taken in open court, the omission of  
clerk to enter it may be subsequently supplied: *Hudg  
Kemp*, 18 Id. 531. The supreme court has power to  
an amendment in a case brought before it by appeal:  
*Nedy v. The Georgia State Bank*, 8 Id. 586; *Woodh  
Brown*, 13 Pet. 1.

## Argument for Defendants.

ERROR from Socorro county. The case is stated in the arguments of counsel and in the opinion.

*T. B. Catron*, for the plaintiff in error. This is an act where the defendants in error applied to the court below in vacation for a writ of mandamus on the plaintiff in error, to compel him to do certain acts as mayordomo of an acequía. An order was made by the judge in vacation, on which the clerk of the court issued a peremptory mandamus as prayed for, to the plaintiff in error, without any rule to show cause, and at the first regular term of the court thereafter an order was entered without notice to the defendant in the court below, making said writ of mandamus perpetual, and also applying it to all of his successors in office. 1. The judge, in vacation, has no jurisdiction to entertain the petition, make the order, or allow the issuance of the writ: See 6 Pet. 1. 2. The practice is to enter a judgment granting the writ, which can only be issued by a court in term time: 7 Wheat. 534. 3. The first writ issued should have been an alternative writ, and not peremptory: *Moses on Mand.* 208. A peremptory writ may, where the moving papers preclude the possibility of any valid excuse being consistent with the facts therein contained, be issued in the first instance, and without the previous issuing of an alternative writ. This, however, can only be done where the parties have been fully heard, etc.: *Id.* 222. 5. The writ can not be issued and then judgment entered; nor a decree take the place of a common law judgment. The writ is admitted to be a common law writ. 6. Said writ commands things to be done for which it shows no basis: *Id.* 203, 206.

*S. A. Hubbell*, for the defendants in error. This is a cause brought by petition in the district court in the nature of a petition in equity. The petition was presented to the judge at chambers, and contained a prayer for relief against the alleged arbitrary and unlawful acts of the plaintiff in error, who was at the time a public officer. An order was made by the judge at chambers on which the clerk of the court issued a writ of injunction and mandamus, to which return was made. An answer to the petition was filed in vacation. At the first regular term of the court therea-

Statement of Facts.

THE UNITED STATES v. JUAN SANTISTEVAN.

**PENAL STATUTE STRICTLY CONSTRUED.**—The penal provisions of a statute must be interpreted strictly according to the context, to the exclusion of every inference suggested by extraneous circumstances.

**QUALIFICATION OF DISJUNCTIVE CONDITIONS IN A STATUTE.**—Where several conditions are set out disjunctively in a statute, a qualifying phrase attached to the last applies equally to each of the others which has no qualifying phrase annexed to itself, and where the qualification will render the condition inoperative.

**ACTION FOR PENALTY UNDER INTERCOURSE ACT OF 1834.**—An action to recover the penalty prescribed by the intercourse act of 1834, for unlawfully settling upon Indian lands, can be maintained only with respect to land belonging, secured, or granted to an Indian tribe "by treaty with the United States," and the petition must show that fact, or it will be bad demurrer.

**PUEBLO INDIANS NOT WITHIN INTERCOURSE ACT.**—The pueblo Indians of New Mexico were, prior to the treaty of Guadalupe Hidalgo, citizens of Mexico, and their rights as such were guaranteed by that treaty, that they now hold the same relation to the United States that they formerly held to the republic of Mexico. They are, therefore, Indian tribes within the meaning of the intercourse act of 1834, no action lies under that act for a penalty for settling on the lands secured to them by patent from the United States, their rights and remedies as to such lands being the same as those of other citizens owning lands.

**ERROR to the district court for the first judicial district.** The plaintiffs brought their suit in the court below, to recover of the defendant the penalty in the sum of one thousand dollars, prescribed in section 11 of the act of congress approved June 30, 1834, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," alleging in their petition that the defendant theretofore "did make a settlement on and now occupies and is settled on lands of the pueblo tribe Indians of the pueblo of Taos, situated in the county of Taos, in said district and territory," etc. (setting out the boundaries of said pueblo lands); "on ten acres of said lands by then and there building houses and making fields there contrary to the form of the statute in such case made, provided, said lands then and there, and at the time of bringing this suit, belonging to the said pueblo tribe



Argument for Defendant.

States Statutes at Large, sec. 11, p. 730. The statute in question clearly intends what may be denominated "Indian lands," or lands to which the right of occupancy secured or granted to an Indian tribe by treaty with the United States, and to which the ultimate absolute title in the United States, and not lands held in fee by Indians who are citizens of the United States, and who are not Indians within the meaning of the statute, or in the usual acceptation of the term. The word tribe, as used with reference to Indians in the United States, is applied to nations of savages or uncivilized people, and that is the sense in which it is used in this statute, which applies only to lands, the right to the occupancy of which is held by uncivilized Indians having tribal organizations, and treated with by the government as independent political communities. The wild tribes of Indians are distinct, independent political communities, retaining the right of self-government under the protection of the United States: *Worcester v. Georgia*, 6 Pet. 515. They are not regarded as the owners of the lands occupied by them. Such lands are held to belong to the United States. The Indians have only a right of occupancy: *United States v. Rogers*, 4 How. 567; *United States v. Rillieux's Heirs*, 14 Id. 189; *United States v. Fernandez*, 10 Pet. 303. Over such lands the United States exercises authority for the benefit of the occupants, and to such lands the statute applies. The pueblo Indians hold their lands in fee under patents from the United States, issued under the authority of an act of congress confirming grants of lands made by the governments to which New Mexico formerly pertained. The act of congress under which their patents were issued and the patents themselves are in no respect different from similar acts and patents for the benefit of individual citizens: See 11 U. S. Stats. at Large, 374. The right of pueblo Indians to their lands was not derived from the United States, but by grant from the governments formerly exercising authority over New Mexico. They do not look to the United States for title to their lands, or for protection in their occupancy, except to carry out the obligations of the treaty of Guadalupe Hidalgo. They were first

Indians is fixed in the first instance by the political branch of the government, and as to the power of a state to withdraw such Indians from the operation of acts of congress concerning Indian tribes. The pueblo Indians are citizens and their status can not be changed by action of a ministerial officer of the government, or of any department of the government. They are citizens of the United States. While the departments are competent to decide as to the continuance of the tribal organization of an Indian tribe they can have no power to decide who are Indians, and certainly not to take away the rights of citizens. The pueblo Indians are subject to the jurisdiction of the United States; consequently they have the same rights to hold and convey property, and to make and enforce contracts, as other citizens: Const. U. S., art. XIV., and act of May 31 1870; 16 U. S. Stats. at Large, sec. 16, pp. 144. The district and supreme courts of New Mexico have decided adversely to the right of the United States to recover a penalty for settling on lands belonging to the pueblo Indians: See decisions supreme court New Mexico. If the defendant is an intruder upon the lands described in the petition of plaintiff, and a right of action exists against him, such right of action is in the pueblo, and he is not subject to penalty to the United States, nor liable in any way under the statute upon which suit is brought.

By Court, JOHNSON, J.:

The question here raised is as to the "ability" (as it is termed by the statutes of this territory in relation to practice in our district courts), *i. e.*, the right of the plaintiffs to bring and maintain this action. In order to determine the question, it is necessary to consider not only whether the plaintiffs have properly set up their claim to the penalty prescribed in the eleventh section of the act of June 3 1834, 4 U. S. Stats. at Large, 730, against the defendant for settling on any of the lands contemplated by the statute at the time of its enactment, but also whether the provisions of this section have been extended by congress to lands owned by inhabitants of the territory known as pueblo

Mexico to the United States by the treaty of Guadalupe Hidalgo, February 2, 1848, and, according to the terms of that treaty, have the same relations to the United States which they had to the republic of Mexico, both as to their persons and property, at the time of the treaty. Their relations can only be modified, regulated or changed by congress in accordance with the terms of this treaty. Articles 8 and 9 of this treaty contain the guaranties conferred by the United States as to persons and property. They are secured to all such persons the same rights and to such persons as should not elect within the time specified in the treaty to retain the character of Mexican citizens admission "to the enjoyment of all the rights and privileges of citizens of the United States according to the principles of the constitution." According to the decree dated at Mexico, February 24, 1821, section 12, these pueblo Indians made citizens of New Spain, which afterwards became the republic of Mexico. This section reads thus: "Todos los habitantes de la Nueva Espana, sin distincion alguna de Nacimientos, Europeos, Africanos ni Indios, son ciudadanos de esta monarquia, con opcion á todo empleo segun su merecimiento y virtudes;" which is translated: "All the inhabitants of New Spain, without any distinction of Europeans, Africans or Indians, are citizens of this monarchy, with eligibility for every office, according to their merits and virtues." It might cursorily seem that the wild Indians are included in the term "Indians," in this section; but such is not the fact, as by the usage of Mexicans the term *habitantes* is limited to persons having a place of abode, and does not embrace vagrants or nomads. The pueblo Indians, however, had places of abode, and, consequently, came within this section, and were made citizens by it. The third section of the same decree says: "Las personas de esta monarquia y sus propiedades seran respetadas y protegidas por el gobierno," which is in English: "The persons and property of every citizen shall be respected and protected by the government." These quotations are from Gallo's

## Argument for Appellees.

*T. B. Catron*, for the United States, relied upon the same points in each of these cases as in the preceding case of *The United States v. Santistevan*.

*Joab Houghton*, for Varela and Koslowski, appellees. This was an action of debt brought by the plaintiff against the defendants for a penalty for settling on the lands belonging to the Indians of the pueblo of Pecos. To the petition of said plaintiffs a demurrer was filed by said defendants, which demurrer was sustained by the court and the petition dismissed, and the cause brought to this court by appeal. The statute imposing a penalty upon persons for settling on Indian lands clearly intends such Indians as are not citizens, but under the wardship of the government: 4 U. S. Stats. at Large, sec. 11, p. 726. The pueblo Indians are citizens, and as free to enjoy all the privileges of citizenship as any other inhabitant in the country: Collection of decrees by Mariano Galvani, published in Mexico, vol. 1, secs. 12, 13, p. 4, and sec. 1, p. 32; also vol. 2, sec. 15, pp. 1, 80, 92, 127. The right of citizenship was secured to the Indians under the republic of Mexico by the laws above referred to, and those rights were secured to them under our government. Such citizens, by the treaty between the Mexican republic and the United States, bearing date February 2, 1848, and commonly known as the treaty of Guadalupe Hidalgo: See 9 U. S. Stat. at Large, pp. 929, 930, arts. 8, 9. All of the Mexican authorities above referred to declare all Indians, Africans, and Europeans, without distinction of race, to be entitled to citizenship, and consequently to the appellation of Mexican, the word used in said treaty, and as entitled to the protection of the United States government in their rights of citizenship, one of the most dear of which is the right to enjoy and dispose of their property as to them may seem most convenient. As to the right of Indians to take hold and dispose of their landed property, see *United States v. Ritchie*, 17 How. 539, 540. Then, as Indians have the right to dispose of their property the same as any other citizens, persons settling on their lands are not liable to the pains and penalties prescribed by the statute above referred

the relations of peace and war; who maintain their natural rights, including that of governing themselves dependent political communities, and who as such dependent political communities hold only treaty relations with the United States, very much on the footing of foreign nations. The only other relations are such as the United States may gratuitously assume, as a superior power and as a protectorate. All these relations are expressed by the acts referred to, and the various additions in reference to the class of Indian tribes embrace such acts.

It would seem to follow from these relations that tracts and conveyances can be entered into and made between such communities and the government, on treaty, and, therefore, that the only way in which the United States can contract with these independent domestic nations, whereby public lands can be secured or granted them, is by or under a treaty. As soon as these relations cease to exist, they lose their character and identity as distinct and independent political communities, and at once come merged in and identified with our own body politic, subject and amenable to our laws, and can no longer be considered as wards of the government.

There is another distinguishing feature, whereby Indian tribes, to which the statute can only apply, are identified, and that is, they must be Indian tribes with whom all intercourse must be carried on exclusively under the direction of the general government.

One of the questions to be determined is whether the term "pueblo tribe of Indians" of a certain designation "pueblo," in the absence of any other descriptive allusion in the declaration, the court can rightfully infer that such an "Indian tribe" as is covered by the statute, between whom and the general government the distinctive relations I have pointed out necessarily subsist. The words of the statute are "Indian tribe;" the words of the declaration are "pueblo tribe of Indians of a pueblo." The word is here used in pleading that is unknown to the English language, except by common consent as descriptive

the real estate and the mortgage made by her of the other half interest, being for valuable considerations, are good, although her husband failed to join with her in the execution of the deed and mortgage. The real estate having been acquired by Quirina while operating as a *feme-sole* under articles of separation from her husband, she had, under said articles, and under the rights she had over her separate property, subject to her sole control, full authority to sell or mortgage it, more especially when the contracts were made for the benefit of her said separate estate. Post-nuptial agreements, in view of a voluntary separation, will be upheld in equity: Tyler on Inf. & Cov., 469, 471, 480, 483; 2 Story Eq. Jur., sec. 1372; 2 Roper on Hus. & Wife. 304, 305. Agreement as to separate trade: Tyler, 483, 484, 494, 496, 507. Desertion: Id. 486; 43 Mo. 39; 4 Metc. 478. How husband may divest himself of property: Tyler, 490; 2 Story Eq. Jur., 1386, 1387; 17 Tex. 613, 616; 5 Id. 507. Power of wife over community property when abandoned by husband: 18 Id. 3, 12; Freeman on Co-tenancy and Partition, 148; 10 Tex. 130. Acts of *feme-covert* for benefit of separate estate: 7 Paige Ch. 112; Tyler, 442, 444, 446, 447; 2 Story Eq. Jur., 1378, 1379, 1397, 1399, 1401, note; 5 Am. Rep., 675; 2 Roper Hus. & Wife, secs. 253, 255, 289. Real estate accruing after marriage: Id., secs. 181, 184, 229, 234, 239, 248. Rights of *feme-covert* to act as *feme-sole* when separate from husband: 16 Ill. 277; Parsons on Partnership, 234. Separate estate of *feme-covert* in equity: Tyler, 507; 10 Paige Ch. 256; 4 Barb. 407; *Insurance Company v. Bay*, 4 N. Y. 9, 278; 3 Johns. Ch. 88, 89; Clancy Hus. & Wife. 272, 285, 286, 287, 289, 290, 293, 314. Private examination: 4 N. Y. 27, 28; Raym. Dig., 109, 318, 322, 333.

*S. B. Elkins*, for the appellees. By the principles of the common law, a married woman can do no act to bind her. Her position is not like that of other disabled persons. Her acts are absolutely void: *Elliott v. Peirsol*, 1 Pet. 338; 7 Cur. 606. Our statutes regulate and prescribe the mode in which a *feme-covert* may convey her real estate: Secs. 5, 9, 10. In order for a married woman effectually to convey her real es-

by the decree of a court of competent jurisdiction; and she remains, until such separation take place, subject to liabilities and disabilities touching her person and property which the law may prescribe. Here the statute prescribes that she may convey her real estate, in a certain manner and form, and by its phraseology implies disability to convey it in any other manner and form.

No agreement, verbal or written, between her and her husband, can avoid the provisions of the statute on these premises, any more than the adverse acts of persons can nullify any other positive rule of law; and this, for two simple reasons: 1. The power which enacts a law is in only one competent to annul, repeal, or modify its provisions; and, 2. Husband and wife, being one person in law, are incompetent to make a valid contract of the kind alleged by the complainants. It has long been settled that courts of equity may enforce the specific performance of a valid contract, afford a party redress for a wrong which common law affords him no remedy, etc., but the jurisdiction of the court below or of this court is not competent to enforce a contract contrary to law, or to afford a remedy against law:

As to the matter of a commission to take account of copartnership between the respondent, Quirina Baccus, and James L. Collins, deceased, prayed for by the complainants, they estop themselves by their own allegation that there had been a settlement of copartnership accounts between the copartners themselves, a short time previous to the death of Collins; and if there was anything due at that time from Quirina to Collins, Collins' legal representatives are entitled to a remedy at common law, to judgment at least.

It would be supererogatory to discuss now the merits or demerits of the bill alleged in the demurrer. The judgment and decree of the court below is affirmed.

BRISTOL, J., concurred in the affirmance.

by unfair means lost such wager at the horse-race, and the note thereupon was delivered by such stakeholder said Willburn, and that of all of which facts the appellees had due notice.

To these special pleas the appellees interposed a general demurrer, which was sustained by the court below, and the appellant excepted thereto. The cause having come on for trial in the court below upon the general issue, the appellant offered evidence to prove substantially the facts alleged in such special pleas, except unfairness practiced at the horse-race. This evidence being objected to the court below sustained the objection, and the appellant excepted thereto. Judgment was rendered in favor of the appellees who were plaintiffs below, for the amount of the note and costs.

The cause is here on writ of error. The only questions for review in this court are: 1. Did the court below in sustaining the demurrer to the special pleas? and, 2. Did the court err in ruling out said evidence? We are of opinion that there was no such error in sustaining the demurrer, as will justify this court in modifying the proceedings in the court below, for the reason that, even if conceded that the special pleas demurred to alleged facts constituting a bar to the action, it is clear that evidence of those facts could be given under the general issue. The ruling of the court below in excluding the evidence offered on behalf of the appellant fairly brings before us the question whether a promissory note, made and delivered upon a wager upon the result of a horse-race, is such a contract that the court in law ought to lend its aid to enforce.

It is claimed on behalf of the appellees that such a contract is neither in contravention of the common law in this territory nor of the statute in relation to gaming debts. Upon a review of the authorities we are of the opinion that neither of these propositions is tenable. It is true that the courts of England have held that at common law a wager contract upon different subjects of chance are void. But we gather from various adjudications, both in England and in those states in this country where the English law



REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
TERRITORY OF NEW MEXICO.  
JANUARY TERM, 1879.

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TERRITORY OF NEW MEXICO *v.* BASILIO PE

**ERRORS NOT PRESENTED BY BILL OF EXCEPTIONS.**—Manifest errors charge of the court below to the jury can not be considered supreme court on appeal, unless properly presented by a bill of excep

**CHARGE TO JURY MUST BE IN WRITING.**—The provision of our statute requiring the charge of the court to the trial jury to be in writing is directory and not directory, and if any part of the charge is given orally is error which will reverse the judgment; as where the court added written instructions, in a case in which the defendant was convicted of murder in the first degree, an oral illustration of what would constitute murder in the second degree, which was erroneous in not being qualified.

**INSTRUCTION PRESUMED PERTINENT.**—An instruction given in a case, if presented in the record on appeal, will be presumed to have related to matters pertinent to the case, and if given orally it will be error; see *Leonardo v. Territory*, ante, 291.

**APPEAL** from the district court for Santa Fe county. The case is stated in the opinion.

*Catron and Thornton, with M. A. Breeden and T. F. Way*, for the defendant and appellant. The appellant below, was tried upon an indictment for murder, charging him with killing Francisco Provencio in the county of Santa Fe, on the seventeenth day of N

a dark room of appellant's house, when appellant was all carrying a bundle under his arm, and that he made a motion as if to draw a weapon; that appellant knew the deceased carried a knife and feared him (deceased).

Now, this may have been true; it was sworn by a competent witness, and it was for the jury to have said whether or not it was true. Yet here the judge takes from them this instruction all consideration of these facts. He tells them plainly and explicitly that if the accused deliberately shot the deceased while he (deceased) was walking from him and killed him, it was murder in the first degree. It may have been that the appellant did deliberately shoot to kill the deceased while walking from him, and yet not murder in the first degree. If he was afraid of deceased and thought that he had come to his house to kill him, we submit that this would have lessened the grade of the offense. That this charge was wrong, see 38 Mo. 213; 44 Id. 20, 45 Id. 137; 16 Id. 394.

We insist that the court erred in giving oral instructions. It is expressly provided by statute that, in this territory (see Compiled Laws, 200), in any suit in the district court the judges shall give their instructions to the jury in writing only. This law was passed in January, 1853, and applies to all suits. But the compiler of the statute has seen fit to place it under the head of civil procedure only. That cannot change the law or limit its application. The compiler was not authorized to make new, but only to compile existing laws. The word suit applies to both civil and criminal procedure. See Bouv. Law Dict. 558, Hammond P. 270, where it says that in its most extended use, the word suit includes not only a civil action, but also a criminal prosecution. The courts of this territory have so considered it, and have uniformly given their instructions in writing. That it is error to give any portion of the instructions orally, see 45 Mo. 64; 6 Mo. 399; *Ray v. Wooters*, Ill. 82; *Gile v. People*, 1 Col. 60; 43 Cal. 29; 37 Id. 245 Id. 650.

The most important part of every charge in a criminal trial is that portion which defines the different grades

would be a fatal defect in the bill of exceptions, even if depositions had been incorporated therein.

The appellant in his assignment of errors in this case based upon this bill of exceptions, has set out several grounds of objection. But can not it be truthfully said that the court below overruled, or in any way decided the particular points now attempted to be raised, and if not, what propriety can this court be asked to entertain and render a decision thereon under the statute? The point is well settled, that general objections of this sort to depositions will not be entertained. This point was decided by the United States supreme court in the case of *C. v. Doremus*, 3 How. 537. In that case the court said: "The naked statement on the record, that the reading of a deposition or a copy of a record was objected to, and the objection overruled without disclosing the nature or grounds of the objection, is nugatory and wholly ineffectual before an appellate court." One reason is obvious, a general objection to an entire deposition, often comprehending hundreds of folios of reading matter, if allowed in practice, would impose on the court the task of looking through the entire deposition, to discover whether there is in fact any materiality or incompetency in the evidence. Appellate courts are not required to perform such an unreasonable task, and will not entertain questions founded on objections of that kind.

The other bill of exceptions appearing in the transcript is as follows: "Be it further remembered, that on the 1st of said cause, Thomas B. Catron was called as a witness for said plaintiff and testified that he had seen the signature of the defendant, John S. Chisum, write, and had also had correspondence with him, by which means he had become acquainted with his handwriting, and that from the best of his knowledge and judgment, he believed the name of John S. Chisum, signed to the paper filed in said cause, and called 'agreement,' was the genuine signature of the said defendant, John S. Chisum. The said depositions and testimony of Thomas B. Catron, as above stated, was the testimony given in said cause, except the promise upon which said suit was founded, and the articles

this assignment of error. One is that the record does not show that the objection was ruled upon by the court. There are two modes by which a decision may be obtained upon a point of this kind. One is to interpose a motion upon the conclusion of the testimony for the plaintiff's judgment for the defendant, on the ground that there is no evidence sufficient to warrant a verdict for the plaintiff. The other is a motion for a new trial on the same ground. The record does not disclose the fact that this point was decided by the court below, in either of these or any other proceeding. It is true that the clerk certifies, in his report, that a motion for a new trial was made on certain grounds, was overruled, and an exception taken. This does not bring the proceeding upon the record for the purpose of review by this court. It must be by bill of exceptions duly authenticated by the signature and seal of the presiding judge: *Insurance Co. v. Lasier*, 5 Otto, 171.

Even if this had been done, no ruling upon the merits could be made by this court, because the evidence is not before us. It is clear that where error is assigned on a verdict of a jury, on the ground of insufficient evidence, the evidence itself, and all the evidence received on the trial, must be embodied in a bill of exceptions and duly authenticated by the seal of the presiding judge: *Simpson v. Ives*, 45 Me. 281; *Russell v. Ely et al.*, 2 Black, 280; *St. Paul & Northern P. Co. v. Chicago and Northwestern R. R. Co. et al.*, 105 U.S. 405; Hilliard on New Trials, sec. 10, p. 28.

In this case there is no pretense, by counsel for the defendant, that two of the most important items of evidence were not introduced, the note sued on, and the articles of copartnership, which appear of record by bill of exceptions. We can only express our regret that such of the proceedings as were taken in the court below were not placed upon the record as they are now, which have enabled us to dispose of the case upon the merits. Not being upon the record before us, they are presumed to be regular, and can not be disturbed. We feel obliged, therefore, though with great reluctance, to affirm the judgment.

The judgment is affirmed.

made no objection to the omission of the court to give instructions in writing until after the same were delivered. The statute requiring instructions to be in writing is a directory statute, and that it was disregarded is no ground for a reversal: *Id.* The court will not reverse on the ground that the instructions were not in writing, unless it appears that the court in its instructions misdirected the jury. *Francisco Leonardo v. Territory, ante*, 291. The refusal of the court to exclude the witnesses from the court was not error. It is a matter entirely in the discretion of the court: *Roscoe's Crim. Ev.*, marginal page 1 *Greenl. Ev.*, sec. 432. The evidence in the cause, and the instructions given by the court not being objected to by this court, this court can not determine whether the instructions asked for by the defendant were proper or otherwise.

By Court, PARKS, J.:

It appears from the record in this cause, that the defendant was indicted for murder in the first degree, at the term, 1877, of the district court of Santa Fe county, and was tried in said court, at the July term thereof, 1878, and was convicted of murder in the third degree, and sentenced to three years' imprisonment in the county jail or territorial prison. He brought the case into this court by writ of habeas corpus. The errors assigned are: 1. That the court "refused to give the defendant a list of the jury twenty-four hours before trial, as asked in a motion filed and now found in the record." 2. That the court refused to give the instructions requested by the jury in writing.

The bill of exceptions recites, "that in open court, immediately upon the impaneling and accepting of the court aforesaid of the petit jury, summoned and accepted for the term and court aforesaid, and upon the first day of said term of said court, and before the jury selected for trial of said defendant had been sworn to try said defendant, and before said defendant was arraigned and had pleaded to the indictment in the above-entitled cause, this defendant, by his attorney, by motion in writing to the court aforesaid, demanded and solicited of said

defendant in this case the benefit of this salutar can not be justified by anything that appears in the bill of the trial, as related in the bill of exceptions. It is a manifest error.

As to the second error assigned, the record shows that the court gave to the jury oral instructions in the case; the only instructions given were oral; that after said instructions were given and concluded, the defendant and his counsel, requested the court to instruct the jury in writing, which the court refused to do. The only authority cited, to show the right of the court to give oral instructions is a dormant decision of the supreme court of the territory. This court, in the case of *Territory v. Perea*, ante, 627, decided at this term, has overruled that decision so far as it conflicts with the statute requiring instructions to a trial jury to be in writing. It was decided in that case that the only proper mode of giving instructions is in writing, and particularly in regard to the higher grade of crimes for the district court to give in writing, all that it is necessary or even proper to say to the jury in its charge. The giving of oral instructions in this case is a clear violation of the law, as laid down by this court, in the case referred to.

For the reasons above given, the judgment of the district court is set aside, and a new trial granted.

**EXTRA ANNOTATION**  
**TO**  
**PRECEDING VOLUME**





EXTRA ANNOTATIONS  
—TO—  
NEW MEXICO REPOR

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# NOTES

## ON THE

### NEW MEXICO REPORTS

#### CASES IN 1 NEW MEXICO.

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**1 N. M. 1, BRAY v. UNITED STATES.**

**Power of territorial legislature to confer criminal jurisdiction on courts.**

Cited in *People v. Douglass*, 5 Utah, 283, 14 Pac. 801, holding territorial legislature have power under organic law to confer jurisdiction of the peace certain jurisdiction.

**1 N. M. 5, TERRITORY v. ORTIZ.**

**Original jurisdiction of court of last resort.**

Cited in note in 58 L.R.A. 836, 845, 847, on original jurisdiction of court of last resort in mandamus.

**Power of legislature to confer jurisdiction upon courts.**

Cited in *Jung v. Myer*, 11 N. M. 378, 68 Pac. 933, to the point affirmative grant of original jurisdiction implies negative upon in any other case; *Ex parte Cox*, 44 Fla. 537, 61 L.R.A. 734, 33 holding that legislature cannot confer upon court created by constitution jurisdiction not given it by that instrument.

**Exclusiveness of statutory remedy.**

Cited in *Risse v. Collins*, 12 Idaho, 689, 87 Pac. 1006, to the point that new rights created by statute which provides new remedy be enforced exclusively by such statutory remedy.

**1 N. M. 19, PINO v. BECKWITH.**

**1 N. M. 29, QUINTANA v. TOMPKINS.**

**1 N. M. 34, LEITENSCHORFER v. WEBB, Affirmed in 20 176, 15 L. ed. 891.**

**Organic act as adopting common law.**

Cited in *Browning v. Browning*, 3 N. M. 659, 9 Pac. 677, on

**1 N. M. 119, TERRITORY v. SEVAILLES.****Organization of grand jury.**

Cited in note in 27 L.R.A. 789, on organization of grand jury.

**1 N. M. 125, PINO v. HATCH.****Sufficiency of execution and attestation of will.**

Cited in *Gildersleeve v. New Mexico* Min. Co. 6 N. M. 27, 1 318, upholding will executed according to existing custom before or judge of first instance and attested by two witnesses while Mexico was part of Mexico.

**1 N. M. 147, CHAVEZ v. McKNIGHT.****Right of wife to lien on husband's property.**

Cited in *Re Chavez*, 80 C. C. A. 451, 149 Fed. 73, to the point wife has tacit lien or mortgage upon husband's property to amount of dotal property of which he became possessed through her; *v. Baca*, 13 N. M. 32, 79 Pac. 723, holding that wife has tacit mortgage on property of her husband to amount to her dotal property.

**1 N. M. 157, ROMERO v. SILVA.****Form of judgment on bond.**

Cited in note in 62 L.R.A. 446, 456, on form of judgment on bonds.

**1 N. M. 160, ARCHIBEQUE v. MIERA.****Power of legislature to confer jurisdiction upon courts.**

Cited in *Jung v. Myer*, 11 N. M. 378, 68 Pac. 933, to the point organic act does not confer upon legislature power to bestow supreme court original jurisdiction.

**Conclusiveness of verdict or findings.**

Cited in *United States v. Bienes*, 8 N. M. 99, 42 Pac. 70; *S. Burrager*, 10 N. M. 692, 65 Pac. 162,—holding that verdict will be disturbed, when founded upon conflicting evidence; *Romero v. marais*, 5 N. M. 142, 20 Pac. 787; *Torlina v. Trorlicht*, 5 N. M. 13, 68 Pac. 68; *Gale v. Salas*, 11 N. M. 211, 66 Pac. 521; *Candelaria v. 13* N. M. 360, 84 Pac. 1020,—holding that findings of trial court not be disturbed when based upon conflicting evidence.

**1 N. M. 166, GREEN v. EWELL.****1 N. M. 172, McDONALD v. CARLTON.****1 N. M. 182, WALDO v. BECKWITH.****Affidavit in support of application for continuance.**

Cited in *Abbott's Civ. Tr.* 2d ed. 36, on power of court to

**1 N. M. 238, SANCHEZ v. LUNA.**

**Power of court to amend pleadings on appeal.**

Cited in *Sanchez v. Candelaria*, 5 N. M. 400, 23 Pac. 289, holding that court on appeal has power to amend pleadings in justice's show jurisdiction there.

**Sufficiency of complaint for forcible entry and detainer.**

Cited in *Rice v. West*, 10 Okla. 1, 33 Pac. 706, holding that in action for forceable entry and detainer must set out facts.

**1 N. M. 247, RUHE v. ABREN.**

**Newly discovered evidence as ground for new trial.**

Cited in *Romero v. Desmarais*, 5 N. M. 142, 20 Pac. 78; *States v. Biena*, 8 N. M. 99, 42 Pac. 70; *Territory v. Clayp* M. 568, 71 Pac. 463,—holding that motion for new trial based on newly discovered evidence should be denied unless such evidence probably change result; *Armstrong v. Aragon*, 13 N. M. 11, 291, holding that on motion for new trial because of newly discovered evidence party must show that failure to produce evidence at trial was not owing to want of diligence.

**Conclusiveness of findings of court.**

Cited in *Torlina v. Trorlicht*, 5 N. M. 148, 21 Pac. 68; *Camacho v. Miera*, 13 N. M. 360, 84 Pac. 1020,—holding that finding of fact not be disturbed on appeal when supported by substantial evidence.

**1 N. M. 255, BUSTAMENTO v. ANALLA.**

**Right to custody of child.**

Cited in *Lovell v. House of the Good Shepherd*, 9 Wash. Am. St. Rep. 839, 37 Pac. 660, holding that corporation having right to custody of child cannot uphold custody as against parent.

Cited in notes in 27 L.R.A. 59, on validity of contract for transfer of parental responsibility or authority; 65 L.R.A. 690, on right of mother, or reputed father, of illegitimate to its custody or care.

**1 N. M. 263, DONALSON v. SAN MIGUEL COUNTY.**

**County as quasi corporation.**

Cited in *Stermer v. La Plata County*, 5 Colo. App. 379, 38 Pac. 101, holding that counties are quasi corporations and not liable for torts.

**1 N. M. 269, ARELLANO v. CHACON.**

**Judiciary as created by organic act.**

Cited in *Jung v. Myer*, 11 N. M. 378, 68 Pac. 933; *Caron v. Hable Gold Min. Co.* 12 N. M. 211, 78 Pac. 63, 6 A. & E. Ann. 101, holding to the point that section ten of organic act is creation of judiciary. Judisdiction of district courts.

Cited in *Territory ex rel. Wade v. Ashenfelter*, 4 N. M. 9, 20 Pac. 101.

879, to the point that district courts may try issues of fact set aside verdicts and grant new trials.

**Jurisdiction of probate courts.**

Cited in *United States v. Hall*, 5 N. M. 178, 21 Pac. 85, holding that probate courts are of special and limited jurisdiction.

**1 N. M. 279, TENORIO v. TERRITORY.**

**Sufficiency of indictment.**

Cited in *Territory v. McGinnis*, 10 N. M. 269, 61 Pac. 20, holding that indictment charging murder in first degree will support a conviction of murder in second degree.

Cited in *Bowlby's Homicide*, 3d ed. 834, on necessity of jury under statute creating and defining crime using language of *Bowlby's Homicide*, 3d ed. 853, on necessity that indictment be an instrument with which death was caused was deadly.

**1 N. M. 286, WATTS v. SANTA FE COUNTY.**

**1 N. M. 291, LEONARDO v. TERRITORY.**

**Sufficiency of indictment.**

Cited in *State v. Buralli*, 27 Nev. 41, 71 Pac. 532, holding that effective description of grand jury in body of indictment may be by title and preamble.

**Necessity for asking for instruction to jury.**

Cited in *Territory v. O'Donnell*, 4 N. M. 196, 12 Pac. 74, holding that party must offer instruction covering point when dissatisfied with instructions given.

**Effect of giving instructions orally.**

Cited in *Abbott's Crim. Tr.* 2d ed. 618, on oral instructions where statute requires charge to be in writing.

**Right of court to define technical terms in charge to jury.**

Cited in *Territory v. Guillen*, 11 N. M. 194, to the point that court may define technical terms in instructions to jury.

**Necessity for objecting in trial court.**

Cited in *Rogers v. Richards*, 8 N. M. 658, 47 Pac. 719; *Padilla v. Territory*, 8 N. M. 562, 45 Pac. 1120,—holding that instructions in criminal case, not excepted to, are not reviewable on appeal.

**1 N. M. 303, MOORE v. DAVEY.**

**1 N. M. 308, SPIEGELBERG v. MINK.**

**Necessity for motion for new trial to review errors.**

Cited in *Schofield v. Slaughter*, 9 N. M. 422, 54 Pac. 757, holding that errors alleged to have been committed will not be reviewed unless motion for new trial is made.

desired; Abbott's Civ. Tr. 2d ed. 36, on necessity that affidavit for postponement, state names and residences of desired witnesses.

**1 N. M. 376, CRENSHAW v. DELGADO.**

**1 N. M. 383, TIPTON v. CORDOVA.**

**1 N. M. 387, TERRITORY v. MIERA.**

**Validity of indictment which omits word "unlawful."**

Cited in Territory v. Armijo, 7 N. M. 571, 37 Pac. 1117; Ruiz v. Territory, 10 N. M. 120, 61 Pac. 126,—holding that omission of word "unlawful" in indictment for murder is not fatal defect.

**1 N. M. 388, SECOU v. LEROUX.**

**Facts upon which amendment may be made nunc pro tunc.**

Cited in Borrego v. Territory, 8 N. M. 446, 46 Pac. 349, to the point that facts upon which courts may amend record nunc pro tunc are confined to their own records and to facts gained from court officers.

**1 N. M. 392, GUTIERRES v. PINO.**

**Injunctions against judgments.**

Cited in notes in 30 L.R.A. 710, on injunctions against judgments for errors and irregularities; 32 L.R.A. 327, on equitable jurisdiction in regard to injunctions against judgments.

**1 N. M. 397, DOLD v. DOLD.**

**1 N. M. 400, METZGER v. WADDELL.**

**1 N. M. 410, GALLEGOS v. PINO.**

**Construction of statutes re-enacted on same day.**

Cited in Brooks v. United States, 6 N. M. 75, 27 Pac. 510. holding that provisions of statutes in respect to recognizances were re-enacted on same day in revision of 1865, and are in force.

**1 N. M. 415, GARCIA v. TERRITORY.**

**What is cruel and unusual punishment for crime.**

Cited in Territory v. Ketchum, 10 N. M. 718, 55 L.R.A. 90, 65 Pac. 169, holding that statute prescribing death penalty for assault committed upon train does not prescribe cruel and unusual punishment; People v. Morris, 80 Mich. 634, 8 L.R.A. 685, 45 N. W. 591, holding that statute providing distinct punishment for horse-stealing is constitutional.

Cited in note in 35 L.R.A. 562, 565, 573, on cruel and unusual punishments.

**1 N. M. 419, ARCHIBEQUE v. MIERA.****Personal liability of servant or agent.**

Cited in note in 50 L.R.A. 651, on liability of servant conversion, trespass, or other positive tort against third orders.

**1 N. M. 422, UNITED STATES v. LUCERO.****Citizenship of Mexican Indians.**

Cited in *United States v. Belt*, 128 Fed. 168, to the Indians were recognized as citizens.

**Right of Mexican Indians to hold title to property.**

Cited in *Hayt v. United States*, 38 Ct. Cl. 455, holding did not recognize title to country in Indians.

**Validity of Mexican land titles.**

Cited in *Territory v. Delinquent Taxpayers*, 12 N. M. 621, holding that Mexican titles are valid under United States law.

Cited in *Territory v. Delinquent Taxpayers*, 12 N. M. 307, holding that lands of Pueblo Indians are taxable.

**1 N. M. 459, SELIGMAN v. ARMIJO.****1 N. M. 464, VASQUEZ v. SPIEGELBERG.****Conclusiveness of findings of court.**

Cited in *Romero v. Desmarais*, 5 N. M. 142, 20 Pac. 78; *Trorlicht*, 5 N. M. 148, 21 Pac. 68,—holding that finding of conflicting evidence will not be disturbed.

**1 N. M. 468, RE STRACHAN.****1 N. M. 471, HUNTINGTON v. MOORE.****Appealable orders.**

Cited in *Jung v. Myer*, 11 N. M. 378, 68 Pac. 933, holding that attachment not appealable.

Cited in note in 60 A. D. 436, on final and interlocutory orders and decrees.

**1 N. M. 476, ZECKENDORF v. HUTCHINSON 9 N. M. REP. 483.****Location of mining claim.**

Cited in note in 7 L.R.A. (N.S.) 840, 879, 884, on location of mining claim.

**1 N. M. 480, TAFOYA v. GARCIA.****Repeal of statute by implication.**

Cited in *Graham v. Muskegon County Clerk*, 116 Mich. 100.







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